

1990

THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

HOUSE OF REPRESENTATIVES

CORPORATIONS LEGISLATION AMENDMENT

BILL 1990

EXPLANATORY MEMORANDUM

(Circulated by Authority of the

Attorney-General, the Honourable Michael Duffy, M.P.)

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CORPORATIONS LEGISLATION AMENDMENT BILL 1990OUTLINE

The Corporations Legislation Amendment Bill 1990 ('the Bill') has been prepared to meet the Commonwealth's agreement with the States and the Northern Territory set out in the Heads of Agreement for the future regulation of companies and securities in Australia that it would introduce legislation which could form the basis of a revised approach for corporate regulation. The Bill contains provisions to enable the commencement of the new national scheme for corporate regulation.

2. Following the High Court's decision in New and others v The Commonwealth (the Corporations case), the Commonwealth and the States and the Northern Territory agreed that the Corporations Act 1989 and the Australian Securities Commission Act 1989 should form the basis for future corporate regulation and that an applied law regime should be adopted by the States and the Northern Territory to enable those Acts to apply Australia wide. This approach is designed to overcome the constitutional uncertainty which would persist if the Commonwealth proclaimed those parts of the Corporations Act which were not affected by the decision in the Corporations case.

3. In giving effect to the agreement, the Bill provides for the Corporations Act 1989 and the Australian Securities Commission Act 1989 to be amended to remove current constitutional underpinning and to be recast as laws for the Australian Capital Territory. The aim of these amendments is to produce Acts which are in a form which can be applied by each State and the Northern Territory as the law of those jurisdictions.

4. The revised Corporations Act will substantially preserve the policy of the Corporations Act and to the fullest extent

3.

possible the language of that Act. As a result of the agreement of State and Northern Territory Ministers the applied laws will have the characteristics of, and will be treated for all practical purposes within each jurisdiction as if they were, Commonwealth rather than State laws. The Bill amends the Corporations Act and the ASC Act to confer these characteristics on the applied laws regime. The Bill will also facilitate the conferral of full administrative authority by State Acts on the ASC.

5. The legislative framework contained in the Bill will enable Commonwealth and State laws regulating companies, securities and futures industries to operate to the greatest extent possible, as national laws. By use of citation provisions, the law governing companies and securities in the States and Territories will be able to be referred to as simply the 'Corporations Law'. There will be a uniform text of companies and securities law applying throughout Australia and companies and persons dealing with companies will be able to operate on the basis that there is a single national law. Companies will be able to lodge documents, including an application for incorporation, with the ASC anywhere in Australia and, in effect, operate as if they were incorporated Australia-wide.

6. The other features of the Bill are:

\* the cross-vesting of civil jurisdiction on the Supreme Courts of each State and Territory and the Federal Court with respect to matters arising under the Commonwealth and State and Territory laws. The purpose of these provisions is to permit relatively simple administration and enforcement of the Corporation Laws.

\* cross-vesting of the relevant State and Territory courts with jurisdiction to deal with offences under the Corporations law of each other jurisdiction.

4.

\* national administration and enforcement of the Corporations Laws through the 'federalising' of offences under the Corporations law of each jurisdiction so that they are treated as if they were offences under Commonwealth law.

\* the language of the Corporations Act and the ASC Acts is to be made as 'neutral' as possible. The purpose of these amendments is to reduce the need for State translator provisions. Application orders will provide for the local variations for the Corporations law in each jurisdiction.

\* an interpretation Part is to be included in the Corporations Act so that once that part is applied by the States there will be a uniform regime for interpretation of the Commonwealth and State Laws.

\* to enhance the national character of the Corporations Law a State law will only be able to override the Corporations Law where it expressly purports to do so.

\* provisions relating to the buy-back of shares have been included. This will update the Corporations Act to bring it into line with the current co-operative scheme law.

\* a small number of provisions have also been included to clarify the operation of, and correct anomalies in, the fundraising provisions and to facilitate the operation of the ASC's national information system for computerisation of corporate affairs records.

\* some technical amendments to provisions of the Corporations Act that are in need of correction or clarification.

Financial Impact Statement

7. The Bill is expected to result in a significant reduction of business costs in the light of the reforms to the law and administration which it will make through the commencement of the national regulatory scheme. The Corporations Act and the ASC Act also contain significant improvements to the existing co-operative scheme law and, in addition, the national operation will remove inefficiencies arising from jurisdictional barriers.

8. The costs of establishing and maintaining the ASC will be primarily covered by revenues from the registration of companies, and the securities and futures industries. As part of the agreement reached on future regulation the Commonwealth has agreed to reimburse the States for revenue forgone through the change in regulatory arrangements. This will amount to \$102 million indexed in line with the Consumer Price Index from 1989/1990 base. This amount will be distributed annually amongst the States on an agreed distribution formula. Interim funding arrangements will apply in respect of reimbursement of foregone revenue for the financial year 1990-91.

Explanatory Memorandum

9. This explanatory memorandum:

(a) contains an overview of the legislative framework of the new scheme (paras. 10-19);

(b) contains a brief introduction to the new national companies and securities scheme (paras. 20-34);

(c) contains an outline of the principal features of the Bill (paras. 35-69); and

(d) deals sequentially with each clause of the Bill (paras. 70- 1351) as follows:

Covering clauses paras. 72 - 270 Schedule 1

Amendments of Chapter 1 (para 271 - 503)

Amendments of Chapter 2 (para 504 - 575)

Amendments of Chapter 3 (para 576 - 629)

Amendments of Chapter 4 (para 630 - 686)

Amendments of Chapter 5 (para 687 - 745)

Amendments of Chapter 6 (para 746 - 780)

Amendments of Chapter 7 (para 781 - 892)

Amendments of Chapter 8 (para 893 - 993)

Amendments of Chapter 9 (para 994 - 1048)

Schedule 2 (para 1049)

Schedule 3 (para 1050 - 1121)

Schedule 4 (para 1122)

Schedule 5 (para 1123 - 1261)

Schedule 6 (para 1262 - 1266)

Schedule 7 (para 1267 - 1351)

(e) Appendix: Locating changes to Corporations Law and ASC Law (para 1352)

OVERVIEW OF THE LEGISLATIVE FRAMEWORK OF THE NEW SCHEME

10. The new national scheme will involve the establishment of a new law, the Corporations Law to be applied as the substantive law of the States and the Australian Capital Territory and the Northern Territory providing for the regulation of companies, and the securities and futures industry. The Corporations Law will be created from the existing Corporations Act 1989 (as modified by this Bill) by a legislative mechanism described below.

11. The national operation of the new scheme will come about by the passage of the Commonwealth Bill and by each State and the Northern Territory Parliament passing complementary Application Legislation. That legislation will apply the Corporations Law created by the Corporations Act (as modified) as the law of each of those jurisdictions. The Corporations Law will be applied in a way that ensures that any further amendments to the Corporations Law by the Commonwealth Parliament will automatically apply in the States and the Northern Territory. In this way the Corporations Law will state the uniform text of the new national law applying in all jurisdictions.

Summary of the Structure of the Corporations Legislation Amendment Bill ('the Bill')

12. Part 2 of the Bill (which contains the 'covering' provisions) changes the character of the Corporations Act 1989 from a law relying for its national operation solely on Commonwealth constitutional power, to a law which has direct operation only in the Capital Territory, and is also capable of application by the States and Northern Territory.

13. To achieve this result the Bill inserts new Parts into the Corporations Act to establish the legal framework in which the Corporations Law will operate as part of a new national scheme. These Parts provide for the way in which the Corporations Law is to apply and be cited; the judicial,



administrative and enforcement arrangements; the mechanisms for the making of subordinate instruments (such as regulations, rules of court etc); and other machinery matters for the new national scheme. These elements are described in more detail in paragraph 35 to 61 below.

14. To establish the Corporations Law the Bill inserts into the Corporations Act a new s.82 which sets up the opening provisions of the Law. Section 7 of the Bill then creates the text of the Corporations Law out of the existing Corporations Act (as modified). Section 5 of the amended Act applies the Law in the Australian Capital Territory as the substantive companies, securities and futures legislation of the Capital Territory.

15. In Part 4 of the Bill a similar approach is adopted to convert the ASC Act into a law for the Capital Territory, some provisions of which will be applied by complementary Application Legislation in each State and the Northern Territory as the ASC Law of the State or Territory.

16. As mentioned above, Application Legislation in each State and the Northern Territory will apply the Corporations Law and relevant provisions of the ASC Act as the law of each of those jurisdictions. One of the main features of the complementary Commonwealth and State Laws is the creation of a uniform text of the substantive law which will apply in each State and the Capital Territory and Northern Territory.

#### The Schedules of the Bill

17. Schedules 1 and 2 of the Bill carry out the necessary modifications of the text of the Corporations Act so that it can apply as the Corporations Law of the Australian Capital Territory. Consistent with the purposes of establishing a uniform text of the legislation for the new scheme, the language of the Corporations Law has been expressed in such a way as to enable the Law to be applied by the States and the Northern Territory without the need for translation and modification by each jurisdiction. The special 'citation'

provisions in the covering provisions enable the Corporations Law of the various jurisdictions to be referred to and, in certain ways, treated as a single national law. Any necessary machinery modifications not in the covering provisions or the Application Laws to take account of local differences relating to the provisions of the Corporations Law of a particular jurisdiction will be made by application orders. Those orders are described in more detail in paragraphs 51 to 53 below.

18. Schedules 3 to 6 carry out various modifications to the Corporations Law that are not related to the process of converting it to a Capital Territory law.

\* Schedules 3 and 4 will amend the Corporations Law to amend technical deficiencies of the Corporations Act, clarify the operation of and correct anomalies in the operation of the fundraising provisions, and facilitate the operation of the new national corporate computer data base and information system being established by the ASC.

\* Schedules 5 and 6 will bring the Corporations Law into line with the amendments to the co-operative scheme legislation relating to company share buy-backs which were passed after the Corporations Act.

19. Schedule 7 of the Bill carries out modifications to the ASC Act, in a broadly similar way to which Schedules 1 and 2 modify the Corporations Act, to convert the ASC Act into a law of the Capital Territory, and to enable relevant parts of that Act to be applied by the States and the Northern Territory as the ASC Law of those jurisdictions.

INTRODUCTION TO THE NEW NATIONAL COMPANIES AND SECURITIES  
SCHEME

Need for replacement of co-operative scheme

20. The present co-operative scheme was an attempt to reconcile the need for a national system of companies and securities regulation with the desire by the States to retain political and administrative control over these activities. As a regulatory model the scheme has serious structural flaws. Over time the inherent tensions with the scheme have proved irreconcilable.

21. The Australian economy is national, and major companies operate across the country and often in the international sphere. To regulate such companies otherwise than on a national basis has done a serious disservice to the interests of Australian business and the broader community. The co-operative scheme provided a fragmented regime in which no Parliament, no Government and no Minister had responsibility and accountability for the operation of the scheme. Thus, the scheme fell short of the fundamental democratic principles which should underpin Government activity in our society.

22. In its operation the scheme was also deficient. It has not been able to meet the challenges of recent years when the companies and securities market has undergone major change. There has been community concern that markets have been manipulated and that some companies have been misused shareholders funds and have, in their operations, completely ignored the interests of creditors and shareholders. Where problems have occurred they have been difficult to identify and to deal with satisfactorily because of the division of responsibility between State and Federal regulators. The failure of the co-operative scheme to provide adequate enforcement of corporate law has led to the questioning by local and foreign investors of the integrity of Australians markets and a loss of confidence by creditors and shareholders.

23. The performance of the co-operative scheme was examined by the Senate Standing Committee on Constitutional and Legal Affairs. The Committee in its report 'The Role of Parliament on the National Companies Scheme' (April 1987) concluded that the co-operative scheme had outlived its usefulness. The Standing Committee unanimously recommended that the Commonwealth introduce comprehensive legislation to assume responsibility for all areas covered by the existing scheme. In short, the co-operative scheme failed to provide public accountability, legislative responsibility or administrative responsibility.

24. It was against this background that the Government set out to reform the co-operative scheme and provide a regime that will meet the needs of the Australian economy into the 1990's and beyond. In doing so the Government has consistently sought to meet the legitimate wishes of the business community, State Governments and other interested groups within the community.

25. A basic regulatory framework for business enterprises is required which promotes efficiency, which represents the national and increasingly international outlook of much of our industry and which is capable of quick reaction as circumstances change. While ensuring that the interests of shareholders and the broader community are protected, the Government must also ensure that the regulatory framework is consistent with the broader national interest.

26. The Commonwealth's key objectives in seeking to establish new national arrangements for the regulation of companies, securities and futures industries have been to:

- \* replace the existing co-operative companies and securities scheme laws with one system of federal law

- \* establish a single national regulatory authority, the Australian Securities Commission (ASC), with the capacity to effectively administer the laws throughout Australia

\* provide mechanisms for the ASC to be accountable to the community though the normal principles of responsible Government

\* introduce important reforms in key areas

\* provide for the strategic involvement of the business and professional community in law reform and in the regulatory system.

27. These objectives have been substantially achieved in the agreement reached between the Commonwealth and the States on the future regulation of corporate law in Australia.

Heads of Agreement between Commonwealth and States and the Northern Territory for future regulation from companies and securities

28. At a meeting of Commonwealth, State and Northern Territory Ministers at Alice Springs on 29 June 1990, Commonwealth and State Ministers reached an agreement to establish a new scheme for the regulation of companies, securities and futures industries under which complementary legislation would be enacted. The Ministers' agreement is to form the basis of a new formal agreement between the Commonwealth and the States and the Northern Territory. The principal features of the agreement are as follows.

(i) Legislative scheme

29. The Corporations Act and the Australian Securities Commission Act is to be amended to apply as law for the ACT which should then be applied in each State as a law of that State. Those Acts are to be amended to be in a form whereby the applied State and Northern Territory laws can be administered as if they were Commonwealth laws.

30. The applied law is to have the characteristics of, and is to be treated, for all practical purposes within each jurisdiction as if it were, a Commonwealth rather than a State

law. As agreed by Ministers express provision is to be included in each applied law with the object of ensuring that the operation of the Corporations Law is not unintentionally varied, repealed or overridden by any other law of that jurisdiction.

(ii) Administration

31. The Australian Securities Commission is to be the sole administering authority, and on the commencement of the ASC, the States are to have no further responsibility for matters transferred to the ASC's authority. The ASC is to be formally accountable and responsible to the Commonwealth Attorney-General and the Commonwealth Parliament and is not to have any formal responsibility or accountability to State Ministers or State Parliaments.

(iii) Investigations and Prosecutions

32. The ASC and the Commonwealth Director of Public Prosecutions (DPP) are to have responsibility for the prosecution of offences under the Corporations legislation and the Australian Federal Police (AFP) is to primarily assist the ASC as required in the performance of its investigative role under the national legislation. The ASC is to assume responsibility for the ongoing conduct of current prosecutions and investigations and the institution of any new prosecution and investigations relating to offences under the co-operative scheme legislation.

(iv) Role of Ministerial Council for companies and securities

33. The Ministerial Council is to continue, although with a revised role in the light of the new national arrangements. The Commonwealth Attorney-General will become the permanent chairman of the Council. The Council is to have no power of direction or control over the ASC. The Ministerial Council is to be consulted in relation to all legislative proposals involving amendment of companies and securities laws. At the

time of introducing legislative proposals into the Commonwealth Parliament, the Commonwealth is to table in the Parliament the advice of the Ministerial Council arising out of its consideration of the proposal.

(v) Law reform

34. The Commonwealth is to have sole responsibility in relation to legislative proposals for the national markets (i.e. takeovers, securities, public fundraising and futures). In relation to other legislative proposals, the Ministerial Council is to approve the legislation before introduction into the Commonwealth Parliament. However, the Commonwealth is not to be obliged to introduce any such proposal with which it does not concur. For the purposes of Ministerial Council voting on those legislative proposals for which the Commonwealth and States share responsibility, the Commonwealth is to have 4 votes and each State and the Northern Territory to have 1 vote. The Commonwealth is to have a casting vote. Where amendments to legislative proposals for which the Commonwealth and States share responsibility are moved in the Commonwealth Parliament, the Commonwealth is to use its best endeavours to consult with the Ministerial Council on those amendments.

PRINCIPAL FEATURES OF THE BILL

35. The Bill will enable significant improvements to be made to the operation, administration and enforcement of companies and securities laws in Australia. As already mentioned, a principal objective of the Bill is to implement the agreement of Commonwealth and State Ministers that the new Corporations Law when applied by the States should operate to the greatest extent possible as a national law.

Corporations Law

36. Through modifications to the text of the Corporations Act and the ASC Act and the use of legislative devices (such as the citation provisions), the Commonwealth and the States and

the Northern Territory will have a uniform body of companies and securities laws which will be called the Corporations Law.

37. Although each jurisdiction will enact a law which picks up that body of law known as the Corporations Law for its own jurisdiction there will be, in effect, for all intents and purposes, a single national Corporations Law applying throughout Australia.

38. In most situations persons dealing with the legislation will not have to concern themselves with which of the 8 Acts they are operating under. The Corporations Act and the ASC Act will be recast so that the language of those Acts is as much as possible in a form that lends itself to uniform application across all jurisdictions.

39. To give effect to the single law concept, an act such as the lodgment of a prospectus will be recognised to have occurred not just for the purposes of the law of the jurisdiction where lodgement actually took place, but also for all other jurisdictions. Documents required by the ASC pursuant to the Corporations Law of one jurisdiction will be able to be filed with an office of the ASC in any jurisdiction.

#### 'Federalising of State Law'

40. To implement the Alice Springs agreement that the State applied laws could be treated as though they were Commonwealth law, each jurisdiction will, in effect, 'federalise' matters arising under the Corporations law of the jurisdiction. The effect of this will be that Commonwealth criminal and administrative law will apply exclusively in relation to the Corporations Law.

##### (i) Administrative law



41. The Commonwealth administrative law package - the Administrative Decisions (Judicial Review) Act 1977, the Administrative Appeals Tribunal Act 1975, the Freedom of Information Act 1982, the Ombudsman Act 1976 and the Privacy Act 1988 will, to the relevant extent, provide exclusive rights of review of decisions of the Attorney-General, the Australian Securities Commission, the Companies and Securities Advisory Committee, and, except in the case of the AAT Act, the Corporations and Securities Panel, the Companies Auditors and Liquidators Disciplinary Board in relation to their functions under the Corporations Law as if they were solely exercising functions and powers under Commonwealth laws. This will apply to the exclusion of relevant State laws. This is a significant advancement on the co-operative scheme legislation which excluded the remedies provided by Commonwealth administrative law legislation.

(ii) Criminal law

(a) Investigation and Prosecution of Corporations law Offences

42. State laws will require offences against the applied provisions to be treated by everyone (in particular the Commonwealth officers and authorities performing investigation, prosecution and related functions) in the same way as those offences would be treated if they were in fact offences against the Corporations Act or the ASC Act, i.e. the offences will be 'federalised'. In accordance with the agreement reached by Ministers, the primary responsibility for the investigation and prosecution of offences under the Corporations Law will rest with the Commonwealth and through it, the ASC, AFP and the DPP.

43. The 'federalising' of Corporations Law offences will achieve the result that, for all intents and purposes, an offence against the Corporations Law of any jurisdiction will be treated as if it were an offence against a nationally-operating Commonwealth law. Thus, each State will

apply the relevant provisions of Commonwealth law (i.e. the Crimes Act 1914, Australian Federal Police Act 1979 and so on) covering the investigation and prosecution of offences, arrest, bail, trial, conviction, sentencing, proceeds of crime etc, as State law in respect of offences against the Corporations Laws. The federalising mechanism will also provide that those laws insofar as they confer authority and power on Commonwealth officers or bodies apply according to their tenor, and that they apply to the exclusion of any relevant State law in that respect. Generally speaking, State investigating and prosecuting authorities will have no involvement in the enforcement of the Corporations Law, subject to the following qualification.

44. In relation to investigations which raise matters having a mixture of offences against State Crimes Acts and the Corporations Law, administrative arrangements will be made which recognise the respective responsibilities of Commonwealth and State officers. Where offences against the Corporations Laws overlap with offences against general State criminal law (for the enforcement of which the States retain responsibility), State police and prosecuting authorities will be empowered by State and Northern Territory Law subject to the existence of those administrative arrangements, to pursue these offences where they form one part of a much larger State criminal law investigation or prosecution. Similarly, the ASC and the AFP and DPP will be empowered by State and Northern Territory Law to pursue State criminal law offences which arise in the course of a major Corporations Law investigation.

(b) Investigation and Prosecution of co-operative scheme offences - Transitional Arrangements

45. It is to be expected that a considerable part of the ASC's immediate law enforcement strategy will be focussed on activity which occurred prior to the commencement of the national scheme. In light of this, Commonwealth and State Ministers agreed that the ASC will assume responsibility from the commencement of the national scheme for the investigation and prosecution of co-operative scheme offences, including ongoing investigations and prosecutions. Thus, all

investigations currently being conducted as at the commencement of the Corporations Law will be deemed to be investigations to which Part 3 of the ASC Act applies after commencement of the new law. Offences against co-operative scheme law will be treated for the purposes of investigation and prosecution as if they are offences against Commonwealth law and consequently Commonwealth investigations and prosecutorial powers or authorities will be exercisable according to their tenor. However, recognising that these matters are and remain matters of State law, the corresponding powers exercisable by State bodies or persons will remain. The exercise of those State powers will be in accordance with arrangements between the Commonwealth and the States, which will be designed to ensure an orderly transition to the new administrative scheme by providing for the continued involvement of State officers in investigations and prosecutions which are under way.

46. Further, the operation of co-operative scheme law on evidence obtained and statements recorded while that law was in effect will be preserved. Examinations, depositions, records, notes and reports made before the commencement of the Corporations Law and ASC Law will continue after commencement to have the same status, effect and operation as they had before commencement.

47. Special investigations which continue after the changeover date will be treated in the same way as investigations under the new national scheme. An inspector appointed by the Ministerial Council will, in practical terms, operate as a 'staff member' of the ASC, and the ASC will assume primary responsibility for the ongoing conduct of the special investigation.

48. The ASC will be empowered to continue and to commence proceedings after the changeover date arising out of an investigation into an alleged contravention of a co-operative scheme law.

49. In the interests of more effective enforcement and administration, the ASC, AFP and the DPP will be given statutory authority to use the powers conferred upon them by Commonwealth law to investigate (and arrest offenders), and to prosecute co-operative scheme law offences. However, as noted above, fundamentally these offences remain matters of State law (albeit administered by the Commonwealth), and therefore custody, bail, the procedure for bringing offenders to trial, conviction, sentencing, proceeds of crime and spent convictions will remain a matter of State law. Consistently with that approach, the substantive law applicable to such matters as procedure for bringing matters to trial, sentencing and so on will remain matters of State law.

#### National Licensing

50. A licence granted to a person under the Corporations Law of a State or Territory for a securities or investment advisory business or for a futures broking or advising business will enable a person to carry out Australia wide the activity that is otherwise prohibited. A single licence will be taken to have been granted under the law of each jurisdiction. Existing licences will be deemed to continue. Such a licence will be deemed, for all purposes, to be a licence under the Corporations Law of the jurisdiction where the licence was originally granted.

#### Application Orders

51. To enable the Corporations Law of the Capital Territory to have a uniform text so that it can be readily adopted by other jurisdictions, statutory instruments called application orders will be used to take account of other laws which need to be referred to in the Corporations Law of a State or Territory.

52. The Commonwealth Minister will provide for these various State and ACT modifications through the making of application orders. The application orders will primarily be used as a device to enable the Corporations Act to be drafted in neutral language so that the body of law contained in the Act can be applied by the States without the need for major textual amendments. The application orders will be a 'specified law' or 'a prescribed law' which will appear in the Corporations Law. They will basically provide clarification to the law and not impose any new duties or obligations.

53. The application orders for the States will deal with matters which are peculiar to each individual State jurisdiction. The application orders will be required to be gazetted.

#### Cross-vesting of courts jurisdiction

54. To enhance the national nature of the new scheme, the Bill contains provisions to establish a system of cross-vesting of jurisdiction between Federal, State and Territory courts for Corporations Law matters.

##### (i) Civil jurisdiction

55. A special regime has been adopted rather than relying on the Jurisdiction of Courts (Cross-vesting) Act 1987 to take account of the unique character of the jurisdictional apparatus under the applied law regime.

56. The essence of the cross-vesting scheme, as provided for in Part 10 of the Bill and proposed complementary State and Northern Territory legislation, is that the Federal Court and the State, Northern Territory and ACT Supreme Courts will be vested with civil jurisdiction under the Corporations Laws of all jurisdictions.

57. The cross-vesting of jurisdiction in this way is central to the conferment of a national character on the Bill. This is further achieved by the conferment on each court of a power to transfer proceedings to another court having jurisdiction where it is in the interests of justice to do so.

58. The Bill confers the necessary jurisdiction on the Federal Court and the State, ACT and Northern Territory Supreme Courts in respect of civil matters arising under the Corporations Law of the Capital Territory. The State and Northern Territory Application of Law Acts will confer corresponding jurisdiction on those courts in respect of matters arising under the State and Northern Territory Corporations Laws.

(ii) Criminal jurisdiction

59. A cross vesting regime is provided for offences arising under the Corporations Laws of the various jurisdictions. This regime is based broadly on Part X of the Judiciary Act 1903. Jurisdiction in respect of offences against Corporations Laws that proceed by way of summary proceedings or an indictment will be conferred on the several courts of the States, Northern Territory and ACT.

60. In relation to summary offences, the courts of each State and Territory will be able to exercise jurisdiction without limitation as to locality in respect of offences under all Corporations Laws.

61. Except in relation to indictable offences committed under the Corporations Law of its own jurisdiction, or outside Australia, the courts of each State or Territory will be able to exercise jurisdiction in respect of indictable offences only where those offences were committed, begun or ended within that State or Territory.

## Registration of Companies

### (i) Jurisdiction Basis

62. Registration of companies under the Corporations Law will in practical effect remain, to the fullest extent possible, a 'national' registration.

63. While the legislative basis of the Corporations Law requires that a company be registered under the Corporations Law of one or other State or Territory jurisdiction, the fact of being so registered will generally allow a company to operate nationally without the need to concern itself with State boundaries. It will no longer be necessary, for example, for companies wishing to carry on business in another State to reserve and register a name, or to establish a principal office, in that other State.

64. Because the registration of companies will in effect be national, it has not generally been necessary to revive the notion of the 'recognised company' which was prominent in the Companies Act and Codes. The exception to this is in the provision which has been made for companies to transfer their jurisdiction of registration. As was the case under the Companies Act and Codes, a procedure is available whereby a company may transfer its registration to another jurisdiction. The procedure which is provided for under the Corporations Law is simpler than the co-operative scheme procedure. In addition, the need for such a procedure in the Corporations Law will be more theoretical than practical, since the Corporations Law effectively will be a single national law, so that a transfer of registration will have limited advantages.

### (ii) Existing Companies

65. The Act is to be amended so that companies which have already previously been registered under the co-operative scheme will not be required to apply for registration under

the Corporations Law. Instead, existing companies will be deemed to be registered under the Corporations Law as from the date of commencement of the Act. This will result in considerable savings in terms of cost and administrative convenience both to the ASC and the companies themselves.

66. Consistent with this automatic deemed registration of existing companies, registrable Australian bodies and foreign companies which were previously registered as 'foreign companies' under CO-operative scheme legislation will also be deemed to be registered under the Corporations Law.

67. Thus, bodies which were previously registered under the co-operative scheme will automatically enjoy the benefits of registration under the new national scheme without the need to apply to be registered. The ASC will assume control from the CACs of the documents and registers pertaining to these bodies, as it takes over responsibility for their regulation.

#### Complementary State and Northern territory Legislation

68. The legislation which is required to be enacted by each State and the Northern Territory for the national scheme to commence will generally mirror those parts of the Corporations Legislation Amendment Bill which provide for the national administration of companies and securities laws. Each State's Bill will apply the Corporations Law, certain provisions of the ASC Act and the Corporations Regulations to the State.

69. The State legislation will also provide for the 'federalising' of matters arising under State and Northern Territory laws and the conferral of powers on the ASC and Commonwealth law enforcement and administrative law bodies. The State legislation will also provide complementary legislation for the cross-vesting of civil and criminal jurisdiction for matters arising under the Corporations Law.



ABBREVIATIONS

70. The following abbreviations are used in this explanatory memorandum:

ASC	- Australian Securities Commission
ASC Act	- <u>Australian Securities Commission Act 1989</u>
C&S Interpretation Act	- <u>Companies and Securities (Interpretation and Miscellaneous Provisions) Act 1980</u>
CA	- <u>Companies Act 1981</u>
CASA	- <u>Companies (Acquisition of Shares) Act 1980</u>
the Act	- <u>Corporations Act 1989</u>
FIA	- <u>Futures Industry Act 1986</u>
NCSC	- National Companies and Securities Commission
NCSC Act	- <u>National Companies and Securities Commission Act 1979</u>
SIA	- <u>Securities Industry Act 1980</u>
TPA	- <u>Trade Practices Act 1974</u>
CACS	- State Corporate Affairs Commissions

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PART 1 - PRELIMINARY

Cl.1: Short Title

72. When enacted, the Bill may be cited as the Corporations Legislation Amendment Act 1990

1.2: Commencement

73. Parts 1 and 2 of the Bill will commence on the day on which this Bill receives the Royal Assent. The remaining provisions of the Bill will commence on a day or days to be fixed by Proclamation.

PART 2 - CONVERTING THE CORPORATIONS ACT 1989 INTO A LAW FOR THE GOVERNMENT OF THE AUSTRALIAN CAPITAL TERRITORY

Cl.3: Principal Act

74. The Corporations Act 1989 (the Act) is referred to in Part 2 as the Principal Act.

Cl.4: What this Part does

75. This clause explains the purpose and effect of Part 2. The purpose of this Part is to change the Corporations Act 1989 from an Act relying on various heads of constitutional power of the Commonwealth and intended to be a national law applying of its own force into a law for the government of the Australian Capital Territory relying on the Territories power (s.122 of the Constitution) in a form suitable for application by the States.

76. Proposed section 6 provides for the insertion into the Act of new Parts providing for the Corporations Law set out in proposed s.71 to apply as a law for the government of the ACT, (sub-cl.4(2)). Proposed section 7 then provides for the creation of the Corporations Law out of the existing provisions of the Act by converting the current text of the

Corporations Act into a document called the 'Corporations Law'. (sub-cl.4(3)). The amendments to the Act contained in the Bill will enable the Corporations Law to be in a form that can be applied by the States (sub-cl.4(4)).

Cl.5 : Title

77. This clause amends the long title of the Corporations Act 1989 to reflect the fact that it will now be a law for the government of the ACT in relation to corporations, securities and the futures industry.

1.6: New Parts providing for the Corporations Law apply in the Australian Capital Territory

78. This clause provides for the insertion of new Parts 1-14 into the Corporations Act. The purpose of this provision is to separate those provisions which establish the administrative and procedural framework for the application of the Corporations Act as a law for the Australian Capital Territory from the core of substantive law relating to companies and securities. That core of law is to be known as the Corporations Law. It will be in a form whereby it can be applied by the States.

Insertion of new Parts Into Corporations Act 1989

PART 1 - PRELIMINARY

Proposed s.1 - Short title

79. This new section makes provision for the amended Act to be cited as the Corporations Act 1989.

Proposed s.2 - Commencement

80. This new section makes provision for the amended Corporations Act to commence on a day or days to be fixed by Proclamation (sub-s.2(11)). Proposed new Part 1 is to commence on the day on which section 6 of the Corporations Legislation Amendment Act 1990 commences.

Proposed s.3: Object

81. The object of the amended Corporations Act (other than Part 8) will be to make a law for the government of the ACT in relation to corporations, securities, the futures industry and some other matters. Part 8 is excluded as it essentially deals with machinery matters rather than substantive law. It makes provision for the performance of functions conferred by State national scheme laws by Commonwealth officers and authorities, (proposed sub-s.3(1)). Proposed sub-s.3(2) will provide that the amended Act has effect and is to be interpreted accordingly. Proposed sub-s.3(3) will provide that the amended Corporations Act and the Corporations Law of the ACT are laws for the administration or government of the ACT. This provision overrides the general rule that a reference to the law of the Commonwealth does not include a reference to a law in force in a Territory, s.22(3) Acts Interpretation Act 1901. The effect is that references in any Commonwealth Act to a law of the Commonwealth can be taken to include a reference to the Corporations Act 1989 and the Corporations Law.

Proposed s.4: Interpretation

82. This provision sets out key definitions for the interpretation of the amended Corporations Act:

\* 'applicable provision' in relation to a jurisdiction, means the Corporations Law, Corporations Regulations, ASC Law and the ASC Regulations of that jurisdiction together with such Commonwealth law applicable to matters arising under such Laws and Regulations for example the Director of Public Prosecutions Act 1983 and the Freedom of Information Act 1982

\* 'Commonwealth law' means any Commonwealth Act and common law other than the Corporations Law and the ASC Law of the Capital Territory and any regulations made thereunder

- \* 'Capital Territory' means the ACT and the Jervis Bay Territory
- \* 'jurisdiction' means a State or an internal Territory
- \* 'modifications' includes additions, omissions and substitutions
- \* 'State' includes the Northern Territory 'Territory' does not include the Northern Territory.

PART 2 - THE CORPORATIONS LAW AND THE CORPORATIONS REGULATIONS, OF THE CAPITAL TERRITORY

Proposed s.5: Application in the Capital Territory of the Corporations Law set out in section 82

83. This new section makes provision for the Corporations Law set out in proposed Part 6 as in force for the time being to apply as a law for the government of the Capital Territory and that law as so applied to be referred to as the Corporations Law of the Capital Territory.

Proposed s.6: Application of regulations in force under section 22

84. The new section makes provision for the regulations made under section 22 to apply as regulations in force for the purposes of the Corporations Law of the Capital Territory and as so applied may be referred to as the Corporations Regulations of the Capital Territory.

85. It also makes provision for regulations which are expressed to take effect on a date prior to being notified in the Gazette. Under proposed ss.6(2) to (5) such regulations are to have effect from the specified date unless they would either:

- \* prejudicially affect the rights of a person (other than a government or an authority of a government); or

\* impose liability on a person (other than a government or an authority of a government) in respect of anything done before the notification date.

86. In such cases, the regulations are to take effect from the date of notification. Section 48(2) of the Acts Interpretation Act 1901 is not to apply to regulations made under s.22 as ss.6(2) to (5) cover the same ground.

Proposed s.7: Interpretation of some expressions in the Corporations Law, and the Corporations Regulations, of the Capital Territory

87. The Corporations Law and the Corporations Regulations are in a form which can be adopted by the States and the Northern Territory without textual variations. This contrasts with the existing co-operative scheme legislation where there are minor textual variations from jurisdiction to jurisdiction. To enable various contributions to statutory funds and levies to be imposed by each jurisdiction's law and at the same time to retain the textual uniformity it has been necessary for the provision enabling the Commonwealth to impose these contributions and levies for the Capital Territory to be removed from the Corporations Law and placed in the covering clauses.

88. Proposed s.7(a) makes provision to enable the reference to an Act of this jurisdiction in provisions dealing with the liability for payment of certain levies and contributions imposed is to mean an Act of the Commonwealth Parliament. For all relevant purposes for the time being, this will effectively be a reference to the covering clauses of the Corporations Act.

89. Proposed s.7(b) makes provision to enable the reference to an 'Act of this jurisdiction' in s.111B of the Corporations Law which provides for application orders to adopt the provisions of other Acts of the relevant jurisdiction to mean an Act of the Commonwealth Parliament or an Act or Ordinance of the Capital Territory.



90. In all other cases a reference to an 'Act of this jurisdiction' in the Corporations Law and Corporations Regulations is to mean an Act or Ordinance of the Capital Territory.

91. When reference is made in the Act to the 'law of this jurisdiction', it will include the Corporations Act 1989, and the Corporations Law of the Capital Territory. When reference is made in the Corporations Law to 'this jurisdiction' it will mean the Capital Territory.

Proposed s.8: Corporations Law of the Capital Territory taken to be an Act

92. The purpose of this provision is to ensure that the Corporations Law of the Capital Territory is taken for all purposes to be an Act (sub-s.8(1)). The Acts Interpretation Act 1901 will not apply to the Corporations Law or application orders under that Law. Instead a specific regime for interpretation will be set out in the Corporations Law, (sections 109A - 109ZF). Similarly State interpretation legislation will not apply to the Corporations Law of other jurisdictions. However, to the extent that any matters are not dealt with in Part 1.2, the Acts Interpretation Act 1901 remains applicable to the interpretation of the Corporations Law. An application order made under the Corporations Law of the Capital Territory will not be a statutory rule within the meaning of the Statutory Rules Publication Act 1903. However, the Corporations Laws imposes requirements for publication and Gazettal, (Part 1.3).

Proposed s.9: Corporations Law, and Corporations Regulation, of the Capital Territory not to be affected by later Commonwealth laws

93. This provision is to ensure that an Act or instrument made after the commencement of the Corporations Law is not to be interpreted as amending or repealing or otherwise altering the effect or operation of the Corporations Law unless the Act or instrument provides expressly that it is to have that

effect despite any provision of the Corporations Law. State Ministers have agreed that a similar provision will appear in the State Application Acts. The purpose of this provision is to ensure that for all intents and purposes the Corporations Law will be a national law and that other laws purporting to amend that law can only do so if they expressly state that they are amending the Corporations law.

Proposed s.10: Relationship between the Corporations Law, and the Corporations regulations, of the Capital territory and the laws of the Capital Territory

94. The purpose of this provision is to avoid or resolve inconsistencies in the interpretation of the Corporations Law and the laws of the Capital Territory.

95. The general rule is that the Corporations Law has effect despite anything in a law of the Capital Territory affecting companies and securities and futures industries matters. However, this general rule is ameliorated by the Corporations Regulations being able to specify that certain laws of the Capital Territory which impinge on matters dealt with in the Corporations Law can operate despite the Corporations Law or that the Corporations Law has effect subject to certain modifications, s.10(4).

96. In order to provide for speed and flexibility in relation to any initial minor amendments to the Corporations Law that are necessary in the transition to the new national scheme, provision is made for the regulations to be able to amend the Corporations Law for the first 12 months of the operation of the national scheme.

Proposed s.11: Operation of particular Acts of the Capital Territory

97. This section provides that various provisions of the Corporations Law of the Capital Territory will have effect subject to, or as modified by, certain ACT legislation. This provision is based on s.601 of the Corporations Act 1989 which will be repealed.

98. To preserve existing State laws which are required to continue, State Application Acts will contain a provision to grandfather those laws.

PART 3 - CITING THE CORPORATIONS LAW, AND THE CORPORATIONS REGULATIONS

Proposed s.12: Simpler citation of Corporations Law, and Corporations Regulations, of the Capital Territory

99. This new section will enable the Corporations Law of the Capital Territory and the Corporations Regulations of the Capital Territory to be referred to simply as the Corporations Law and the Corporations Regulations, respectively. This will facilitate the national operation of the Corporations Act. Each State Application Act will have a similar provision. The interlocking of these provisions will enable in most instances persons and companies to refer to the Corporations Law without specifically identifying the Corporations Law of a particular jurisdiction.

Proposed s.13: References to Corporations Law, and Corporations Regulations, of other jurisdictions

100. This new section will enable the Corporations Law as in force for the time being as set out in the Corporations Act and which is applied by a State or the Northern Territory as the Corporations Law of that jurisdiction to be referred to as the Corporations Law of that jurisdiction in any Commonwealth Act, law of the Capital Territory or instrument made under any such Act or law. A corresponding provision will be included in the State Application Acts; s-s.13(2)

101. A similar provision will enable the Corporation Regulations in force under the Corporations Act as applied by a State or the Northern Territory to be referred to as the Corporations Regulations of that jurisdiction in such legislation and documents, s-s.13(3).

Proposed s.14: References to Corporations Law and Corporations Regulations

102. This new section will enable instruments to refer simply to the Corporations Law or to the Corporations Regulations without the need to specify the particular jurisdiction under which that law or regulation has been enacted. The State Applications Acts will contain a similar provision. The Corporations Law of the Capital Territory will, as far as possible, operate as if that Law and the Corporations Law of each jurisdiction were a single national Corporations Law applying of its own force throughout Australia, s-s.14(1).

103. A reference in an instrument to the Corporations Law is to be read, for the purposes of the laws of the Commonwealth and of the laws of the Capital Territory, to be a reference to the Corporations Law of the Capital Territory and a separate reference to the Corporations Law of each jurisdiction other than the Capital Territory, s-s.14(2). When this provision is read with the corresponding State provisions, any reference to the Corporations Law in an instrument means the Corporations Laws of all jurisdictions. A specific reference to the Corporations Law of a jurisdiction or a contrary intention expressed in the instrument will override this general rule, s-s.14(3) and (4).

104. For the purposes of the section, instrument has a wide definition and includes 'an Act', a law of the Capital Territory, an industrial award, licence, agreement, pleading or any other document whatever (including private documents), s-s.14(5).

Proposed s.15: Saving of citation provisions of other jurisdictions

105. This section provides that the citation provision in this Part are not intended to affect the corresponding operation of citation provisions in other jurisdictions. It is envisaged that the applications of laws legislation of each State and the Northern Territory will provide that the Corporations Law

or the Corporations Regulations of their jurisdiction may be referred to simply as the Corporations Law or the Corporations Regulations and that each jurisdiction will be able to provide for how a reference to the Corporations Law or Corporations Regulations is to be interpreted for the purposes of the laws of that jurisdiction.

PART 4 - APPLICATION OF THE CORPORATIONS LAW TO THE CROWN

106. This Part sets out whether certain provisions of the Corporations Law apply to the Crown or emanations of the Crown. Corresponding provisions will be included in the State Application Acts.

107. For the purposes of this Part, a reference to the Crown in a particular right includes a reference to an instrumentality or agency (whether a body corporate or not) of the Crown in that right.

Proposed s.16: Interpretation

108. Proposed s.17(1), provides that the Crown in right of the Commonwealth, of each of the States, of the Capital Territory, of the Northern Territory and of Norfolk Island, will be bound by the external administration provisions of the Corporations Law (chapter 5) except in relation to offences committed by officers of companies that are in some form of external administration. Section 17(1) duplicates s.3 of the Act which is to be repealed. In order to avoid doubt, proposed s.17(2) expressly provides that the securities provisions (Chapter 7) of the Corporations Law do not bind the Crown in these rights.

109. Those parts of the Companies Act and Codes which correspond to Ch.5 (other than Pt.5.8) are also expressed to bind the Crown in all its relevant capacities. The purpose of so binding the Crown is to displace its special priority in relation to the payment of debts, except insofar as a priority

is specifically preserved by other legislation; and to treat the Crown for the purposes of the insolvent administration of a company like any other creditor of a company.

Proposed s.18: Corporations Law of other jurisdiction

110. This new section provides that the Crown in right of the Commonwealth, of the Capital Territory and of Norfolk Island to be bound by the external administration provisions of the Corporations Law of other jurisdictions (except in relation to offences committed by officers of companies that are in some form of external administration.

111. This provision is necessary as it is doubtful that State legislation of its own force is capable of binding the Crown in the right of the Commonwealth. The provision ensures that the Commonwealth will be treated in the same way as the States under the Corporations Law.

Proposed s.19: Crown not liable to prosecution

112. This new section makes it clear that nothing in Part 4A or in the Corporations Law renders the Crown in any right liable to be prosecuted for an offence.

Proposed s.20: This Part overrides the prerogative

113. This new provision makes it clear that where Ch.5 (other than Pt.5.8) of a Corporations Law of another jurisdiction binds the Crown in the right of the Commonwealth, the Capital Territory or Norfolk Island by virtue of proposed s.18, that Law overrides any prerogative right of privilege of the Crown, for example in relation to payment of debts.

PART 5 - POWER TO MAKE REGULATIONS FOR THE PURPOSES OF THE CORPORATIONS LAW

Background

114. This Part will replace s.1345 of the Act which is to be repealed. All regulations for the Corporations Laws for the various jurisdictions will be made by the Commonwealth under this Part. These regulations will apply by virtue of this Part for the purposes of the Corporations Law of the Capital Territory and will be applied by State legislation for the purposes of the Corporations Law of the other jurisdictions.

Proposed s.21: Interpretation

115. This provision sets out definitions for the purposes of Part 5.

Proposed s.22: The Corporations Regulations

116. This provision is based on s.1345(1). It will enable the Governor-General to make regulations not inconsistent with the Act or Corporations Law prescribing all matters required or permitted by that Law to be prescribed by the regulations, or necessary or convenient to be prescribed by regulations for carrying out or giving effect to the Corporations Law.

Proposed 23: Regulations may provide for application orders to specify matters

117. This provision will enable application orders made under Part 1.3 to specify matters that could be set out in regulations. Application orders will primarily be used to provide for the differences in the circumstances of the various jurisdictions whereas the Corporations Regulations will be in a form that can be applied by the States without amendment to operate in their jurisdiction.

Proposed s.24: Scope of particular regulations

118. This provision is based on s.1345(2). It will enable regulations to be made which are of general or a specially limited application and to differ according to differences in time, locality, place or circumstances.

Proposed s.25: Power to prescribe fees

119. This provision will enable the regulations to prescribe fees (including fees that are taxes) for chargeable matters. A 'chargeable matter' will include the lodgement of a document, the inspection of a register, the granting of a license etc. A 'chargeable matter' is defined in s.9.

Proposed s.26: Aspects of the power to prescribe fees

120. This provision will enable a fee for a chargeable matter to be determined by reference to a prescribed matter whether or not the prescribed matter has a direct or indirect connection with the chargeable matter.

Proposed s.27: Effect of certain provisions

121. This provision is intended to clarify the interaction of the provisions of this Part.

Proposed s.28: Verifying or certifying documents

122. This provision is based on s.1345(3). It will enable regulations to be made which will enable documents which are required to be verified or certified to be verified or prescribed by a statement in writing by prescribed persons.

Proposed s.29: Document lodged by an agent

123. This provision is based on s.1345(5). It will enable the regulations to prescribe in certain cases that there must be lodged with a document, which is lodged by an authorised agent, the original or a verified copy of the authority of that agent.



Proposed s.30: Exemptions from Chapter 7 or 8

124. This provision is based on s.1345(6). It will enable the regulations to provide for persons and transactions to be exempted from the operation of the provisions of the Corporations Act relating to the regulation of Securities and futures industry.

Proposed s.31: Penalty Notices

125. This provision is based on s.1345(7). It will enable the regulations to prescribe certain less serious offences for the purposes of the Corporations Law. Under s.1313 of the Corporations Law the ASC, where it has reason to believe that a person has committed a prescribed offence, will be able to serve a penalty notice on that person alleging the commission of the offence and giving particulars and setting out the prescribed penalty.

PART 6 - ACCOUNTING STANDARDS

Proposed s.33: Accounting Standards

126. This provision will enable the Australian Accounting Standards Board (the Board) to make accounting standards for the purposes of the accounts (Part 3.6) and audit (Part 3.7) provisions of the Corporations Law, s-s.33(1). Each State and the Northern Territory will apply the instruments in force for the time being on accounting standards under their Corporations laws.

127. A standard must be in writing and must not contain requirements that conflict with either requirements of the Corporations Law or Regulations of the Capital Territory (such as prescribed disclosure requirements for accounts and group accounts).

128. An instrument made by the Board will be a disallowable instrument for the purposes of the Acts Interpretation Act

1901 (AIA), s-s.33(2). That section provides that AIA ss.48-50, with appropriate modifications, apply to standards. The effect of AIA ss.48-50 on accounting standards includes the following:

(a) requiring a standard to be notified in the Gazette (AIA para.48(1)(a));

(b) standards operate from date notified or other specified date (which is not normally to be before date of notification) (AIA para.48(1)(b) and sub-s.48(2));

(c) standards are to be laid before each House of the Parliament within 15 sitting days of that House after the standard is made (AIA para.48(1)(c)).

129. The effect of either House of Parliament disallowing the revocation, replacement or amendment of a standard will be to restore the standard to the form in which it existed prior to the Board notifying the revocation, replacement or amendment (AIA sub-s.48(7)). These provisions were previously set out in s.283 of the Act which is to be repealed.

130. To ensure that the standards are in a form so that they can operate nationally, the Board will be required, when making standards, to have regard to the effect the instrument would have for the purposes of the Corporations Law of other jurisdictions and the fact that the standards will be gazetted and tabled in the Commonwealth Parliament.

131. This provision and the corresponding State provisions together with the new definition of accounting standard in section 9 of the Corporations Law and s.286(1) of the Law will enable standards to apply in all jurisdictions.

132. An 'accounting standard' will be defined to mean an instrument in force under section 20 of the Act as it has effect for the purposes of Parts 3.6 and 3.7 of the Corporations Law of the jurisdiction.

PART 7 - IMPOSITION OF FEES AND TAXESBackground

133. Various fees, taxes and charges which were to be payable under the Corporations Act 1989 were to have been imposed under a number of separate Acts because of the requirements of s.55 of the Constitution (which requires legislation imposing taxation to be included in separate Acts). This constraint is no longer applicable as the Corporations Act will rely on the territories power.

134. Accordingly the relevant Acts are being repealed and the provisions therein which imposed fees, taxes and other charges included in this Part.

Proposed s.33: Fees (including taxes) for chargeable matters

135. This new section will enable fees (including fees that are taxes) to be imposed under the Corporations Regulations of the Capital Territory. Each State and the Northern Territory will enact complementary legislation which will enable fees to be imposed under the Corporations Regulations in their jurisdiction.

Proposed s.34: Contributions and levies for fidelity funds of securities exchanges

136. Part 7.9 of the Corporations Law deal with the conduct of the fidelity funds required to be kept by exchanges which are not participating in the Securities Exchange Guarantee Corporation (see Part 7.10). A person must not be admitted to membership of a securities exchange (or to partnership in a member firm) unless he has paid a contribution to the fidelity fund, s.902.

137. This new section will enable the imposition of the various contributions and levies that are payable under the Corporations Law by members of a securities exchange and persons wishing to be admitted to membership of a securities exchange.

Proposed s.35: Levies for National Guarantee Fund

138. This new section will enable any levy that is payable under sections 938, 940 or 941 of the Corporations Law of the Capital Territory to be imposed.

Proposed s.36: Contribution and Levies for fidelity funds of Futures Organisations

139. Part 8.6 of the Corporations Law deals with the fidelity fund which must be established by each futures organisation. The term 'futures organisation' is defined in section 9 for the purpose of Part 8.6 to mean a futures exchange or a futures association (of which not all the members are members of a futures exchange).

140. This new section will enable the imposition of the various contributions and levies that are payable under the Corporations Law by a member of a futures organisation and persons wishing to be admitted to membership.

PART 8 - NATIONAL AND ENFORCEMENT OF THE CORPORATIONS LAW

141. This Part provides for the 'federalising' of State applied laws. The federalising technique will involve each State and the Northern Territory providing in its Application of Laws legislation for the application of relevant Commonwealth laws (such as the Crimes Act 1914, Australian Federal Police Act 1979 etc) to the investigation, prosecution and enforcement of offences under each jurisdiction, to the exclusion of relevant State and Territory laws. One effect will be to confer investigatory, prosecutorial and other associated powers on the relevant Commonwealth authorities and officers to the exclusion of the corresponding State authorities and officers. Thus, for all practical purposes, offences under the Corporations Laws of each jurisdiction will be treated as if they were offences against Commonwealth law. This is consistent with the primary responsibility borne by

the Commonwealth for the enforcement and administration of the Corporations Law across Australia. However, it is recognised that State officers and authorities will have a continuing involvement in Corporations Law enforcement in the following respects:

\* in the transition to the new scheme, while Commonwealth officers are developing the necessary expertise to deal with these matters, there may be a need for State officers to continue their involvement in investigations and prosecutions, particularly in respect of a course of conduct transcending the commencement date and involving offences against both co-operative scheme law and the Corporations law;

\* in respect of their responsibility for enforcing State criminal law, past experience has demonstrated that investigations by State officers of suspected State officers of suspected State Crimes Act offences involving a company in some way (e.g. misappropriation of property by an employee, or fraud) may well turn up evidence of Corporations Law offences also.

\* 142. This Part also provides authority for Commonwealth officers, including the Minister, to perform functions and exercise powers conferred on them by a corresponding State or Northern Territory law. Provision will therefore be made for such powers to continue to be exercised by State authorities and officers in circumstances where arrangements are put in place between the Commonwealth and the relevant State or Territory government to enable the most efficient and effective use to be made of resources.

#### Division 1 - Preliminary

##### Proposed s.37: Object

143. The object of the Part is to ensure that the Corporations Law and the ASC Law of the Capital Territory and each other jurisdiction are administered and enforced on a national

basis, in the same way as if those laws constituted a single law of the Commonwealth.

Proposed s.38: Interpretation

144. This section defines terms that are used in this Division.

\* 'authority' is a body established for a public purpose or a tribunal or authority established by an Act of Parliament.

\* a 'corresponding' law is the State and Northern Territory Application of Laws Acts State and Northern Territory Act or the Corporations Law of a State or the Northern Territory or rules of court made by those jurisdictions and any other applied provision.

\* an 'officer', in relation to the Commonwealth, includes a person holding an appointment under a Commonwealth Act, a person holding a non-statutory appointment, Commonwealth public servants and members or officers of an authority of the Commonwealth.

\* an 'applicable provision' in relation to a jurisdiction is a provision of the Corporations Law, Corporations Regulations, ASC Law or ASC Regulations of that jurisdiction, or a provision of a Commonwealth law (such as the Crimes Act 1914) which is applied in relation to an offence against a law of that jurisdiction.

\* 'Commonwealth law' means any of the Acts and unwritten laws of the Commonwealth (such as the Judiciary Act 1903, the Crimes Act 1914, the Australian Federal Police Act 1979, the Director of Public Prosecutions Act 1983), other than the Corporations Law of the Capital Territory or the ASC Act.

Proposed s.39: Effect of Part

145. This section provides that nothing in this Part limits the generality of anything else in it.

Division 2 - Offences against applied provisions

Proposed s.40: Object

146. This section sets out the object of this Division, which is to enable an offence against an applied law of a jurisdiction to be treated in the ACT as if it were an offence against the law of the Commonwealth. With the inclusion of similar provisions in each State and Northern Territory Application of Laws Act, Corporations Law offences will be treated in all jurisdictions as if they were offences against a Commonwealth law.

Proposed s.41: Effect of Division

147. This Division has effect subject to the Corporations Act 1989, the Corporations Law of the Capital Territory and the Australian Securities Commission 1989.

Proposed s.42: Application of Commonwealth laws in relation to offences against applied provisions of other jurisdictions

148. This section will enable a Commonwealth law, such as the Crimes Act 1914, to apply as a law for the Capital Territory in relation to an offence against the Corporations Law or ASC Law of another jurisdiction, by treating that offence as if it were an offence against the corresponding applied provision of the Corporations Law or ASC Law of the Capital Territory, (sub-s.42(1)). The effect of this provision and complementary State provisions will be that the relevant Commonwealth laws covering the investigation and prosecution of offences, arrest, bail, trial, conviction, sentencing, proceeds of crime etc will apply as State Law in respect of offences against the Corporations Law.

149. A similar provision will apply to offences committed in external Territories, (sub-s.42(2)).

150. Proposed sub-section 42(3) clarifies the territorial limitations of these laws by providing that a Commonwealth law applying in relation to offences against a State Corporations Law does not empower the doing of an Act outside the Capital Territory or the external Territory. The State Application Acts will complement this provision by providing for the application of those Commonwealth laws in each other jurisdiction.

151. Proposed sub-section 42(4) makes it clear that the operation of a Commonwealth law is not affected by it being used to apply to offences under State Acts.

Proposed s.43: Functions and powers under Commonwealth laws as applying because of section 43

152. This section will enable functions and powers to be conferred on Commonwealth officers (such as officers of the AFP) to investigate offences against the Corporations Law of the Capital Territory, and enable similar functions and powers to be conferred under the Corporations Law of other jurisdictions, (sub-sections 43(1) and (2)).

153. The functions and powers so conferred may only be exercised in the Capital Territory (sub-s.43(3)). The State Application of Laws legislation will confer similar powers and functions on Commonwealth officers for operation in other jurisdictions.

154. When exercising functions in relation to an offence against a State law, a Commonwealth officer such, must act in all respects as if the offence were an offence against the Corporations Law of the Capital Territory, (sub-s.43(4)). For example, an officer of the AFP is required to exercise his/her investigatory powers in investigating an offence against the Corporations Law of Queensland in the same way as he/she would exercise them in respect of an offence against the Corporations Law of the Capital Territory.



Proposed s.44: References in a Commonwealth law to a provision of a Commonwealth law

155. This section will allow a reference in a Commonwealth law, which applies to offences against Corporations or ASC Laws of the Capital Territory and the States and the Northern Territory, to be taken to be a reference to that law as applied.

Proposed s.45: How offences against applied provisions of other jurisdictions are to be treated

156. For the purposes of Commonwealth and Capital Territory law, all offences against the Corporations or ASC Law of a State or the Northern Territory are to be taken to be an offence against the corresponding provision of the Corporations Law of the Capital Territory, and not an offence against a law of a State, (sub-s.45(1)). The effect is that the exercise of powers by State and Territory officers in relation to such offences is excluded. However, to take into account the continuing involvement of State and Territory officers described above, the State Application of Laws legislation will enable the exercise of those powers subject to the existence of administrative arrangements. This provision will enable the AFP to arrest a person in Victoria for an offence against that State's Corporations Law.

157. This provision will only have effect in so far as it is within the authority of the Commonwealth Parliament, and except as provided by regulations made by Governor-General, (sub-s.45(2)).

158. Complementary State and Northern Territory legislation will be required to complete the 'federalising' of offences against the State and Territory Corporations and ASC Laws.

Division 3 - Performance of functions that corresponding laws of States confer on Commonwealth Authorities and Officers

Proposed s.46: Ministers

159. This section will enable the relevant Commonwealth Minister to exercise functions and powers that are conferred by the Corporations Law of a State.

Proposed s.47: Prescribed functions and powers

160. The provision will enable regulations to be made whereby prescribed authorities and officers of the Commonwealth may exercise functions and powers conferred on them under State laws. For example, it will be necessary to prescribe the Administrative Appeals Tribunal for this purpose to authorise the AAT to perform functions conferred on it by a State Corporations Law or ASC Law.

Proposed s.48: Gazette notices under corresponding laws

161. This new section will enable documents, that are required or permitted by a State Corporations or ASC Law to be published, to be published in the Commonwealth of Australia Gazette.

PART 9 - JURISDICTION AND PROCEDURE OF COURTS

Division 1 - Vesting and Cross-vesting of Civil Jurisdiction

Background

162. The purpose of this Division is to establish a system of cross-vesting of civil jurisdiction between federal, State and Territory Courts.

163. The cross-vesting provisions of this Act and the State and Territory Application of Laws Acts, taken as a whole, in effect bring together the eight State and Territory Supreme Courts and the Federal Court into a common jurisdictional framework, for the purposes of proceedings other than criminal

proceedings arising under the Corporations Law or the ASC Law. Broadly speaking, the legislation will achieve two objectives:

\* first it will enable any one of these courts to exercise civil jurisdiction under the Corporations Law of its own or any other jurisdiction;

\* secondly, it enables proceedings to be transferred from one court to another where the interests of justice so require.

Proposed s.49: Operation of Division

164. This new Division provides a regime for the jurisdiction of Australian courts in respect of civil matters arising under the Corporations Law of the Capital Territory, and for the jurisdiction of courts of the Capital Territory in respect of civil matters arising under the Corporations Law of another jurisdiction.

165. The provisions providing for cross-vesting of civil jurisdiction and transfer of proceedings set out in Division 1 replace the need for the application of the Jurisdiction of Courts (Cross-vesting) Act 1987. The exclusion of section 39B of the Judiciary Act 1903 will ensure that, in the exercise of jurisdiction under Division 1, the Federal Court will be in the same position as State Supreme Courts.

Proposed s.50: Interpretation

166. S.50(1) provides that a 'judgment' means for the purposes of this Division a judgment, decree or order, whether final or interlocutory. 'Full Court' is defined to include any court of appeal, however described, from which an appeal lies from a single judge of a Supreme Court.

167. S.50(2) provides that a reference in the Bill to the Corporations Law of the Capital Territory includes a reference to the Corporations Act, the Corporations Regulations, rules

of court, the ASC Act 1989, and regulations made under that Act. A reference to the Corporations Law of a State includes a reference to an Act of the State corresponding to this Bill, and the ASC Law of the State.

Proposed s.51: Jurisdiction of Federal Court and State and Territory Supreme Courts

168. This section confers jurisdiction on the Federal Court of Australia with respect to civil matters arising under the Corporations Law of the Capital Territory (sub-s.51(1)).

169. Jurisdiction is also conferred on the Supreme Court of each State, the Northern Territory and the Capital Territory with respect to civil matters arising under the Corporations Law of the Capital Territory (sub-s.51(2)). The conferral of this jurisdiction is limited to the extent that a court of a State does not have jurisdiction to grant an injunction, a prerogative writ or a declaratory order in relation to certain decisions of an administrative character, in accordance with s.9 of the Administrative Decisions (Judicial Review) Act 1977.

170. Pursuant to sub-s.51(3) the jurisdiction conferred on a Supreme Court of a State or Territory by sub-s.51(2) is not limited by any limits to which any other jurisdiction of that Supreme Court may be subject (such as territorial limits or limits as to locality).

Proposed s.52: Appeals

171. This purpose of this provision is to ensure that, notwithstanding the cross-vesting of jurisdiction, the normal hierarchy of appeals will apply. This section provides that an appeal may not be instituted from a decision of a single judge of the Federal Court to the Full Court of the Supreme Court of a State or Territory, sub-s.52(1). The appeal will be to the Full Federal Court as usual.

172. An appeal may not be instituted from a decision of a single judge of the Supreme Court of the Capital Territory to the Full Court of the Supreme Court of a State. The normal avenue of appeal is to the Full Federal Court, see s.24(1)(b) of the Federal Court of Australia Act 1967.

Proposed s.53: Transfer of proceedings

173. The purpose of this provision is to enable proceedings to be transferred from one superior Court to another. Proceedings concerning matters which, apart from the cross-vesting provisions, would be entirely or substantially within the jurisdiction of a particular Court should be instituted and determined in that Court as far as practicable. Under new s.53, where proceedings in respect of a civil matter arising under the Corporations Law of the Capital Territory are pending in the Federal Court or in the Supreme Court of a State or Territory, that Court will be able to transfer the proceeding to another court having jurisdiction where it appears having regard to the interests of justice that it is more appropriate for the proceeding to be determined by the other court, (sub-s.53(2)). The Court will be able to transfer the proceeding or application on the application of a party made at any stage, or of the court's own motion (sub-s.53(4)).

174. The criteria a court must have regard to in determining whether to transfer a proceeding or application are:

- \* the principal place of business of any body corporate concerned in the proceeding or application; and
- \* the place or places where the events the subject of the proceeding or application took place (sub-s.53(3)).

175. Where a transfer to another court occurs, the Registrar of the transferring court must transmit all documents that had been filed to the court accepting jurisdiction (s.53(5)(a)).

176. The court which has accepted the transfer, the proceeding or application must proceed as if the proceeding had been originally instituted or application originally made in that court (s.53(5) (b)).

Proposed s.54: Conduct of proceedings

177. This section deals with the questions of which laws, and which rules of evidence and procedure, should be applied in a case involving cross-vested jurisdiction. In effect, the section gives the court freedom to choose the rules of any superior court in Australia or an external Territory, whichever the court considers appropriate.

178. Where the Federal Court or the Supreme Court of the Capital Territory will be, or will be likely to be, exercising jurisdiction with respect to a civil matter arising under the Corporations Law of any jurisdiction, the Court is empowered by sub-s.54(1) to apply such rules of evidence and procedure as the court considers appropriate in the circumstances, being rules that are applied in a superior court in Australia or in an external Territory.

179. Where a proceeding is transferred from another court, the accepting court must give reciprocal recognition to the steps that had been taken for the purposes of the proceeding in the transferring court.

180. This provision, applies to:

(i) jurisdiction conferred on the Federal Court in respect of matters arising under the Corporations Law of the Capital Territory, under the Corporation Law of or a State where the jurisdiction is being exercised by the Federal Court sitting in the Capital Territory;

(ii) jurisdiction conferred on the Supreme Court of the Capital Territory with respect to matters arising under the Corporations Law of a State;

(iii) jurisdiction conferred on the Supreme Court of a State with respect to matters arising under the Corporations Law of the Capital Territory.

Proposed s.55: Courts to act in aid of each other

181. This new section will enable the Judges and officers of all courts having jurisdiction in civil matters arising under the Corporations Law of the Capital Territory to severally act in aid of to each other in these matters.

Proposed s.56: Exercise of jurisdiction pursuant to cross-vesting provisions

182. Sub-s. 56(1) provides that the provisions of this Division are subject to the operation of any Act of a State or Territory relating to cross-vesting of jurisdiction with respect to Corporations Law matters. The cross-vesting scheme is intended to operate as a complementary Commonwealth and State exercise and requires for its operation both Commonwealth and State legislation. Sub-s.56(2) confirms that the Federal Court or the Supreme Court of the Capital Territory may exercise cross-vested jurisdiction and hear and determine proceedings transferred under any Commonwealth or State law relating to cross-vesting of jurisdiction.

Proposed s.57: Rights of appearance

183. This new section will enable barristers and solicitors involved in transferred proceedings to have the same entitlement to practise in relation to those proceedings as if they were proceedings in a Federal Court exercising federal jurisdiction (cf. Judiciary Act 1903, s.55B.). The right to practise also extends to any other proceedings that are related to, or arise out of, the transferred proceeding and that are to be heard together with the transferred proceeding.

Proposed s.58: Limitations on appeals

184. This new section provides that a decision under the cross-vesting legislation as to whether a proceeding should be transferred to or removed from a court, or as to which rules of evidence or procedure are to be applied in transferred proceedings, is to be non-justiciable. This provision is based on s.13 of the Jurisdiction of Courts (Cross-vesting) Act 1987.

Proposed s.59: Enforcement and effect of judgments

185. This new section will enable a judgment of the Federal Court or a judgment of the Supreme Court of the Capital Territory given in the exercise of cross-vested jurisdiction to be enforceable in the Capital Territory as if it were a judgment in the exercise of that Court's ordinary jurisdiction. Corresponding State provisions will similarly enable a Federal Court judgment given in the exercise of any State or Territory jurisdiction to be enforced by the Federal Court in the enacting State as if it were a judgment given entirely in the exercise of its federal jurisdiction. Provision will also be included in the State legislation so that any judgment of the Supreme Court of a State given in the exercise of cross-vested State or Territory jurisdiction will be enforceable in that State as if it were a judgment in the exercise of the Supreme Court's own non-cross-vested State jurisdiction. For example where a NSW Court gives a judgment under the Corporations Law of the ACT, a party seeking to enforce that judgment outside NSW will be required by the Service and Execution of Process Act 1901 to register that order to obtain enforcement of the order. In contrast, a judgment of the Federal Court in the exercise of its federal jurisdiction or its cross-vested Corporations Law jurisdiction does not require registration in order to obtain enforcement in other jurisdictions. The effect of the provision is that it turns the order into an ordinary judgment of the Court making the order, for the purposes of enforcement.



186. Where a provision of a law of the Commonwealth or of the Capital Territory refers to a thing done by the Federal Court or the Supreme Court or the Capital Territory, and that thing is done by another Court exercising cross vested jurisdiction, the reference in that provision to the Federal Court or the Supreme Court of the Capital Territory is taken as a reference to the Court which took the action (sub-s.59(2)).

Proposed s.60: Rules of the Federal Court

187. This provision will enable the Federal Court to make rules of court in relation to matters arising under the Corporations Law of the Capital Territory with respect to proceedings of the Federal Court wherever those proceedings take place. Where the Federal Court exercises jurisdiction under the Corporations Law of another jurisdiction, the Court is required to use those rules with such alterations as are necessary.

Proposed s.61: Rules of the Supreme Court

188. The Judges of the Supreme Court of the Capital Territory will be empowered by this section to make rules of court with respect to proceedings, practice and procedure of that Court under the Corporations Law of the Capital Territory (sub-s.61(1)). Like the Federal Court, where the ACT Supreme Court exercises jurisdiction under the Corporations Law of another jurisdiction, it will be required to apply, with such modifications as are necessary, the rules it makes under sub-s.61(1).

189. The Federal Court will also be empowered to make rules in relation to matters prescribed by the Act. For example, the Courts may make rules for the holding and conducting of meetings to be convened by a liquidator as an officer of the Court, s.488 of the Corporations Law, sub-s.61(1)(b). The Federal Court will be required to apply the rules of court developed for the Corporations Law of the Capital Territory when exercising jurisdiction conferred by a State.

190. Each State and the Northern Territory will empower its Court to make rules of court for the Corporations Law in its jurisdiction. In relation to proceedings under the Corporations Law of the Capital Territory in another jurisdiction's Supreme Court, the Court is directed by sub-s.61(3) to apply the same rules of court as it has established in respect of matters arising under its Corporations Law. It is hoped that the Federal Court and the Supreme Courts of the States and Territories will develop uniform rules of court for Corporations Law matters.

## Division 2 - Vesting and Cross-vesting of Criminal Jurisdiction

### Background

191. This Division provides for a cross-vesting of criminal jurisdiction for offences against the Corporations Law based on Part X of the Judiciary.

192. Under the present co-operative scheme, criminal matters are largely prosecuted in the jurisdiction in which the criminal activity occurs. Limited provision is also made for offences occurring in several jurisdictions.

193. This Division provides for a separate regime for jurisdiction of the courts of the Capital Territory in relation to offences against the Corporations Law of any jurisdiction, and the jurisdiction of all State and Territory courts in relation to offences against the Corporations Law of the Capital Territory. Similar legislation is to be enacted by each State and the Northern Territory so that there is a cross vesting of jurisdiction for the handling of offences against all Corporations Laws.

194. As a result of the agreement between Ministers that the State and Northern Territory applied laws should be treated for all intents and purposes as Commonwealth laws, offences against State and Northern Territory Corporations Laws will be 'federalised', i.e. treated as though they were offences against Commonwealth law. In respect of offences against a

Corporations Law that proceed by way of summary proceedings or on indictment, jurisdiction will be conferred on the several courts of the States and Territories to conduct these proceedings.

195. Consistently with the approach adopted in relation to the conferment and exercise of civil jurisdiction, the Bill spells out in detail the regime for the conferment and exercise of criminal jurisdiction rather than take the more complex and circuitous route of relying on the application of Part X of the Judiciary Act 1903 (with necessary modifications) under the general federalising formula.

196. In summary, the cross-vesting of criminal jurisdiction in respect of offences against the Corporations Law provides for the following courts to exercise jurisdiction.

(a) In respect of summary offences, the several courts of the States and Territories exercising jurisdiction with respect to the summary conviction of offenders or persons charged with offences against the laws of that State or Territory will have equivalent jurisdiction with respect to persons charged with summary offences against any Corporations Law (sub-ss.64(1), (7) and (8); of sub-ss.68(2) and (5A) of the Judiciary Act 1903):

\* however, the courts exercising jurisdiction in relation to summary offences against any Corporations Law may decline to exercise that jurisdiction, in relation to an offence committed outside the particular jurisdiction, if satisfied that it is appropriate to do so (sub-s.64(9); cf. sub-ss.68(5A) of the Judiciary Act 1903;

\* for example, a person charged with a summary offence against the Corporations Law of NSW which was committed in NSW may be located in Victoria - the person may be tried and convicted in a Victorian court exercising jurisdiction with respect to the summary conviction of offenders against Victorian Law, subject to the courts discretion to decline the exercise that jurisdiction in the public interest.

(b) In respect of indictable Offences;

(i) committed outside Australia (including offences committed in the coastal sea), the several courts of each State and Territory exercising jurisdiction with respect to the trial and conviction on indictment of offenders against the laws of that State or Territory have the equivalent jurisdiction with respect to persons charged with indictable offences against any Corporations Law (sub-ss.64(1) and (10) (c); cf sub-ss. 68(2) and (6) and s.70A of the Judiciary Act 1903);

(ii) committed partly in one jurisdiction and partly in another, the several courts of those State and Territories in which the offence was partly committed exercising jurisdiction with respect to indictable offences against the laws of those States and Territories have equivalent jurisdiction with respect to indictable offences against the Corporations Law (sub-ss. 64(1) and 10(d); cf sub-s.68(2) and s.70 of the Judiciary Act 1903);

(iii) committed wholly within one jurisdiction, the several courts of that State or Territory in which the offence was committed exercising jurisdiction with respect to indictable offences against the laws of that State or Territory have equivalent jurisdiction with respect to indictable offences against the Corporations Law (sub-ss. 64(1) and 10(d), of sub-ss.68(2) and (5C) of the Judiciary Act 1903;

(iv) wherever committed, the courts of the State or Territory against whose Corporations Law the offence was committed which exercise jurisdiction with respect to indictable offences against the laws of the State or Territory, have equivalent jurisdiction with respect to indictable offences against the Corporations Law of that jurisdiction (sub-ss.64(1) and (7)).

197. The following examples illustrate the effect of these provisions:

\* A person commits an indictable offence against the Corporation Law of Queensland in New Zealand, but subsequently the person is located in WA. The person may be tried and convicted on indictment in a WA court exercising jurisdiction with respect to indictable offences against WA laws, because the offence was committed outside Australia (see (i) above).

\* The person commits the indictable offence against the Corporation Law of Queensland partly in Victoria and partly in Tasmania. The person may be tried and convicted of the offence in either Victoria and Tasmania, because the offence was begun or completed in those jurisdictions (see(ii) above).

\* The person commits the above-mentioned indictable offence wholly in SA. The person may be tried in a competent SA court (see (iii) above).

The person commits a separate indictable offence against the Corporations Law of Queensland in each mainland State and Territory. While the person may be tried for each offence in the jurisdiction in which it was committed, all of the offences may be tried in Queensland because all were offences against that jurisdiction's Corporations Law (see (iv) above).

198. The application of the Commonwealth Crimes Act by the general 'federalising' formula for Corporations Law offences will govern which offences under the Corporations Law of the ACT and all other Corporations Laws are indictable, see s.4E, 4H and 4J of the Crimes Act 1914.

199. An advantage of cross vesting is that summary offenders can be tried in the jurisdiction in which they are found. There would be no need to remove summary offenders to the jurisdiction in which the offence arose for prosecution.

200. Cross vesting of jurisdiction also deals more effectively with offences constituted by acts or things done partly in one jurisdiction and partly in another.

201. The provisions described below comprise the legislation achieving this cross-vesting for the purposes of the Corporations Law of the Capital Territory. Corresponding provisions in the State and Northern Territory Application of Laws Act will complete the cross-vesting scheme.

Proposed s.62: Operation of Division

202. This Division provides for the jurisdiction of courts in respect of criminal matters arising under the Corporations Law of the Capital Territory and the jurisdiction of courts of the Capital Territory in respect of criminal matters arising under the Corporations Law of a State or the Northern Territory.

203. As a result of the cross vesting scheme established by the Division, sections 68, 70 and 70A of the Judiciary Act 1903 are excluded to the extent that they provide for the exercise of criminal jurisdiction, as those provisions are replaced by the special regime provided in this Division.

Proposed s.63: Interpretation

204. For the purposes of the Division a reference to a magistrate means a magistrate who is remunerated by salary or otherwise. As these provisions will be replicated in State and Northern Territory legislation, this provision is necessary to ensure that there is a uniform level of judicial officer who can exercise cross vested jurisdiction with respect to the summary conviction or examination and commitment for trial of persons committing offences against the Corporations Law.

205. A reference to the Corporations Law of the Capital Territory includes the Corporations Act 1989 and the ASC Law, together with relevant regulations.

Proposed s.64: Jurisdiction of courts

206. This new section will enable the conferring of jurisdiction on the several courts of the States, the Northern Territory and the Capital Territory with respect to the summary conviction, the examination and commitment for trial on indictment of offenders or persons charged with offences against the Corporations Law of the Capital Territory and with respect to the hearing and determination of appeals sub-s.64(1). This provision is based on sub-s.68(2) of the Judiciary Act 1903.

207. Sub-s.64(2) will enable the jurisdiction conferred by a State, in respect of persons charged with offences against the Corporations Law of that State, on a court of the Capital Territory to be exercised by that court. This is an 'acceptance' provision which is needed to authorise the courts of the Capital Territory, to exercise cross-vested jurisdiction.

208. Sub-s.64(3) provides that the jurisdiction conferred on a State Court with respect to the summary conviction or examination and commitment for trial of an offence against the Corporations Law of the Capital Territory may only be exercised by a magistrate: cf. sub-s.69(3) of the Judiciary Act 1903.

209. Sub-s.64(4) will enable a court which has had jurisdiction conferred under sub-s.56(1) in respect of indictable offences against the Corporations Law of another jurisdiction, to commit a person who pleads guilty to an indictable offence to be sentenced without there being a trial. This provision is based on sub-.68(7) of the Judiciary Act 1903.

210. Sub-s.64(5) will enable a court which has had jurisdiction conferred under sub-s.56(1) to sentence a person who pleads guilty to a charge for which he or she could be prosecuted on indictment or could be required to be prosecuted either summarily or on indictment, without there being a trial. This provision is based on sub-s.68(8) of the Judiciary Act 1903.

211. Sub-s.64(6) provides that a reference to an indictable offence in a law which provides that a person who pleads guilty to an offence that can be tried on indictment can be sentenced without trial includes an offence that may be prosecuted on indictment. For the purposes of determining the sentence that can be imposed, the person is deemed to have been prosecuted and convicted on indictment in that court. This provision is based on sub-s.68(9) and (10) of the Judiciary Act 1903.

212. Sub-s.64(7) provides the general rule in relation to the forum for proceedings. Subject to sub-ss.(9) and (10) (see below), jurisdiction conferred under this Division on a court of a State or the Capital Territory is conferred despite any limits as to locality of the jurisdiction of that Court under the law of that State or of the Capital Territory. This provision is based on sub-s.68(5) of the Judiciary Act 1903. (This means that if there is an offence against the law of the enacting jurisdiction, the courts of that jurisdiction would have jurisdiction to try the offence regardless of where it is committed).

213. Sub-s.64(8) will enable the cross vested jurisdiction conferred on a court of the Capital Territory by a State to be exercised despite any limits as to locality of the jurisdiction of that court under the law of the Capital Territory.

214. An ACT Court which has had jurisdiction conferred in relation to the summary conviction of persons charged with offences against the Corporations Law of the Capital Territory or a State will be able to decline to exercise jurisdiction in relation to an offence committed outside the Capital Territory. The Court must be satisfied that it is appropriate to decline jurisdiction having regard to all the circumstances including the public interest: sub-s.64(9). This provision is based on sub-s.68(5A) of the Judiciary Act 1903. This provision is intended to prevent forum shopping.



215. The jurisdiction which will be conferred by the Act on a court of a State in relation to persons charged with indictable offences against the Corporations Law of the Capital Territory is limited to offences alleged to have been committed outside Australia and offences alleged to have been committed, begun or completed within the State concerned: sub-s.64(10). The trial of a person for an indictable offence against the Corporations Law of the Capital Territory may also take place in the ACT.

216. Sub-s.64(11) defines a 'relevant law' for the purposes of this section. A relevant law is a law which enables a person, who has pleaded guilty to a charge for which he or she could be prosecuted on indictment, to be committed to a court having jurisdiction to try offences on indictment and to be sentenced or otherwise dealt with without first being tried in that court. The term 'relevant law' is used in sub-ss.64(4) and (5)

Proposed s.65: Laws to be applied

217. This new section will clarify that State laws applying to the arrest and custody of offenders or persons charged with offences, and the procedure for their examination, committal, trial and appeals, will apply to persons charged with offences against the Corporations Law of the Capital Territory in respect of whom jurisdiction has been conferred on a court of the State by this Division sub-s.65(2). This provision is based on s.68(1) of the Judiciary Act 1903.

218. The effect of this provision will be that, consistent with the cross vesting of criminal jurisdiction between State and Territory Courts, the laws respecting arrest, custody and criminal procedure of the jurisdiction whose courts are seized of jurisdiction with respect to the offence will apply. For example when a person who has committed an indictable offence under the Corporations Law of Victoria in Victoria is arrested in Queensland, that person will be arrested pursuant to a warrant issued in Victoria, as the only courts vested with jurisdiction in respect of that indictable offences are the Victorian courts (see above under Background to Division 2).

219. That warrant would be endorsed in Queensland and accordingly authorised for execution in that State under the procedures set out in Part III of the Service and Execution of Process Act 1901. The person will be arrested in Queensland using the Queensland laws of arrest and custody pursuant to the Service and Execution of Process Act 1901.

220. The section will also clarify that the Capital Territory laws applying to the arrest and custody of persons in the ACT and the procedure for their examination, committal for trial, trial and appeals will apply in the Territory to persons charged with offences against the Corporations Law of the Capital Territory, or against the Corporations Law of a State where jurisdiction has been conferred on a Court of the Capital Territory: sub-s.65(1).

#### PART 10 - THE NATIONAL GUARANTEE FUND

221. On the establishment of the ASX a National Guarantee Fund, made up of the pooled assets of the existing fidelity funds was established in accordance with the Australian Stock Exchange and National Guarantee Fund Act 1987. One function of the fund is to meet certain claims in respect of defaults by dealers who are members of the ASX. If a broker defaults or is suspended, that broker's clients can claim against the fund if they do not receive scrip for settled purchases or payments for settled sales.

222. The fund also benefits a selling or buying broker where there has been default by the broker on the other side of a transaction. The fund can also compensate clients on whose behalf property was entrusted to a member where the member has become insolvent and there is a deficiency in their property.

223. The fund is run by a corporation, the Securities Exchange Guarantee Corporation ('SEGC'). Eligible stock exchanges are members of the SEGC.

Proposed s.66: Interpretation

224. This section provides that SEGC means a body corporate nominated by the Minister as the Securities Exchanges Guarantee Corporation under section 67.

Proposed s.67: Minister to nominate SEGC

225. The Minister is empowered to nominate a company limited by guarantee as the SEGC. SEGC is responsible for the operation of the National Guarantee Fund (NGF). Included in the criteria for nomination are the ability of the body corporate to perform its functions under the Fund provisions having regard to the interests of the public, the sufficiency of indemnity insurance and the suitability of the business rules in respect of ensuring safety of property and protection of the interests of the public. Membership of the corporation is to be limited to the ASX Ltd. and any other eligible exchanges.

226. The National Securities Exchanges Guarantee Corporation Ltd., which had been nominated as the SEGC by the Ministerial Council under the corresponding section of the co-operative scheme, will be deemed to have been nominated as the SEGC by the Minister, sub-s.59(5).

Proposed s.68: SEGC's function and powers under Part 7.10 of the Corporations Law

227. The SEGC has, in addition to general corporate powers and capacities of a company, the functions and powers conferred on it by Part 7.10.

228. The general provision in s.162 of the Corporations Law which enables a company to be restricted or prohibit from certain exercises of power by its constitution will not apply to the above mentioned functions and powers.

Proposed s.69: Establishment of National Guarantee Fund

229. The provision will enable the SEGC to establish and maintain the NGF as soon as practicable after the commencement of Part 11.

PART 11 - MISCELLANEOUS

Proposed s.70: National business names register

230. When the Minister is satisfied that the ASC has access to the business names registers of a jurisdiction or jurisdictions the Minister is empowered by proposed s.70 to make a declaration to this effect in the Gazette. Under the Heads of Agreement for the establishment of the national scheme the Commonwealth and the States and the Northern Territory have agreed that there will be a national business names register established by the States to which the ASC has on-line access.

Proposed s.71: Companies Unclaimed Money Account

231. Proposed s.71 is based on s.1338 of the Corporations Act. It provides for the establishment of a Trust Account into which unclaimed money will be able to be paid under the Corporations Law of the Capital Territory and other jurisdictions. There is to be a single Trust Account for the national scheme. Accordingly s.1338 is being repealed and the Trust Account established solely under Commonwealth legislation.

232. Sub-s.71(3) will enable money standing to the credit of the Account to be paid in accordance with Part 9.7 of the Corporations Law of the Capital Territory and other jurisdictions.

Proposed s.72: Companies Liquidation Account

233. The provision will enable money standing to the credit of the Companies Liquidation Account established by the Companies Act 1981 to be dealt with in accordance with s.427 of that Act. Section 1341(b) of the Act which was to have dealt with this money is being repealed.

Proposed s.73: Regulations for the purposes of this Act

234. The provision will enable the Governor-General to make regulations not inconsistent with the Act prescribing all matters required or permitted by the Act to be prescribed by the regulations, or necessary or convenient to be prescribed by regulations for carrying out or giving effect to the Act. This regulation making power is mutually exclusive of the regulation making power in Part 5 of the Act.

PART 12 - TRANSITIONAL

Background

235. The co-operative scheme companies and securities legislation is not to be repealed. This is because the operation of other State legislation depends upon the continued operation of the co-operative scheme State Codes. Further the external administration of existing companies is to continue under the existing legislation.

236. This Part makes provision for the interaction of the new national scheme legislation and the co-operative scheme legislation.

Proposed s.74: Co-operative Scheme Acts

237. This provision sets out those Acts that are referred to as the Co-operative Scheme Acts for the purposes of Part 12.

Proposed s.75: National scheme laws of the Capital Territory

238. This provision states that for the purposes of this Part, the Act, the Corporations Law of the Capital Territory and the ASC Law of the Capital Territory are referred to as the national scheme law. A similar provision will appear in each of the State Application Acts. This will enable the body of Commonwealth and State law to be known collectively as the national scheme laws.

Proposed s.76: National scheme laws prevail over Co-operative Scheme Acts

239. This section provides that if there is any inconsistency a national scheme law of the Capital Territory will prevail over a Co-operative Scheme Act.

240. Under the Heads of Agreement for the establishment of the national scheme, the national scheme laws are to operate as if they are Commonwealth laws. Accordingly, for the purposes of this provision, "inconsistent" is to have the same meaning as in s.109 of the Constitution.

Proposed s.77: Regulations may exclude operation of Co-operative Scheme Acts

241. This section will enable regulations to be made excluding the operation of prescribed provisions of the Co-operative Scheme Acts.

Proposed s.78: Effects of Sections 76 and 77

242. To the extent that a co-operative scheme Act ceases to operate by virtue of inconsistency (under s.76) or because of a regulation made under s.77 it is to be taken to be repealed for the purposes of the Acts Interpretation Act 1901. Relevant provisions of that Act provide for example that the repeal does not:

\* affect anything previously done under the repealed provision; or

\* affect any right, privilege or obligation acquired under the repealed provisions.

Proposed s.79: Regulations may modify Co-operative Scheme Acts

243. This section will enable regulations to be made modifying the operation of provisions of a Co-operative Scheme Act. Such regulations may enable provisions rendered inoperative by ss.76 or 77 to have effect.

Proposed s.80: Updating reference to Co-operative Scheme Acts and regulations

244. This provision will enable references in Capital Territory or State legislation to the co-operative scheme legislation or to provisions contained in that legislation to be read as references to the corresponding provisions of the national scheme laws.

Proposed s.81: Saving of provisions about Australian Stock Exchange Limited

245. Proposed s.81 specifically preserves the operation of Pt. IIA of the SIA which makes various provisions for the operation of the Australian Stock Exchange Limited.

PART 1 - THE CORPORATIONS LAW

Proposed s.82: The Corporations Law

246. This section will enable new headings to be inserted in the Corporations Act for the purposes of delineating the Corporations Law.

Citation

247. In each jurisdiction, the Corporations Law may be referred to as the Corporations Law.

Commission has general administration of this law

248. The ASC has the general administration of the Corporations Law of the enacting jurisdiction.

Cl.7: The rest of the Principal Act becomes part of the Corporations Law

249. This new section will enable the Corporations Act as amended by Schedule 1 and 2 of the Bill to become the remainder of Corporations Law.

PART 3 - AMENDMENTS OF THE CORPORATIONS LAW

Cl.8: Principal Law

250. This new section will provide that a reference to the Corporations Law in Part 3 means the Corporations Law set out in section 82 of the Corporations Act 1989.

Cl.9: Amendments

251. This new section will provide that the Corporations Law is amended as set out in Schedules 3,4, 5 and 6 of the Bill.

PART 4 - AMENDMENTS OF THE AUSTRALIAN SECURITIES COMMISSION ACT 1989

BACKGROUND

252. This Part, together with the amendments in Schedule 7 to the Bill, amends the Australian Securities Commission Act 1989 ("the ASC Act") to convert it from a Commonwealth law applying



of its own force throughout Australia, into a law relating to the regulation of corporations, securities and the futures industries in the ACT. As with the Corporations Act 1989, it has been agreed that the States and Northern Territory will pass legislation applying provisions of the ASC Act to their own jurisdictions, and conferring powers on the ASC to administer the Corporations Law of their respective jurisdictions. The amendments are therefore designed to make parts of the ASC Act suitable for application as a uniform law relating to the administration of the Corporations Law.

253. The amendments contained in this Part amend sections 1 -4 in Part 1 of the ASC Act, and deal with the objects of the ASC and the citation of provisions of the ASC Law. The amendments contained in Schedule 7 amend the remainder of the ASC Act to make it suitable for application as a uniform law in the States and Northern Territory.

Clause 10: Principal Act

254. In Part 4, the ASC Act is referred to as the Principal Act.

Clause 11: What this Part does

255. In Part 4, references to the Principal Act should be read as references to the ASC Act.

256. This provision will also enable the ASC Act to be transformed into a law relying on s.122 of the Constitution for the regulation of corporations, securities and futures industry, cl.11(1).

257. This provision will also enable the States to confer functions and powers on the Companies and Securities Advisory Committee, the Takeovers Panel, the Companies Auditors and Liquidators Disciplinary Board and Accounting Standards Power Board, cl.11(2). Through the transformation of the ASC law

into a law based on the territories powers, this provision will enable the States to apply provisions of the ASC Act as their own law, c1.11(3).

Clause 12 - Repeal of section 3 and insertion of new section

258. This clause repeals s.1 of the ASC Act (which deals with citation) and replaces it with the following Divisions and sections.

Division 1 - Objects

Proposed section 1 - Objects

259. This section will replace the existing provision dealing with objects, s.3. Consistent with the legislative scheme being adopted, the primary object of the amended ASC Act is to establish an Australian Securities Commission to administer such laws of the ACT, the States and other Territories as confer functions on it. As previously, the ASC Act also establishes a Companies and Securities Advisory Committee, a Corporations and Securities Panel, a Companies Auditors and Liquidators Disciplinary Board, an Australian Accounting Standards Board and a Parliamentary Joint Committee on Corporations and Securities, to perform various roles in relation to the regulation of corporations and the securities and futures industries.

260. Proposed sub-s.(2) mirrors existing sub-s.3(2) and sets out the ASC's objectives in exercising its powers and performing its functions.

261. In performing its functions the ASC will have among its objectives:

- \* the maintenance and improvement of capital markets

- \* maintenance of investor confidence
- \* achievement of uniformity
- \* enforcement of national scheme laws.

252. Proposed sub-s.(3) provides that the ASC Act should be interpreted accordingly, having regard to the preceding statement of objects.

253. Proposed sub-s.(4) clarifies that, notwithstanding that proposed sub-s.(1) refers to the ASC administering laws of the ACT, the Act should not be construed as "an Act providing for the ... administration of [the] Territory" within the meaning of sub-s.22(3) of the Acts Interpretation Act 1901. The effect is that references in any Act to a law of the Commonwealth can be taken to include a reference to the ASC Act.

#### Division 2 - Citation

254. This Division, which corresponds to proposed Part 3 of the Corporations Act 1989, deals with citation of the ASC Act and regulations made under the Act. It expands on current s.1.

#### Proposed Section 1A - Short title

255. This section, which has the same effect as current s.3, provides that the Act may be cited as the Australian Securities Commission Act 1989

#### Proposed section 1B - Alternative citations of this Act and regulations made under s.251

256. This section provides that the Act may also be referred to as the ASC Law of the ACT, or simply as the ASC Law (subject to proposed s.1D). Similarly, regulations made under the Act may be referred to as the ASC Regulations of the ACT, or simply as the ASC Regulations (subject to proposed s.1D).

Proposed section 1C - Citation of provisions of this Act, and regulations under s.251 applying as law of another jurisdiction

257. Where a law of another jurisdiction provides for provisions of the ASC Act or the regulations made under that Act to be applied as the law of that jurisdiction, the provisions may be referred to, for the purposes of an Act or Law of the ACT or an instrument made under such Act or Law, as the ASC Law of that jurisdiction or ASC Regulations of that jurisdiction, as the case may be.

Proposed section 1D - Reference to ASC Law and ASC Regulations

258. The purpose of this section is to enable the ASC Law of the ACT and all other jurisdictions to be treated, for all intents and purposes, as a single national law covering all of Australia. It provides that a reference in any instrument (as defined in sub-s.1D(5)) to the ASC Law or ASC Regulations shall be taken to include a reference to the ASC Law or ASC Regulations of all jurisdictions. This presumption does not apply where the reference is expressed as a reference to the ASC Law or ASC Regulations of a jurisdiction (sub-s.1D(4)), or where the instrument evinces a contrary intention (sub-s.1D(3)). An instrument includes an Act, an award, an order, a notice, a certificate, a license, an indictment and any other document whatever (including a private document).

Proposed section 1E - Saving of citation provisions of other jurisdictions

259. So as to enable corresponding citation provisions in the ASC Law of other jurisdictions to mesh with these provisions, this section specifically provides that these citation provisions are not intended to affect the corresponding operation of citation provisions in other jurisdictions.

Division 3 - Commencement and Application

260. After proposed s.1E a new heading, "Division 3 - Commencement and Application" is inserted, to reflect that the next following section (s.2) deals with commencement and not citation.

Clause 13 - Repeal of section 3

261. This clause repeals existing s.3, which is to be replaced by proposed s.1A.

Division 4 - Interpretation

Clause 14 - Insertion of Division heading

262. This clause inserts a new heading, "Division 4 - Interpretation", after current s.4, consequential upon the insertion of new Divisions 1, 2 and 3 described above.

Clause 15 - Further amendments

263. This clause provides that the ASC Act is also amended as set out in Schedule 7.

PART 6 - AMENDMENT OF OTHER ACTS

Clause 16: Amendments of the Acts Interpretation Act

Proposed s.40: Reference to Corporations Law and Australian Securities Law

264. This section provides that for the purposes of the interpretation of other Commonwealth legislation any reference to the Corporations Law and Corporations Regulations will mean the Corporations Law and Corporations Regulations of the Capital Territory and the States and the Northern Territory.

Clause 17: Amendments of the Cash Transactions Report Act

265. This provision will amend the Cash Transactions reports Act 1988 to enable information to be obtained by the Cash Transaction Reports Agency in relation to an investigation of, or prosecution of, a person for an offence against the Corporations Law of any jurisdiction. Proposed s.243D of the Corporations Law will require a cash dealer who has reasonable grounds to suspect that he or she has information concerning a cash transaction that may be relevant to the investigation of an offence against the Corporations Law to report that to the Agency. The Agency is empowered to provide information obtained from such reports to the ASC to facilitate the ASC's law enforcement functions.

Clause 18: Amendments of the Crown Debts (Priority) Act

266. This section will amend the Crown Debts (Priority) Act 1981 to be amended to include a reference to the Corporations Law of the Capital Territory.

Clause 19: Amendments to the Taxation Administration Act

267. Section 3E of the Taxation Administration Act 1953 provides the Commissioner of Taxation with a discretion to disclose taxation information to an officer of an authorised law enforcement agency.

268. This provision will amend that Act to enable information to be disclosed to the ASC to facilitate their law enforcement functions.

PART 7 - REPEAL OF ACTSClause 20: Repeal

269. This section lists a number of Acts which formed part of the Corporations Law package of legislation which are now unnecessary in light of the Corporations Act now being a law that is to be applied by the States and the Northern Territory, cl.13(1).

86.

270. Sub-C1.13(2) provides for repeal of co-operative scheme legislation which has not yet commenced operation.

SCHEDULE 1 - AMENDMENTS TO ENABLE THE CORPORATIONS LAW TO BE APPLIED AS A LAW OF EACH STATE AND TERRITORY

Introduction

271. Schedule 1 contains amendments for the purposes of converting the Corporations Act 1989 into a law for the Australian Capital Territory in a form appropriate for application as the law of the States and the Northern Territory, in the context of the new national scheme for corporate regulation in Australia. The amendments in general terms have the following specific purposes:

\* Removal of constitutional underpinning

The Act is presently drafted in terms of relevant heads of Commonwealth legislative power and subject to constitutional constraints. As the Commonwealth Parliament has plenary powers to legislate for the Australian Capital Territory (s.122 of the Constitution) it will be possible to remove the specific underpinnings and drafting devices which appear in the Act. In so doing, many provisions which because of limitations to Commonwealth power are narrower in scope than the corresponding provisions in the present co-operative scheme legislation will be brought into line with those provisions.

\* Jurisdictional nexus

The Corporations Act was enacted as a law of national application. Although it is to become the basis of a national legislative scheme, the Act as a law for the Australian Capital Territory and when applied a law of the other jurisdictions will only be capable of applying to persons, acts and things with an adequate nexus with each jurisdiction. Accordingly, where necessary, amendments are proposed to ensure that provisions only



apply where there is such a nexus rather than purporting to operate as a national law. In some places, amendments to relevant definitions have been sufficient while in others, substantial amendments have been made.

\* Neutralising of language

There are textual variations in the co-operative scheme legislation, from jurisdiction to jurisdiction. As far as possible these will be avoided in the Corporations Law of each jurisdiction by the use of 'neutral' language in the Corporations Law for the ACT. That is, amendments will be made to the Act so that the Corporations Law will be capable of literal application by the other jurisdictions. This contrasts with existing co-operative scheme arrangements under which the text of the legislation enacted for the Australian Capital Territory is varied by "translator" provisions in the course of being applied as the law of other jurisdictions.

\* Jurisdiction of Courts

Jurisdiction to deal with matters arising under the Act was, in general terms, to have been conferred concurrently on the Federal Court and the State Supreme Courts. Many provisions dealing with Courts were framed on the basis that this jurisdiction would be federal jurisdiction under a Commonwealth Act of national application. A number of amendments are now necessary to take into account the new basis of the legislation under which jurisdiction will be conferred under the laws of the Commonwealth, the States and the Northern Territory.

\* References to "corresponding" law

A number of provisions of the Act refer to corresponding provisions in the co-operative scheme and former companies and securities laws. As it will now be

necessary to also refer to corresponding provisions in the Corporations Law of other jurisdictions, the existing references in the Act will be amended by provisions of this Schedule to refer to "previous corresponding laws" or an appropriate variation thereof to fit the particular context.

#### AMENDMENTS OF CHAPTER 1

##### Part 1.1 - Preliminary

272. The proposed amendments omit the heading to Chapter 1 and repeal Part 1.1 which set out various preliminary provisions. A new Chapter heading and preliminary provisions of the Corporations Law are inserted by cl.6 of the Bill. Some of the matters dealt with the present preliminary provisions will be dealt with in the covering clauses of the Act.

##### Section 6 - Effect of this Part

273. With the introduction of the concept of 'Chapter 6 body' (cf. s.58A), the interpretation provisions of Part 1.2 will apply in relation to Chapter 6 as though a Chapter 6 body were a body corporate.

##### Section 8 - How to read references to provisions of this Law

274. Re-enacted section 8 seeks, so far as possible, to enable the Corporations Laws of the various jurisdictions to operate as a single national law applying throughout Australia. References to the Corporations Law or to particular provisions of the Corporations Law are to be taken as being reference to the Law or the provisions as applied in each jurisdiction. The effect of this is that as far as possible, a person using the Corporations Law of any jurisdiction will not have to distinguish between it and the corresponding laws of other jurisdictions.

275. The exceptions to this approach will be required either by express contrary intention or by context, or will be prescribed by regulations. In particular, express mention of 'the Corporations Law of this jurisdiction' will be taken to refer only to the particular jurisdiction, as will references in the provisions set out in proposed s.8(5)(c).

Section 8A - Corporations Regulations, and application orders, of a jurisdiction treated as part of that jurisdiction's Corporation Law

276. By proposed s. 8A a reference to this Law includes a reference to the regulations and application orders: and a reference to the Corporations Law of a jurisdiction includes a reference to Corporations Regulations and applications of that jurisdiction.

277. In effect proposed s.8A extends the existing interpretation provisions under which a reference to the Act includes a reference to the regulations by taking into account the introduction of application orders and catering for the fact that the Corporations Law will be part of a system of applied laws.

Section 9 - Dictionary

278. This section is to be retained as the general dictionary for the Corporations Law, but the revised constitutional basis of the regulatory scheme has necessitated or allowed a number of amendments, by way of omission, replacement, alteration or addition of definitions.

279. Where definitions are omitted and not replaced, this occurs because the term is no longer used in the Law. Often the reason for this is that the term was used in the Corporations Act as, or as part of, a constitutional device which was designed to ensure the validity of particular provisions as a Commonwealth law of national operation. For example, a number of provisions were expressed to prohibit

certain conduct in 'eligible circumstances' such as the offering of prescribed interests made available by persons other than corporations (Act s.1064(5)). That term reflected the Commonwealth's power in relation to interstate trade and territories. As devices like s.1064(5) can now be removed, definitions such as 'eligible circumstances' can be simply omitted. Such instances of omission and non-replacement of definitions are merely listed below, without further comment.

280. Amendments which alter definitions, or which add significant definitions, are set out with some comment or explanation.

a) Definitions which are to be omitted and not replaced:

- 'close corporation'
- 'eligible circumstances'
- 'eligible corporation'
- 'eligible futures advice business'
- 'eligible futures adviser'
- 'eligible futures broker'
- 'eligible futures broking business'
- 'eligible futures conduct'
- 'eligible futures contract'
- 'eligible futures market'
- 'eligible investment advice business'
- 'eligible securities'
- 'eligible securities business'
- 'foreign corporation'
- 'insurance corporation'
- 'interstate'
- 'trading activities'
- 'trading corporation'
- 'transfer day'
- 'Type A body'
- 'Type B body'

b) Amendments to, or replacements of definitions include the following:

'accounting standard'

281. The definition of accounting standard is to be replaced with a new definition reflecting the relocation of the standards provision (as amended) to s.32 of the covering clauses of the Act, and recognising the jurisdictional limitation on the setting of accounting standards.

'Act'

282. This replacement definition reflects the role which State and Territory legislation will play in the new regulatory scheme.

'ancillary offence'

283. This replacement definition extends the existing definition by including reference to s.5 of the Crimes Act 1914. In addition, it recognises the 'federalising' of Corporations Laws offences in referring to the application of Crimes Act 1914 provisions as State or Territory law.

'approved securities organisation'

284. This replacement definition removes a former constitutional limitation on this term, so that the term now refers to a body corporate which is approved pursuant to s.770 of the Corporations Law of this jurisdiction.

'Australia'

285. This replacement definition recognises the revised constitutional basis of the Law as part of a system of State and Territorial laws. This necessitates mention of the coastal sea of each jurisdiction and the exclusion of the external Territories.

'banning order'

286. The replacement definition reflects the new legislative basis for the operation of the Corporations Law. As the Law now operates as a State or Territory law rather than a stand-alone Commonwealth Act, most references to a banning order refer to such an order made under Chapter 7 or 8 of the Corporations law of the particular jurisdiction - see paras. (b) and (d) of the definition. In those provisions (ss.835, 836 1199 and 1199A) where it is necessary to give national effect to such an order, the term is given an expanded meaning to include an order made under a corresponding law.

'Board'

287. This replacement definition reflects the application of the Corporations Law as a State Law. The amendment to this definition is consequential upon the renaming of the particular body - it is to be known as the "Australian Accounting Standards Board".

'body corporate'

288. The inclusion of an unincorporated registrable body in this definition will ensure the application of the provisions of Chapter 1 and of section 230 (disqualification from management of bodies corporate) to certain unincorporated bodies which approximate corporations. The term will also refer to a Chapter 6 body (which is capable of including certain unincorporated bodies) when used in that Chapter.

289. The express references to 'foreign company' in the existing definition are subsumed into the definition of 'corporation' (para.(a) thereto).

'clearing house'

290. The amendments to the definition of clearing house remove references to eligible corporations. The term 'eligible corporations' was used to provide a link with a head of Commonwealth constitutional power and as such is no longer

required. The amendment also inserts a reference to subsection 1131(4) so that clearing houses approved under a previous law are clearing houses for the purposes of the Corporations Law.

'clients' segregated account'

290. The amendment to this definition removes a reference to money deposited under a corresponding law to section 1209.

291. The substitution of 'corresponding previous law' for 'corresponding law' preserves the meaning of this definition in line with the distinction which s.58 now makes between those terms.

'commencement'

292. In order to clarify references to the commencement of the Corporations Law (as distinct from the Corporations Act), the commencement of the Law is defined as the time at which the Law comes into operation.

'company'

293. The major denotation of this term has been amended so that it is consistent with the co-operative scheme definition of 'company'. In particular, the term is jurisdictionally limited, in as much as it refers to a company incorporated 'under the Corporations Law of this jurisdiction'.

294. The definition is 'sliced' into four subsidiary denotations, being:

(i) The term includes a 'recognised company' (see definition) where it is used in the definition of a group holding company, in relation to service of documents on a company, or in relation to stays of execution and proceedings against a company in the context of official management or creditors' voluntary liquidation;

(ii) The term includes 'registered bodies' (see definition) in Part 3.5, requiring those bodies to adhere to the provisions relating to the registration of company charges;

(iii) The term includes a 'Part 5.7 body' (see definition) in Part 5.8, thus applying to those bodies the offence provisions relating to external administration; and

(iv) For the purposes of Chapter 6, the term "company" means:

\* a company incorporated or taken to be incorporated under the Corporations Law of the particular jurisdiction;

\* a body corporate that is incorporated under some other law of the particular jurisdiction and is listed on a local securities exchange; or

\* a Chapter 6 company formed in this jurisdiction which has a share capital (see new s.53A).

'company limited by shares'

295. The replacement definition in effect reflects the omission of para.(b) of the existing definition as the term will not be used in relation to a State or Territory in the Corporations Law.

'constitution'

296. The amendment is consequential upon the reintroduction of the concept of 'recognised companies' and the removal of the concept of a company of a State or Territory from the Corporations Law.



'corporation'

297. This replacement definition in effect returns the meaning of this fundamental term to the meaning which it had under the Companies Act and Codes. In part this reflects the fact that the 'constitutional' function of the existing definition in the Act is no longer necessary. It also reflects an agreement amongst the relevant Ministers of the Commonwealth and the States, that the status quo should be preserved in regard to the extent to which the Corporations Law will apply to bodies incorporated or formed under State legislation other than companies. Such bodies are in most jurisdictions exempt from many provisions of the co-operative scheme legislation which apply to companies by virtue of being excluded from the definition of corporation in the jurisdiction concerned.

298. The proposed definition will not, however, vary textually between the States and Territories, since the bodies of all jurisdictions which are excluded from the definition will be listed in each jurisdiction's Law (see s.66A).

'Court'

299. The replacement definition reflects the fact that jurisdiction under the Corporations Law will be jurisdiction under the Laws of the various States and the Northern Territory as well as the Commonwealth (and not simply Commonwealth jurisdiction).

'dealers licence'

300. The 'slicing' of this definition recognises the territorial limitations upon the State and Territory jurisdictions under the applied law of which dealer's licences will be given. The holding of a licence will entitle the licensee to carry on business and to employ representatives in any Australian jurisdiction. As well, a licensee will be an 'exempt recipient' throughout Australia for the purposes of the prospectus provisions.

301. Obligations imposed by way of regulation of licensees will, however, be matters coming within power of the jurisdiction in which the licence is issued.

302. This amendment, as a result, provides that for most purposes the term "dealers licence" refers to such a licence issued under the Corporations Law of this jurisdiction. In those provisions (ss 780, 806, 807 or 1017A) where it is necessary to recognise persons holding licences under the laws of other jurisdictions, the term is given a broader meaning.

'debentures'

303. The substitution of 'body corporate' for 'corporation' in this definition is consequential upon the amendments to the definitions of those terms.

'Division 1 company'

304. The amendment to this definition reflects the revised jurisdictional basis of company registration.

'Division 2 company'

305. This amended definition reflects the automatic deemed registration of existing companies under Division 2 of Part 2.2. Service of documents on such companies will continue to be consistent with service on other companies registered under the Corporations Law, by virtue of the inclusion of the reference in the definition to section 220.

'Division 3 company'

'Division 4 company'

306. The amendments to these definitions are similar to the amendment to the definition of 'Division 1 company', and are made for the same reason.

'eligible securities conduct'

307. This definition is amended to omit constitutional underpinning which was previously required to attract Commonwealth heads of power. As amended, it means any conduct in connection with dealing in or advising a person of securities.

'Exchange subsidiary'

308. This amendment reflects the new legislative basis for the operation of the Corporations Law. In ss.779 and 920, where it is necessary to include within the term securities exchanges located in other jurisdictions which are subsidiaries of the Exchange, the term is given a broader meaning. Generally, however, the term describes a securities exchange in this jurisdiction which is a subsidiary of the Exchange.

'exempt public authority'

309. The replacement definition generally reflects the wording of the definition in s.4(1) of the SIA with a view to preserving the status quo in regard to the application of the Corporation Law to public authorities.

'financial year'

310. The substitution of 'Law' for 'Act' in this definition is consistent with the change in usage of these terms throughout the Law.

'foreign company'

311. The substantial meaning of this definition, which is based on the CA definition, is retained, while omitting terms which were included for constitutional reasons, such as 'foreign corporation'. In particular, despite the return to an applied laws regime, 'recognised company' is not included in the amended definition.

'Fund'

312. This amendment is consequential on the relocation of the provisions establishing the Fund from s.929 of the Corporations Law to s.69 of the Corporations Act 1989 applying only in the ACT. This relocation was necessary to prevent the establishment of a separate Fund in each applying jurisdiction.

'futures advisory licence'

313. By virtue of paragraph (a), a futures advisers licence for the purposes of Chapter 1 and section 1173 of the Corporations Law of one jurisdiction means a futures advisers licence granted under Part 8.3 of the Corporations Law of any jurisdiction.

314. However, for the other provisions of Chapter 8 in the Corporations Law references to a futures advisers licence, are references to a licence granted under Part 8.3 of the Corporations Law of that jurisdiction.

'futures association'

315. By virtue of paragraph (a), a futures association for the purposes of Chapter 1 and sections 1220, 1222, 1223 and 1269 of the Corporations Law of a jurisdiction, means a body corporate for which an approval under section 1132 of the Corporations Law of any jurisdiction is in force, or for which an approval is taken to be in force by virtue of subsection 1132(3) of the Corporation Law of any jurisdiction.

316. For the purposes of the remainder of Chapter 8 of the Corporation Law of a jurisdiction, a futures association is defined to be body corporate for an approval is in force under section 1132 of the Corporations Law of that jurisdiction.

'futures broker'

317. The amendment to paragraph (a) of this definition has the effect that except in 1209 and Part 8.5, a futures broker means the holder of a futures brokers licence granted under Part 8.3 of the Corporations law of any jurisdiction or a person who carries on, or 2 or more persons who together carry on, a futures broking business, whether or not the person, or any of the persons, also deals in futures contracts on the person's own account.

318. Proposed paragraph (b) of the definition provides that a futures broker for the purposes of section 1209 and Part 8.5 (excluding subsection 1209(14), (15) and (16) and section 1221 section 1222) of the Corporations Law of a jurisdiction, is a holder of a futures brokers licence granted under Part 8.3 of the Corporations Law of that jurisdictions.

319. Proposed paragraph (c) of the definition, provides that for the purposes of subsections 1209(14), (15) and (16) and sections 1221 and 1222, a future broker is the holder of a futures brokers licence granted under Part 8.3 of the Corporations Law of any jurisdiction.

'futures brokers licence'

320. Proposed paragraph (a) of the definition provides that for the purposes of Chapter 1 and sections 1142, 1172, 1173 and 1269 of the Corporations Law of a jurisdiction, a futures brokers licence means a futures brokers licence granted under Part 8.3 of the Corporations Law of any jurisdiction.

321. Proposed paragraph (b) means that for the remainder of Chapter 8 of the Corporations Law of a jurisdiction, a reference to a futures brokers licence is a reference to a futures brokers licence granted under Part 8.3 of the Corporations Law of that jurisdiction.

'futures exchange'

322. Proposed paragraph (a) of the definition provides that for the purpose of Chapter 1 and sections 1220, 1222, 1223 and 1269, of the Corporations Law of a jurisdiction, a reference to a futures exchange is a reference to a body corporate in respect of which an approval is under section 1126 of the Corporations Law of any jurisdiction is in force, or in respect of which an approval is taken to be in force by virtue of subsection 1126(3) of the Corporations Law of any jurisdiction.

323. Proposed paragraph (b) provides that for the remainder of Chapter 8 of the Corporations Law of a jurisdiction, a reference to a futures exchange is a reference to a body corporate which is the subject of an approval under section 1126 of Corporations Law of that jurisdiction.

'futures law'

324. A 'futures law' will be a law set out in Chapter 8.

'futures organisation'

325. Proposed paragraph (a) of the definition means that for the purposes of Chapter 1, section 1141A and subsections 1242(3) and 1249(3) of the Corporations Law of a jurisdiction, a reference to a futures exchange or a futures association is a reference to an exchange or association in respect of which an approval is in force under section 1126 or section 1132 of the Corporations Law of any jurisdiction, including approvals taken to be in force by virtue of subsection 1132(3).

326. Proposed paragraph (b) means that for the purposes of Part 8.6 of the Corporations Law of a jurisdiction, a reference to a futures organisation is a reference to:

(i) a futures exchange for which an approval is in force under section 1126 of the Corporations Law of that jurisdiction; or

(ii) a futures association for which an approval is in force under section 1132 of the Corporations Law of that jurisdiction, other than a futures association each of whose members is also a member of a futures exchange.

327. Proposed paragraph (c) provides that for the remainder of Chapter 8 of the Corporations Law of a jurisdiction, a reference to a futures organisation, is a reference to a futures exchange for which approval is in force under section 1126 of the Corporations Law of that jurisdiction or a futures association for which an approval is in force under section 1132 of the Corporations Law of that jurisdiction.

'incorporate'

327. The amendment to this definition is made to include a reference to s.76, which refers to the jurisdictional basis of incorporation.

'investment advisers licence'

328. The 'slicing' of this definition performs the same constitutional function as the slicing of the definitions of 'dealers licence' and 'futures brokers licence', the dual denotation of the term reflects the ability of the local jurisdiction to allow an interstate licensee to carry on business in the jurisdiction, while recognising the territorial limitations which prevent a jurisdiction from regulating the activities of interstate licensees.

'investment contract'

329. The substitution of 'this jurisdiction' for 'Australia' in this definition reflects the revised constitutional basis of the Law, but leaves the substantial meaning of the term unchanged.

'law'

330. The amendment to this definition reflects the revised constitutional basis of the regulatory scheme, whereby it is to return to an applied laws regime. In each jurisdiction 'law' means a law of, or in force in that jurisdiction. For the purposes of the ACT, the term expressly includes the Commonwealth laws relating to the new national scheme and the old co-operative scheme.

'Law'

331. As a result of cl.71 and as a matter of terminology, the substantial provisions of corporate legislation under the new national scheme will be known as the 'Corporations Law'. The reference in this definition to sections 8 and 8A indicate the way in which the term is to be interpreted under the applied laws regime (see sections 8, 8A).

'licence'

332. As is the case with the definitions of the particular types of licence referred to in the Corporations Law, this definition is 'sliced' in order to reflect a territorial nexus to the jurisdiction in question.

333. Only the jurisdiction in which a securities licence or futures licence is issued may impose an obligation on the holder of that licence. However other matters, such as the defences afforded by sections 808 and 1174 and the reporting of certain matters by auditors or futures exchanges, do not rely on the territorial nexus of the issuing of a licence for their validity.



'licence'

334. The 'slicing' of this definition is consistent with the slicing of other relevant definitions, such as 'dealers licence', 'futures licence' etc, and it similarly reflects the revised constitutional basis of the Law.

'lodge'

335. This amendment makes it clear that lodgment of any document with the ASC may take place at any of its offices in Australia.

'management company'

336. This amendment is consequential upon the proposed new definition of 'corporation'.

'marketable securities'

337. The substitution of 'body corporate' for 'corporation' in these definitions is consequential upon the amendments to the definitions of those latter terms.

'member firm'

338. This amendment is consequential on the amendment to the definition of 'securities exchange'. As no relevant provisions rely on this term to provide a jurisdictional nexus, the term covers any partnership that is a member organisation of any securities exchange in Australia.

'Minister'

339. This is defined in s.80A.

340. This amendment is consequential upon the distinction now made in s.58 between 'corresponding law' and 'corresponding previous law'.

'option on contract'

341. As with the definition of "member firm", the term "option contract" is not used in any provision to provide a jurisdictional nexus. It is therefore being amended, in the light of the constitutional underpinning of the legislation, to refer to an option contract entered into on the stock market of a securities exchange anywhere in Australia. The alteration to para (a) is consequential on the amendments to the definition of 'securities'.

'Part 5.1 body'

342. The proposed amendments to the definition provides that a Part 5.1 body for the purposes of the Corporations Law of a jurisdiction is a company or a registrable body (other than a registrable local body) that is registered under Division 1 or 2 of Part 4.1 of the Corporations Law of that jurisdiction.

343. The effect of this will be to maintain the same level of regulation of registrable Australian bodies as was provided for under the Companies Act and Codes. This results from an agreement between the relevant Commonwealth and State Ministers.

'Part 5.7 body'

344. The proposed definition provides that a Part 5.7 body for the purposes of the Corporations Law of a jurisdiction means:

(a) a registrable body (other than a registrable local body) that is registered under Divisions 1 or 2 of Part 4.1 of the Corporations Law of that jurisdiction or carries on business in that jurisdiction; or

(b) a partnership, association or other body that consists of more than 5 members.

345. This amendment is made for the same reason as the amendment to the definition of 'Part 5.1 body'.

'place of origin'

346. Under the replacement definition, 'place of origin' of a body corporate will mean:

\* where the body is incorporated in a State or Territory - that State or Territory; or

\* otherwise - the place of the body's incorporation.

'prescribed'

347. This amendment reflects terminological and constitutional changes to the Law.

'previous Fund'

348. This amendment reflects the amendment to s.58 providing for a new definition of a 'corresponding law'.

'proprietary company'

349. This definition is amended to reflect the nature of the new regulatory scheme as an applied laws regime.

'prospectus'

350. The substitution of 'body corporate' for 'corporation' in this definition reflects the amendments which are to be made to those definitions.

'public company'

351. References to a public company 'of a State or Territory' are omitted from the definition as a reflection of the revised constitutional basis of the Law.

352. References in the definition of 'public corporation' (in s.9) and in paragraphs 228(1)(b) and subsection 879(1) to 'public company' will include interstate public companies since they are not directed at the bodies themselves.

'public corporation'

353. The amendment to this definition results from the revised constitutional basis of the Law.

'registered Australian body'

354. This new definition replaces the definition of 'registered Australian corporation'. The 'slicing' of the definition reflects the tying of the registration of such bodies to particular State and Territory jurisdictions.

'registered company auditor'

355. This definition is 'sliced' as a result of the revised constitutional basis of the Law, so as to ensure that registration of an auditor is essentially a national registration whilst obligations are imposed on the auditor only under the Law of the jurisdiction of the registration.

'registered foreign company'

356. The 'slicing' of this definition reflects the fact that registration takes place under and for the purposes of the Corporations Law of a particular jurisdiction. It allows, however, for the provisions of Chapter 1 and for the service provision (s.363) to apply to registered foreign companies of other jurisdictions.

'registered office'

357. This replacement definition is necessary as a consequence of the proposed new definitions of 'company' and 'registered body'.

'registered liquidator'

358. This definition is 'sliced' as a result of the revised constitutional basis of the Law, so as to ensure that registration as a liquidator is essentially a 'national' registration, whilst obligations are placed upon the liquidator by virtue of registration only by the Law of the jurisdiction of registration.

'registrable Australian body'

359. This term replaces 'registrable Australian corporation' throughout the Act. In general terms it refers to a similar type of body to that which the previous definition referred (generally, non-company bodies corporate) but it has been possible to omit the 'constitutional' terms (trading corporation, etc) from the definition.

360. The lifting of previous constitutional restrictions also allows unincorporated bodies to be included in the definition, consistent with the approach in the CA (cf. CA s.5(1) 'foreign company').

'registrable body'

361. The substitution of 'body' for 'corporation' results from the amendment of the definition of 'corporation' and the replacement of 'registrable Australian corporation' with 'registrable Australian body'.

'registrable day'

362. The registration day of a 'Division 2' company will now be the day of commencement of that Division, since existing companies will on that day be deemed to be registered under that Division.

'rules'

363. Reference to rules of court in the Corporations Law as applied in each jurisdiction will refer to the rules as made for that jurisdiction.

'securities recommendation'

364. The omission of 'eligible' from this definition is consequential upon the omission of the definition of 'eligible securities'.

'securities exchange'

365. These amendments reflect the new legislative basis for the operation of the Corporations Law. In those provisions in which the term 'securities exchange' does not provide the jurisdictional nexus for the operation of the provision (i.e. those set out in new para.(a)), the term is given an extended meaning to cover any securities exchange in Australia. See, e.g., amended s.778 which provides that nothing in a gaming or wagering law of this jurisdiction shall be taken to affect an options contract entered into on a stock market of any securities exchange. Where the provisions impose obligations on a securities exchange (see e.g.s.776), the term is given a sliced denotation to provide a jurisdictional nexus for the provision.

'SEGC'

366. The amendment of this definition is consequential upon the relocation of provisions relating to the National Guarantee Fund to the covering clauses.

'sole trader'

367. This amendment reflects the new constitutional underpinning for the legislation, and is made for the same reason as the change to the term 'member firm'.

'stock exchange'

368. These amendments, like the changes to the definition of 'securities exchange', are made to provide in appropriate cases for a sliced denotation of this term, where it is necessary for this term to provide the jurisdictional nexus for the provision. Where the jurisdictional nexus is provided by some other term (as in the case of 'licensee' in s.869), the term 'stock exchange' is broadened to cover any stock exchange in Australia. Some amendments consequential on changes to other definitions are also necessary.

'Table A proprietary company'

369. Reference to a 'company of a State or Territory' is omitted as a result of the applied laws nature of the legislative scheme.

'takeover scheme'

370. This definition is amended to refer to the new definition of the term which is inserted into s.603.

'Territory'

371. Under the replacement definition Territory will refer to external Territories generally (rather than simply those to which the Act extends).

'this Law'

372. This definition replaces the definition of 'this Act'. The interpretation of the term is explained in sections 8 and 8A.

373. Significant new definitions which are to be added to section 9 include the following:

'chargeable matter'

374. This definition is inserted for the purposes of the provisions under which fees and charges are imposed (cf. s.33 of the Covering Clauses and Pt.9.10 of the Corporations Law. It lists the matters in respect of which fees may be prescribed by regulation. This list is based on s.4(1) of the Corporation (Fees) Act 1989 but also includes a provision for making available information under the Law.

'court'

375. This new definition are inserted to reflect the cross-vesting of jurisdiction of courts in matters arising under or in relation to the Corporations Law.

'local corporation'

376. This new definition reflects the jurisdictional nexus of registration/incorporation. It refers to companies and other corporations which are incorporated within the jurisdiction.

'local futures association'

377. The proposed definition provides that for the purposes of the Corporations law of a jurisdiction, a reference to a local futures association is a reference to a body corporate in relation to which an approval is in force under section 1132 of the Corporations law of that jurisdiction.

'local futures exchange'

378. The proposed definition provides that for the purposed of the Corporations Law of a jurisdiction, a reference to a local futures exchange, is a reference to a body corporate in relation to which an approval is in force under section 1126 of the Corporations Law of that jurisdiction.



'local securities exchange'

379. This new definition refers to a securities organisation under the laws of this jurisdiction or a local stock exchange (see below).

'local stock exchange'

380. This new definition refers to a stock exchange operating in, or approved under the Corporations Law of, this jurisdiction. This term and the term 'local securities exchange' is used for the purpose of slicing the pivotal terms 'stock exchange' and 'securities exchange'.

'non-company'

381. This definition refers to a body corporate other than a company, a recognised company, a corporation sole or an unincorporated foreign company or registrable Australian body.

'outstanding property'

382. This new definition refers generally to property of a body which has not been disposed of or dealt with when the body is dissolved.

'recognised company'

383. This new definition corresponds with the definition of the same term in CA s.5(1). It has been re-introduced into the Corporations Law for limited purposes (cf. Divs. 4, 4A of Part 2.2) as a result of the revised constitutional basis of the Law.

'registrable local body'

384. This term refers to registrable Australian bodies which are incorporated or formed or have a head office or principal place of business within the jurisdiction.

'relevant body'

385. This term has a very wide, general signification except in sections 599 and 600 where it is limited to particular types of body.

'relevant previous law'

386. This definition refers to the co-operative scheme legislation of each jurisdiction.

Section 22 - Carrying on business interstate

Section 25 - Dealing with futures contracts: General

387. Sections 22 and 25(4) (b) were inserted as constitutional underpinnings, and are being omitted as they are no longer necessary.

Section 53A - Chapter 6 body and Chapter 6 company

388. Proposed s.53A enables the ASC to declare an incorporated body to be a body or Chapter 6 company by Gazette notice.

Section 58 - Corresponding laws and corresponding previous laws

389. Re-enacted section 58 recognises the revised constitutional basis of the Law. Under the Corporations Act enacted as a single national Commonwealth law, no distinction was needed between corresponding laws which were current laws, and those which were no longer current, since the legislative scheme was based on one Commonwealth Act, rather than a series of applied laws.

390. The distinction between 'corresponding laws' and 'corresponding previous laws' is necessary under the Corporations Law since in some provisions it is necessary to refer to the Law as it applies in other particular jurisdictions ('corresponding law' - e.g.

subparagraph 341(e)(i)), while elsewhere reference to previous companies legislation is required ('corresponding previous law' e.g. proposed s.149A).

391. References to a corresponding law (or to a corresponding provision, etc) will thus be taken to refer to the Corporations Law (or provision of that Law) as applied in another jurisdiction—subs.58(1), (2).

392. References to corresponding previous laws (or to provisions of such laws, etc) will be taken to refer to previous laws of the jurisdiction which correspond to the Corporations Law, and generally to provisions of previous laws of other jurisdictions which similarly correspond (such references will generally be, in effect, to co-operative scheme legislation, particularly the CA and Codes) — subs.58(3), (4).

393. In particular, subsection 58(5) provides that a lodgment or registration of a prospectus under a corresponding previous law is to be taken as a reference to such lodgment or registration under the previous law of any Australian jurisdiction.

#### Section 58A - Recognition of acts etc done under corresponding laws

394. Proposed section 58A will play an important role in retaining the 'national' nature of the Corporations Law by providing that any act or thing done by or in relation to the ASC or a court, will be deemed to have been done for the purposes of the Corporations Law of each jurisdiction.

#### Section 58B - Discharge of obligations under this Law

395. This section will also play an important role in retaining the national nature of the Law. It provides that the discharge of an obligation under the Corporations Law of

one jurisdiction will be recognised as discharging that obligation for the purposes of the Corporations Law of each jurisdiction. This will apply, subject to particular exceptions (subsection 58B(3)), no matter in which jurisdiction the act is done or obligation discharged.

Section 62 - Dormant bodies corporate

395A. The amendments to this section reflect changes in the usage of terminology and are consistent with such usage throughout the Law.

Section 63 - Eligible circumstances

396. The omission of section 63 is a result of the removal of unnecessary constitutional underpinning from the Law.

Section 65 - Excluded corporations

397. The substitution of 'body corporate' for 'corporation' in this section is consequential upon the amendments to those definitions in s.9.

Section 66 - Excluded issues, offers and invitations

398. The exclusion of reference to Chapter 7 from subsection 66(1) is consequential upon the amendment to the definition of stock exchange so as to preserve the meaning of 'listed corporation'.

399. The addition of 'or' to the end of the paragraphs of subsections 66(2) and (3) is for the convenience of the user of the legislation, and introduces no material change.

Section 66A - Exempt bodies

400. Under the national Corporations Law regime, the bodies of each jurisdiction which are excluded from the definition of 'corporation' are listed in section 66A of the Law of every

jurisdiction. This preserves the textual identity of the Law as it is applied in each jurisdiction and thus avoids what was a source of confusion under the co-operative scheme legislation. The lists of bodies are based on the express exemptions from the definition of corporation in s.5(1) of the 'Companies Act and Codes.

#### Section 67 - Exempt brokers and exempt futures advisers

401. The re-enacted paragraphs 67(4) (a)-(g) extend the exemption provided for in the subsection to a person who acts as an official receiver or trustee within the meaning of the Bankruptcy Act 1966, or who acts as a personal representative of a dead futures broker or a dead futures adviser. This is consistent with the approach taken in FIA paragraphs 10(4) (a)-(g).

#### Section 69 - Exempt proprietary company

402. The amendments to subsections 69(2), (3), (4) and (6) reflect the revised constitutional basis of the law, so that references to companies of a State or Territory become reference to companies of other jurisdictions (or recognised companies).

403. Subsection 69(1) 'slices' the definition to ensure that references in the provisions mentioned will include exempt proprietary companies of other jurisdictions.

#### Section 69A - Exempt securities

404. This section defines exempt securities for the purposes of a proposed exemption from the share hawking provisions. As these securities are different in relation to different jurisdictions, the drafting structure of this provision is similar to that for proposed s.66A so as to ensure textual identity and completeness in the Corporations Law as applied in each jurisdiction.

Section 71 - Futures advice business and eligible futures advice business

405. The amendments to section 71 are made to remove unnecessary constitutional underpinning from the Corporations Law.

Section 73 - Futures representatives

406. The amendments to section 73 introduce no substantial change to the existing provisions, they merely omit features which were included in the Corporations Act by way of constitutional underpinning.

Section 76 - Incorporation in a jurisdiction or in Australia

407. Re-enacted section 76 reflects the revised constitutional basis of the Law. Under the Corporations Law as it is applied in State and Territory jurisdictions, a company or body corporate will be taken to be incorporated in a particular jurisdiction, and is distinguishable on that basis from companies and bodies corporate registered elsewhere.

Section 77 - Investment advice business and eligible investment advice business

408. The amendments to section 77 are made in order to remove unnecessary constitutional underpinning from the section.

Section 80 - Jervis Bay Territory taken to be part of the Australian Capital Territory

409. The Jervis Bay Territory is deemed to be part of the Australian Capital Territory.

Section 80A - References to Ministers

410. This section provides in general for the interpretation of 'Minister' and 'Minister for a jurisdiction'.

Section 81 - New companies

411. This section was included in the Act as constitutional underpinning. It is now unnecessary and is to be omitted.

Section 91A - Effect of prohibition, order or notice under section 229, 230, 599 or 600

412. This section provides in general for the interpretation of the phrase 'managing a corporation' as it occurs in sections which provide for the disqualification of persons from managing corporations. In its application to local corporations, the definition merely reproduces the words of the existing sections. In relation to other corporations, the definition recognises the territorial limitations on the Law as applied in each jurisdiction, and refers to acts, etc, done by the person or by the corporation within the jurisdiction.

Section 92 - Securities

413. The definition has been changed to remove the constitutional underpinning.

Section 93 - Securities business and eligible securities business

414. 'Eligible securities business' was a term included in the Act for the purposes of providing the constitutional underpinnings for various provisions. It is now to be omitted as it is no longer necessary.

Section 94 - Securities representatives

415. The amendments to section 94 are made in order to remove unnecessary constitutional underpinning.

Section 98 - Transfer days for bodies corporate

416. This section is to be omitted since the concept of 'transfer day' is discarded under the Corporations Law. All existing companies, etc, will be deemed to be registered under the Law.

Section 100A - Operation of certain laws relating to instruments on which stamp duty has no been paid

417. This section preserves the operation of laws relating to the use in proceedings of unstamped documents, or which prohibit the registration of transfers of securities in respect of which stamp duty has not been paid.

Section 102A - Application not to be granted unless applications also made under corresponding laws

418. This section reflects and enhances the national nature of the Corporations Law scheme. It provides that applications for registration by registrable Australian bodies or foreign companies, and applications for the various approvals, licenses and registrations provided for in Chapters 7, 8 and 9 are not to be made unless it is under the Corporations Law of each jurisdiction.

419. This will not result in any practical inconvenience as an application can be made under the Law of each jurisdiction by expressing it to be made under 'the Corporations Law', in which case it will be taken to be made under the Law of each jurisdiction (cf. c1.14(2)). By proposed s.102A(5) application is not to be granted unless it is granted under each of the Laws. However, in practice only a single decision needs to be made.

420. The section does not apply to applications made under previous legislation. Thus, approvals, licences and registrations granted under previous legislation will be regulated by the jurisdiction in which they were granted. The



'sliced' definitions relating to exchanges, licences etc will be of particular relevance in such cases.

Section 102B - "In Australia or elsewhere" "in this jurisdiction or elsewhere"

421. The expression "in Australia or elsewhere" does not limit the generality of the expression "in this jurisdiction or elsewhere". This is also the case for similar expressions.

Section 105 - Calculation of time

422. Existing subsection 105(3) is omitted in view of the general non-application of the Acts Interpretation Act 1901, to the Corporations Law.

423. Re-enacted subsections 105(3) imports the sense of subsection 36(2) of the Acts Interpretation Act 1901, making provision for the situation in which the last day of a period prescribed for the doing of a thing falls on a day which is not a business day.

424. The subsection provides that, in such a case, the thing may be done on the next business day.

Section 109A - Reference to Commonwealth Acts

425. The purpose of this new provision is to ensure that a reference in the Law to an Act by its short title is taken to be a reference to an Act of the Commonwealth having that short title.

Section 109B: References to amended or re-enacted Acts of the Commonwealth this jurisdiction

426. This provision is based on section 10 of the Acts Interpretation Act 1901.

427. The purpose of the provision is to ensure that where the Law contains a reference to an Act, the reference shall be construed as a reference to that Act as originally enacted and as amended from time to time.

428. If the Act has been repealed and re-enacted, with or without modifications, the reference will include a reference to the re-enacted Act as originally enacted and as amended from time to time, and where particular provisions of the repealed Act are referred to, the reference will include a reference to the corresponding provisions in the re-enacted Act.

Section 109C: Every section a substantive enactment

429. This provision is based on section 12 of the Acts Interpretation Act 1901.

430. It operates to ensure that every section of the Law has effect as if it were a substantive enactment.

Section 109D: Headings, schedule, marginal notes, footnotes and end notes

431. This provision is based on section 13 of the Acts Interpretation Act 1901.

432. The reference to 'Chapters' is new.

433. The provision ensures that the headings of Chapters, Parts, Divisions and Sub-divisions and any Schedules to the Law, form part of the Law.

434. It also provides that each heading to a section of the Law and each footnote, marginal note or end note in the Law, does not form a part of the Law.

Section 109E: Effect of repeal

435. This provision is based on section 8 of the Acts Interpretation Act 1901

436. The provision ensures that where a provision of the Law is repealed, the repeal does not:

- (a) revive anything not then in force or existing;
- (b) affect the previous operation of the repealed provision;
- (c) affect any right, privilege, obligation or liability acquired or accrued under the repealed provision;
- (d) affect any penalty, forfeiture or punishment incurred in respect of an offence committed under that provision; or
- (e) affect any investigation, legal proceeding or remedy in respect of such a right, privilege, obligation, liability, penalty, forfeiture or punishment.

Section 109F: Implied repeals etc

437. This provision is based on as section 8A of the Acts Interpretation Act 1901.

438. The purpose of this provision is to clarify and expand the operation of proposed section 109E.

439. Under the provision a reference in proposed section 109E to the repeal of a provision of the Law is extended to include a reference to:

- (a) a repeal effected by implication;

(b) the abrogation or limitation of the effect of the provision; and

(c) the exclusion of the application of the provision to any person, subject-matter or circumstance.

Section 109G: Effect of expiration of provision

440. This provision based on section 8B of the Acts Interpretation Act 1901

441. Again the provision clarifies and expands the operation of sections 109E and 109F by providing that where a provision of the Law expires, lapses or otherwise ceases to have effect, sections 109E and 109F apply as if the provisions had been repealed.

Section 109H: Regard to be had to purpose or objective of Law

442. This provision is based on section 15AA of the Act Interpretation Act 1901.

443. The effect of this provision is that in interpreting a provision of the Law regard should be had to the purpose or object underlying the Law.

Section 109J: Use of extrinsic material in the interpretation of this Law

444. This provision is based on section 15AB of the Acts Interpretation Act 1901.

445. It provides that where material not forming part of the Law is capable of assisting in the interpretation of a provision of the Law, consideration may be given to that material.

446. The paragraph does not operate to enable material not forming part of the law to overturn the ordinary meaning of a provision, taking into account its context in the Law and the purpose or object underlying the Law. Such extrinsic material may only be used to:

(a) confirm that the meaning of the provision is the ordinary meaning conveyed by the text of the provision taking into account its context in the Law and the purpose or object underlying the Law; or

(b) determine the meaning of the provision when either the provision is ambiguous or obscure or the ordinary meaning is manifestly absurd or is unreasonable.

447. Subparagraph 109G(3) lists some of the main categories of material that can be used to assist in interpreting the Law where and when resort to extrinsic material is permitted. The list is not exhaustive. It does not limit the generality of Subparagraph 109J(1) in allowing use of "any material not forming part" of the law that is capable of assisting in working out the meaning of a provision.

448. Subparagraph 109J(4) recognises two of the arguments which have been voiced against the use of extrinsic material and requires the court to bear these arguments in mind when determining (a) whether or not to allow the use of extrinsic material and (b) what weight to give the material once admitted.

Section 109K: Change to Style not to affect meaning

449. This provision is based on section 15AC of the Acts Interpretation Act 1901.

450. The purpose of the provision is to ensure that where a provision of the Law has expressed an idea in a particular form of words, and a later provision appears to have expressed

the same idea in a different form of words, the ideas shall not be taken to be different merely because different forms of words were used.

Section 109L: Examples

451. This provision is based on section 15AD of the Acts Interpretation Act 1901.

452. It provides that where a provision of the Law includes an example of the operation of a provision:

(a) the example shall not be taken to be exhaustive;

(b) if the example is inconsistent with the provision, the provision prevails.

Section 109M: Parts of speech and grammatical forms of words

453. This provision is based on section 18A of the Acts Interpretation Act 1901 and ensures that where in the Law a word or phrase is given a particular meaning, other parts of speech and grammatical forms of that word or phrase will have corresponding meanings.

Section 109N: References to offices and officers

454. Although extensively redrafted this provision is substantially the same as section 20 and subsection 21(a) of the Acts Interpretation Act 1901.

455. The purpose of this provision is to ensure that a reference to an officer in general terms is to be construed as including all persons who at any time occupy for the time being that office or perform for the time being the duties of the office.

456. The provision also provides that unless the contrary intention, appears, a reference in the Law to an office or officer will be taken as a reference to such office or officer in and for the Commonwealth.

Section 109P: Reference to companies etc

457. This provision is based on subsection 22(2) of the Acts Interpretation Act 1901.

458. It provide that express references in the Law to companies, corporations or bodies corporate are not taken to imply that references in the Law to persons do not also include references to companies, corporations or bodies corporate.

Section 109O: Reference to Commonwealth Laws

459. This provision is based on subsection 22(3) of the Acts Interpretation Act 1901.

460. It provides that a reference to the law of the Commonwealth or to a law of the Commonwealth does not include a reference to a law in force in a Territory in so far as the law is so in force by virtue of an Act providing for the acceptance, administration or government of that Territory.

Section 109R: Rules as to gender and number

461. This provision is based on section 23 of the Acts Interpretation Act 1901.

462. Its purpose is to ensure that unless the contrary intention appears:

(a) words importing a gender include every other gender; and

(b) words in the singular include the plural and vice versa.

Section 109S: Production of records kept in computers etc

463. This provision is based on section 25A of the Acts Interpretation Act 1901 and ensures that where the law requires a person to produce or make available information stored in a computer (or like device) that information will be reproduced in writing in a form capable of being understood by the court, tribunal or person for whom it is produced.

Section 109T: Changes of names of body and officers

464. This provision is based on subsection 25B(1) of the Acts Interpretation Act 1901

465. The purpose of the provision is to ensure that where the name of a body or office is changed by law, a reference in Corporations Law to the body or office under the former name, except in relation to matters that occurred before the change took effect, is taken as a reference to the body or office under the new name.

Section 109U: Compliance with forms

466. This provision is based on section 25C of the Acts Interpretation Act 1901.

467. Where the Law prescribes a form strict compliance with the form is not required and substantial compliance will be sufficient.

Section 109V: Contents of statements of reasons for decision

468. This provision is based on section 25D of the Acts Interpretation Act 1901.



469. It provides that where the Law requires a tribunal, body or person making a decision, to give written reasons for the decision, the instrument giving the reasons must set out the findings on material questions of fact and the evidence or other material on which these findings were based.

Section 109 W: Attainment of particular age

470. This provision is based on section 25E of the Acts Interpretation Act 1901 and provides that, for the purpose of the Law, the time at which a person attains a particular age is the commencement of the relevant anniversary of the date of birth of that person.

Section 109X: Service of documents

471. This provision is based on section 28A of the Acts Interpretation Act 1901.

472. It provides that where the Law requires or permits a document to be served on a person, service may be effected:

(a) in the case of a natural person, by delivering it to the person personally or by leaving it at, or by sending it by post to, the residential or business address of the person last known to the person serving the document;

(b) in the case of a body corporate, other than a company, a recognised company or a registered body, by sending it by post to the head office, a registered office or a principal office of the body corporate.

473. By virtue of proposed subsection 109X(2), other provision of the Law or of a law of the Commonwealth, or of any other jurisdiction is which the law applies, the provision does not affect any that authorises a different method of service nor does it affect the power of the court to authorise a different method of service.

Section 109Y: Meaning of service by post

474. This provision is based on section 29 of the Acts Interpretation Act 1901.

475. Under the provision service by post is effected by properly addressing, prepaying and posting the document to the last known address of the person to be served and unless the contrary is proved will be taken to have been effected at the time at which the letter would be delivered in the ordinary course of post.

Section 109Z: Measurement of distance

476. This provision is based on section 35 of the Acts Interpretation Act 1901 and provides that distance is to be measured in a straight line on a horizontal plane.

Section 109ZA: Expressions of time

477. This provision is based on section 37 of the Acts Interpretation Act 1901 and provides that expressions of time refer to the standard legal time in each jurisdiction in Australia unless the contrary appears.

Section 109ZB: Exercise of powers and duties

478. This provision is based on section 33 of the Acts Interpretation Act 1901.

479. It provides that:

(a) a power or duty under the Law may be exercised or performed from time to time as occasion requires;

(b) where the Law confers a power or imposes a duty on the holder of an office the power may be exercised and the duty must be performed by the holder for the time being of the office;

(C) where the Law provides that a person court or body may do a particular act or thing, and the word 'may' is used, the act or thing may be done at the discretion of the person, court or body;

(d) where the Law confers a power or function or imposes a duty on an body, the exercise of the power or the performance of the function or duty is not affected merely because of vacancies in the membership of the body;

(e) where the Law confers a power to make, grant or issue any instrument (including rules, regulations or by-laws) this power is taken to include a corresponding power to repeal, rescind, revoke, amend or vary such instrument;

(f) where the Law confers a power to make, grant or issue an instrument with respect to particular matters this power includes a power to make grant or issue an instrument with respect to some only of those matters or with respect to a particular class or classes and to make different provision with respect to different matters or different classes of matters;

(g) where the Law confers a power to make, grant or issue any instrument the power is not taken by implication not to include the power to make provision for, or in relation to, a particular aspect of a matter by reason only that provision is made by the Law in relation to another aspect of that matter or in relation to another matter;

(h) a power conferred by the Law to make appointments to any office or place includes:

\* a power to appoint another person temporarily in the place of any person suspended or in place of any sick or absent office holder of such office;

- \* a power to remove or suspend any person appointed;
- \* a power to appoint a person to act in the office until it is substantively filled (subject to a limit of 12 months from the occurrence of the vacancy).

This is subject to the proviso that where the primary power is exercisable only upon the recommendation or subject to the approval or consent of some other person, the power derived from subsection 109ZB(8) is likewise restricted.

(i) where the Law confers a power to make grant or issue an instrument prescribing penalties not exceeding a specified amount of imprisonment for a specified period that limitation on the penalties does not prevent the instrument from requiring the making of a statutory declaration.

Section 109ZC: Power to determine includes authority to administer oath

480. This provision is based on section 34 of the Acts Interpretation Act 1901.

481. It grants any person authorised to hear and determine a matter, authority to receive evidence, hear witnesses and administer an oath.

Section 109ZD: Delegations

482. This provision is the same as section 34AA of the Acts Interpretation Act 1901 with only minor wording changes.

483. Proposed section 109ZD provides that a power to delegate a function or power under the Law includes a power to delegate to any person from time to time holding, occupying or performing the duties of a specified office or position.

Section 109ZE: Effect of Delegation

484. This provision is based on section 34AB of the Acts Interpretation Act 1901.

485. It provides that where the Law confers a power on a person or body ('the authority') to delegate a function or power:

(a) the delegation may be made either generally or as otherwise provided by the delegation instrument; and

(b) the powers that may be delegated do not include the power to delegate; and

(c) delegated functions or powers, when performed or exercised by the delegate, will be taken to have been performed or exercised by the authority; and

(d) the delegation of a function or power by an authority does not prevent that authority from exercising the function or power that has been delegated; and

(e) if the authority is not a person section 109ZF applies as if it were.

Section 109ZF: Exercise of certain powers and functions by a delegate

486. This provision is based on section 34A of the Acts Interpretation Act 1901.

487. Proposed section 109ZF where under the Law the exercise of a power or function by a person is dependent on that person's opinion or belief or state of mind and that power or function is delegated pursuant to the Law, the relevant opinion or belief or state of mind is that of the delegate.

Part 1.3 - Application

488. Existing Pt 1.3 reflects limitations in Commonwealth legislative power and accordingly is being repealed in view of the applied laws approach. It is being replaced by proposed Divisions 9 and 10, which contain various new interpretation provisions as follows.

Section 110 - Expressions have same meaning as in the Law

Section 110A - Severing invalid provisions

Section 110B - Expressions have the same meaning as in the Law

Section 110C - Severing invalid provisions

489. Proposed ss.110 to 110C are based on s.46 of the Acts Interpretation Act 1901.

490. They provide that expressions in regulations and instruments have the same meaning as in the Law and when made pursuant to a particular provision of the Law have the same meaning in that provision (ss.110 and 110B).

491. In addition regulations and instruments are to be interpreted subject to the Law; and where they would otherwise be interpreted as being inconsistent with the law or exceeding the power under which they were made they are to be read down so as to be consistent or within power.

Section 110D - Chapters 1 to 6 and 9

492. Proposed new section 110 clarifies the intention of the legislature as to the application of Chapters 1 to 6 and 9 in relation to natural persons, to bodies corporate and unincorporated bodies, and to acts and omissions occurring outside the jurisdiction. It is based on s.3(2) of the CA.

Proposed section 110E

493. This section applies the Corporations Law to the coastal sea of each jurisdiction in which it is applied.

Part 1 3 - Application Orders

494. As is the case with the Corporations Law itself, the Corporations Regulations for each jurisdiction are to be textually identical and complete. However, it is recognised that differing situations will inevitably exist between the States and Territories applying to the Law, and that these differences may demand minor alterations to the Law or regulations as applied in a particular jurisdiction or jurisdictions.

495. Application orders are a procedural mechanism designed to deal with such cases in a way which preserves the national operation of the corporations Law scheme. The orders will be made centrally, by the Commonwealth Minister, so that there is one point of reference or control for the making of the orders. This will enable the orders to be made in harmony with the general body of the Law.

Section 111A - Power to make

496. This section will provide for the making of application orders by the Minister upon such matters as are specified in the Law. Application orders must not be inconsistent with the Law.

Section 111B - Orders under the Part and corresponding laws

497. In order to make application orders simpler in form and more accessible for the user, proposed section 111B provides that application orders under the Corporations Law of several jurisdictions may be integrated into one document. Where this is done it will mean that the user will not need to read a separate document for each jurisdiction in order to determine the effect of the order.

Section 111C - Specifying a matter by reference to another instrument

498. This section makes provision for the specifying of certain matters in application orders by applying adopting or incorporating the provisions of Acts, regulations, instruments etc.

section 111D - Notification in the Gazette

499. Notice of the making of an application order, and of the places where copies of the order can be bought, is to be published in the Gazette.

Section 111E - When order takes effect

500. An application order takes effect on the day and at the time specified in the order, or else at the commencement of an Act (or provision) specified in the order. If no such time or date is specified, the application order takes effect on the day upon which it is published in the Gazette.

Section 111F - Interpretation of application orders

501. The interpretation provisions of the Corporations Law both generally and in particular provisions will apply to terms used in application orders made under the Law, unless the contrary intention appears in the order.

Section 111G - Severing invalid provisions

502. This section provides general guidance on the interpretation of application orders. The orders are to be interpreted subject to the Corporations Law, and so as not to exceed the powers conferred by Part 1.3.

503. Where an order would otherwise be in excess of the powers conferred by Part 1.3, it is intended that the provisions be read down so as not to exceed those powers.



AMENDMENT CHAPTER 2Background

504. Chapter 2 of the Corporations Act deals with restrictions on the formation of outside partnerships, with the registration of companies, with the legal capacity powers and status of companies, and the requirements on membership and share capital.

505. The principal amendments to Chapter 2 deal with the revised jurisdictional basis for registration of companies and with the automatic deemed registration of existing companies.

Nature of Amendment(i) Jurisdiction Nexus: Registration

506. The nature of the Corporations Law as an applied laws regime makes it necessary that a company be registered within a particular State or Territory jurisdiction. This arises as a result of the territorial limitations on State and Territory legislation. The process of changing the Corporations Act from a single Commonwealth Act of national operation into the national scheme of interlocking laws which the Corporations Law will be, has thus necessitated a number of amendments to the provisions relating to registration.

507. The following have been amended in recognition of the requirement of the applied laws regime that registration be tied to the Corporations Law of a particular State or Territory: sections 113, 118(2), 121(2)(a), new Division 4 and 4A, 148, 161, 166A and 180(2).

(ii) Existing Companies

508. The Act as it was originally enacted provided that existing companies would translate into the new scheme as a result of formal registration by the ASC following an application by the company. This requirement has been removed and the Bill provides for the automatic deemed registration of existing companies.

509. In this way, companies which are currently registered under the co-operative scheme will become registered under the Corporations Law without the necessity of making an application or lodging any documents with the ASC. The ASC will take over the relevant documents and registers from the CACs, and will thus have the information it needs to provide such companies with the necessary registration numbers, and to regulate them as registered companies under the Corporations Law. In addition, recognition of existing certificates of incorporation will mean that there is no need for the ASC to issue fresh certificates to existing companies.

510. Existing companies will be deemed to be registered under the Corporations Law as from the date of commencement of the Act.

511. The move to automatic deemed registration has led to the following provisions to be amended in Chapter 2: sections 126, 127, 128, 129, 130, 132, 148, 149, 149A, 150, and 174.

(iii) Corresponding Law /Corresponding Previous Laws

512. A number of the amendments to provisions in Chapter 2 arise out of the distinction provided for in s.58 between a 'corresponding law' and a 'corresponding previous law'. These references have been inserted as necessary to ensure the recognition of certain acts or states of affairs under the appropriate legislation in each case. References to a 'corresponding law' reflect the nature of the Corporations Law as an applied laws regime; references to 'corresponding previous laws' are generally transitional provisions allowing for continuity between the old scheme and the new.

512. Current references to 'corresponding law' in the Act generally refer to the co-operative scheme legislation, since there was to have been no other current 'corresponding' law needed beyond the Act itself. These references will generally become references to 'corresponding previous laws'.

513. The following provisions have been amended in Chapter 2 as a result of result the introduction of the concepts of 'corresponding laws' and 'corresponding previous laws': sections 120, 131, 181 and 185.

(iv) Constitutional Underpinning

514. The following provisions of Chapter 2 are to be removed either because their inclusion in the Act was solely for the purpose of bringing the Act within one or more provisions of the Constitution so as to ensure its validity, or else consequentially upon the removal of such 'constitutional' provisions: sections 122, 133, 149 and Division 6 and 7.

(v) 'Corporations Law'

515. Under the new national regime, the legislative vehicle which contains the substance of corporate law will be referred to as the 'Corporations Law' rather than the 'Corporations Act', which will refer to the complete legislative scheme including application provisions, etc. In the following provisions of Chapter 2, this has necessitated amendments to substitute 'Law' for 'Act': sections 122(a), 131 (throughout), 132(2) (throughout), 149(a), 161(2)(a), 195(8), (9), (10), (12) and (15).

Amendments

Section 112 - Outsize partnerships and associations

516. Consequent upon the repeal of section 113, this section is to be re-enacted in amended form in recognition of the fact that under the new scheme of regulation, trading corporations will be incorporated under State or Territory law.

517. The number of members which a professional partnership or association will be allowed to have is to be provided for in an application order made in relation to the particular profession or calling.

Section 113 - Certain corporations not to be formed under State or Territory company law

518. The prohibition on the formation of trading corporations under State or Territory law is, due to the fundamental change in the legislative basis of the scheme of regulation, to be repealed.

Section 118 - Registration application

519. Subsection 118(2) is to be re-enacted in amended form so as to require an application for registration to specify the jurisdiction in which the company is to be incorporated.

Section 120 - Registration

520. Paragraph 120(1)(b) is to be amended to enable the recognition of the registration of companies and registrable Australian bodies under the Corporations Law of other jurisdictions in order to ensure provision of a unique registration number to each such body.

Section 121 - Certificate of registration

521. The amendment to paragraph 121(2)(a) will have the effect of requiring the jurisdiction of incorporation to be mentioned on a company's certificate of incorporation.

Section 122 - Effect of certificate

522. In paragraph 122(a) the reference to section 155 is omitted as a consequence of the repeal of that section.

Division 2 - Registration of existing companies

523. Under the Corporations Act, it was envisaged that all currently-existing bodies corporate, such as companies incorporated under the co-operative scheme, would have to apply to be registered under the new regime. This has been replaced with a process whereby existing bodies corporate are automatically deemed to be registered under the Act.

Section 126 - Certain State and Territory companies not to carry on business unless registered under this Division

524. This section will be the operative provision by which companies which were previously incorporated under the co-operative scheme (or an earlier law) will be deemed, as from the commencement of the Act, to be registered under the Corporations Law.

Section 127 - State and Territory company may apply for registration

Section 128 - Determination of application

525. These provisions referred to the application procedure by which existing companies were to have become registered under the Corporations Law. As such they are no longer necessary and so are to be repealed.

Section 129 - Registration of applicant as a company

526. Consequential amendments are to be made to this section as a result of the deemed registration of existing bodies corporate. As well, a new subsection 129(2A) is inserted so as to allow for the provision of registration numbers to existing companies by the ASC in advance of the commencement of the new scheme.

Section 130 - Constitution of Division 2 company

527. Subsection 130(1) is to be re-enacted so as to refer to a company which is deemed to be registered. Subsection 130(2) is similarly amended to refer to the commencement of the Division rather than the 'registration day' of a company. The amendment to subsection 130(3) merely makes for consistent use of terminology in the Law.

Section 131 - Application of Act in relation to Division 2 companies

528. section 131 is a general transitional provision. References to 'corresponding' laws in paragraphs 131(1)(c) and 131(2)(a) are to be amended to refer to 'previous' corresponding laws.

Section 132 - Acts preparatory to external administration of Division 2 company

529. The amendment replacing the final words of subsection 132(3) is consequential upon the deemed registration of existing companies. The reference to a time 'when the company was not a company' is to be omitted in recognition of the fact that there can now be no time lag between the commencement of the Act and the registration of a company under Division 2, and that co-operative scheme companies are deemed to continue in existence under the Corporations Law.

Division 3 - Registration non-companies as companies

530. The replacement of "foreign company" with "non-company" in Division 3 both widens and narrows the scope of that Division. It is narrowed in that unincorporated foreign companies will not be able to register as companies under the Corporations Law; this accords with the spirit of the existing law, the purpose of which is to allow an incorporated body to transfer its incorporation to the national regulatory scheme.

531. Importantly, the scope of the Division is widened so that incorporated registrable Australian bodies, as well as foreign companies, will be able to transfer their incorporation to the Corporations Law.

532. The following amendments are to be made to the provisions of Division 3:

Section 133 - Foreign company may apply for registration

533. "Non-company" is substituted for "company" in subsection 133(1). Reference to Division 6 is omitted from subsection 133(2) in view of the proposed repeal of that Division.

Section 134 - Externally-administered body corporate not to be registered

Section 135 - Prerequisites to eligibility

534. "Non-company" is substituted for "foreign company" in these sections.

Section 136 - Form and content of application

535. "Non-Company" is substituted for "foreign company" in subsections 136(1) and (3), and paragraph 136(1)(f). Paragraphs 136(2)(a) and (b) are amended to ensure that lodgement of a document under the law of another jurisdiction is recognised for the purposes of the section.

Section 137 - Registration of applicant as a company

536. The amendment to subsection 137(2) is made to ensure that registration numbers of companies registered under the Division will be unique throughout Australia.

Section 138 - Registered foreign company

537. Re-enacted section 138 reflects the revised scope of Division 3 of Part 2.2 which now allows for the transfer of incorporation of registrable Australian bodies to the Corporations Law.

Section 139 - Constitution of Division 3 company

538. "Non-company" is substituted for "foreign company" in subsection 139(1) and (2). "Law" is substituted for "Act" in subsection 139(2).

Section 140 - Alteration of constitution

539. "Non-company" is substituted for "foreign company" in subsection 140(1).

Divisions 4, 4A

540. Division 4 of Part 2.2 previously provided for the registration of Close Corporations as companies under the Act. This is now to be replaced with two new Divisions, 4 and 4A, which make provision for the transfer of registration of a company from one jurisdiction to another.

541. The proposed Divisions 4 and 4A provide for a transfer procedure which is essentially similar to that provided for in CA Division 4 of Part III. Proposed Division 4 provides for transfer of registration into the jurisdiction, while proposed Division 4A provides for transfers to another jurisdiction.

542. These provisions, which would not have been required under the Corporations Act as it previously stood, are necessary in view of the fact that the registration of a company will now be tied to a particular jurisdiction.



Proposed Section 142 - Conversion of a close corporation into a company

543. This section provides for the making of an application by a recognised company for registration in the jurisdiction. Such an application must be granted by the ASC provided it complies with formal requirements and provided the company is not or is not about to become an externally administered company. Section 142 is to have substantially the same effect as CA subsections 84(1) and 86(1).

Proposed Section 143 - Requirements as to memorandum

544. This section is to substantially the same effect as CA subsection 84(3) - a recognised company may not transfer its registration to the jurisdiction if it is externally administered or is about to become so.

Proposed Section 144 - Registration application

545. This section sets out the form and content requirements for an application under section 142. These requirements largely coincide with those provided for in CA subsection 84(2), requiring in addition evidence of compliance with section 143. Where the documents specified in the section have already been lodged under the CA, the ASC may dispense with any requirement to re-lodge (subsection 144(2)).

Proposed Section 145 - Power to require production of unlodged memorandum

546. This section corresponds to CA subsections 86(3)-(5) dealing with the consequences of a successful application. The ASC is to register the applicant as a company of the appropriate class and as either a private company or a public company, and must allot it a number which is distinct from that held by any other body corporate (other than the applicant company).

Proposed Section 146 - Registration

547. This section corresponds to CA subsections 87(4) and (5), providing that the memorandum and articles of the recognised company become the memorandum and articles of the company of this jurisdiction, and also making provision for the case where a company's constitution is in a language other than English.

Proposed Section 147 - Articles of association

548. Where a company intends to transfer its registration to another jurisdiction, proposed s.147 provides that an application must first be made to the ASC for a certificate authorising the application to transfer. The requirements set out in the section mirror those in CA s.83, the two exceptions to this being that there need be no reservation of a name in the "new" jurisdiction, and that the consent of the Commonwealth Minister is needed in addition to that of the Minister for the company's "home" jurisdiction.

Proposed Section 147A

549. This section, which mirrors CA s.89, provides that a company's registration in its "home" jurisdiction ceases upon its registration in a "new" jurisdiction.

Section 148 - Certification of registration

550. Subsection (1) is amended consequential upon the automatic deeming of registration of existing companies. The omission of reference to Division 2 relieves the ASC of the requirement to issue a certificate of registration to a company which is deemed to be registered under that Division.

551. Paragraph (2)(a) is amended to provide that company registration certificates must refer to the jurisdiction in which a company is registered.

Section 149 - Effect of certificate

552. The reference to a company registered under Division 2 is omitted consequential upon subsection 148(1) and new section 149A, which together relieve the ASC of the requirement to issue certificates of registration to existing companies. In paragraph 149(a) the reference to section 155 is omitted as a consequence of the repeal of that section.

Section 149A - Effect of certificate issued under previous law

553. This section will provide for the recognition of certificates of incorporation issued under previous laws. Such certificates will be conclusive evidence for the purposes of the Corporations Law of incorporation and registration under the previous law, and of compliance with the requirements of that law concerning registration.

Section 150 - Effect of registration under Division 2, 3, or 4

554. Subsection (1) is amended consequential upon the automatic deeming of registration of existing companies. The amendments to subsections (2) and (3) simplify the language and clarify the effect of the existing provisions.

555. Subsections (4) and (5) were technical provisions which owed their existence to the basis of the national scheme as previously proposed, that is, national Commonwealth Legislation. They are not necessary or appropriate in the context of an applied law regime, and are thus to be repealed.

Section 152 - Establishment of registers and minute books

556. "Corresponding law" is replaced by "corresponding previous law" in paragraph 152(2) (a) and (b) and (3) (b) which relate to books and registers previously kept by "Division 2" companies.

557. Proposed subsections 152(3)(a) and (3)(b) are necessary in the light of the distinction between "corresponding law" and "corresponding previous law" in the Corporations Law (s.58).

558. Subsections 152(2) - (3)(b) retain intact the meaning and effect of existing subsections 152(2) and (3).

#### Division 6 and 7 of Part 2.2

559. These Divisions comprised constitutional underpinning to attract the operation of placitum 51(i) of the Constitution. They are to be repealed since they are now unnecessary.

#### Division 161 - Legal capacity

560. 'This jurisdiction' is substituted for 'Australia' in setting out the legal capacities of companies. This reflects the fact that a company is registered in a particular jurisdiction.

#### Section 163 - Application of certain State and Territory laws

561. This section, which would operate to exclude the operation of State and Territory laws, was appropriate to a scheme based on national Commonwealth legislation, but not to an applied law regime. It is therefore to be repealed.

#### Section 164 - Persons having dealings with companies etc.

562. "Corresponding law" is replaced by "corresponding previous law" in paragraph 164(3)(b).

#### Section 165 - Lodgment of documents etc. not to constitute constructive notice

563. "Corresponding law" is replaced by "corresponding previous law" in paragraphs 165(1) and (2), and in subsection 165(2) (first occurring).

Proposed Section 166A Effect of fraud

564. Consequential upon the tying of registration to one jurisdiction and the consequent introduction of the notion of "recognised company" being a company incorporated in another Australian jurisdiction, proposed 166A makes provision for the actual recognition of such bodies.

565. The section will allow for the national operation of all companies registered under the scheme, since a recognised company will be deemed to have in each jurisdiction the same legal personality, capacity, powers and status as if it were a company. Subsection (3) ensures that such recognition does not impose obligations upon companies that they would not otherwise have had, such as obligations already fulfilled in the jurisdiction of registration, which are duplicated in the law of other jurisdictions.

Section 167 - Change of status

566. "Corresponding law" is replaced by "corresponding previous law" in subparagraph 167(1)(a)(ii).

Section 174 - Effect of memorandums of certain Division 2 companies

567. The amendment to the definition of 'translation day' is to be made since specification of the day is more appropriately contained in the Regulations.

568. The re-enacted subsection omits reference to the registering of a company under Division 2, in recognition of the deemed registration of existing companies.

Section 179 - Constitution of companies limited by guarantee

569. Paragraph 179(3)(j) is to be repealed as a result of the altered legislative basis of the scheme.

Section 180(2) - Operation of memorandum and articles

570. Under the applied laws regime, each jurisdiction's law regarding specialty debts will apply to companies of that jurisdiction, thus mention of a specialty debt "according to the law of the Capital Territory" is to be removed.

Section 181 - Copies of memorandum and articles

571. Paragraph 181(6)(b) is amended to make reference to "previous law corresponding".

Section 185 - Membership of holding company

572. "Corresponding previous law" replace "company law of a State or Territory" in paragraph 185(7)(a), reflecting the revision of s.58 of the Law.

573. Subparagraph 185(7)(b)(ix) is to be deleted since under the new scheme the Act will not apply to the external Territories.

Section 195 - Special resolution for reduction of share capital

574. "Corresponding law" is replaced by "corresponding previous law" in paragraph 195(15)(c).

Section 20 - Company financing dealings in it shares etc.

575. The amendment to paragraph 205(6)(a) reflects the "federalising" of offences under the Corporations Law, which will include the application of the aiding and abetting provisions of the Crimes Act 1914 as State and Territory law.

AMENDMENTS OF CHAPTER 3Background

576. Chapter 3 of the Corporations Act regulates the internal administration of companies registered under the Act. The various Parts of the Chapter contain provisions dealing with registered offices and names, company officers, meetings and proceedings, oppressive conduct, charges, accounts, audit and annual returns.

577. The substance of Chapter 3 is generally unaffected by the conversion of the Act into the Corporations Law, save for the provisions relating to accounting standards which previously comprised section 283 and which are now to be contained in the covering clauses. The other Schedule 1 amendments to Chapter 3 are by and large consequential upon changes which are to be made elsewhere in the Act, particularly Chapter 2. In particular, the automatic registration of 'Division 2 companies', the introduction of the jurisdictional nexus of registration and the revision of the definitions of 'company', 'corporation' and 'body corporate' have each necessitated a number of amendments to Chapter 3. As well, a number of amendments of lesser note are made, such as the removal of constitutional underpinning and the terminological change from 'Act' to 'Law'.

Nature of amendments(i) Jurisdictional Nexus: Registration

578. The jurisdictional nexus in Chapter 3 is to be the registration of a company in the jurisdiction. The amendments which reflect this approach follow generally upon the amendments to the registration provisions themselves in Chapter 2, including the automatic deemed registration of 'Division 2 companies'.

579. The amendments to the registration provisions in Chapter 2 and the adoption of registration as the sole jurisdictional nexus in Chapter 3 have necessitated the amendments to the following provisions: section 218(1)(b), 220(3), 232(4A), 232(6A), 233(1)(a), 234(12), 242(7A), 304(1)(b), 307 and 325.

(ii) References to 'Corporation' 'Company' 'Body Corporate' etc

580. The amended definitions of 'Corporation', 'Body Corporate' and 'Company' which have been enabled or required by the revised constitutional base of the Corporations Law have required amendments in Chapter 3 to the following provisions: sections 229, 230, 232, 233 and 263.

(iii) Corresponding Laws/Corresponding Previous Law

581. Section 58 of the Corporations Law will now provide for a distinction between 'corresponding laws' and 'corresponding previous laws'. The former reference will occur generally in cases in which the Corporations Law of another jurisdiction is being referred to. The latter will generally be of a transitional nature, referring to previous laws, particularly co-operative scheme legislation. Such references under the Corporations Act as it was originally enacted would have been to 'corresponding law' (or 'corresponding Act') - the distinction in section 58 was unnecessary because of the absence of any 'current' law corresponding to the Act.

582. The distinction between 'corresponding laws' and 'corresponding previous laws' will result in the following provisions being amended: sections 220(3), 229, 230(6) and 242(9).

(iv) Other Amendments to Chapter 3

583. There are certain other miscellaneous amendments to sections 229, 237, 261, 263, 265, 283, 286, 288, 336, and 338.



Amendments

Section 218 - Notice of address of registered office and office hours

584. Consequential amendment based on automatic deeming of registration of existing companies.

Proposed Section 218A - Registered office of Division 2 company

585. This section is inserted as a result of the automatic deemed registration of "Division 2 companies". It provides that a company's registered office and office hours under a previous law are to be taken to be its registered office and office hours for the purposes of the Corporations Law.

Section 224 - Vacation office

586. "Corresponding law" is replaced by "corresponding previous law" wherever the term occurs in subsections 234(2) - (7).

Section 226 - Validity of acts of directors and secretaries

587. "Corresponding law" is replaced by "corresponding previous law" in subsection 226(2).

Section 229 - Certain persons not to manage certain bodies corporate

588. The subsection 229(1) definition of 'relevant body corporate' becomes obsolete with the amendment to the definition of 'corporation' bringing it into line with the CA definition of that term. The definition of 'relevant body corporate' will therefore be repealed, and in the re-enacted subsection (1) the reference will be to 'a corporation'. This will bring the provision into line with CA s.227 upon which it is based.

589. The proposed amendments to paragraph 229(3)(a) will clarify the scope of its operation, ensuring that relevant convictions under the law of any Australian jurisdiction will attract the disqualification for which the section provides.

590. Further amendments to the section will draw upon the new definitions of 'corporation' and 'serious fraud'. Reference to 'a corresponding law' in paragraph 229(3)(c) is to be amended to refer to a provision of a corresponding previous law, so as to catch convictions under the Companies Act and Codes.

591. The closing words of subsection 229(3) are to be simplified in line with the amendment to paragraph 229(3)(a), drawing upon the definition of 'managing a body corporate' in proposed s.91A (cf. subsection 229(3A)). The re-enacted paragraphs essentially maintain the effect of the provision as originally enacted, but clarify the broad scope of their operation in view of the revised constitutional basis of the legislation. In subsection 229(8) the reference to 'corresponding law' becomes 'corresponding previous law'.

#### Section 230 - Court may order persons not to manage certain bodies corporate

592. 'Relevant body corporate' becomes 'body corporate' in subparagraphs 230(a)(a)(i), 230(1)(b)(i), and 230(1)(c)(ii), and paragraph 230(1)(d). 'Company' becomes 'body corporate' in subparagraph 230(1)(a)(i). 'Relevant body corporate' becomes 'corporation' in subsection 230(1) (last occurring). 'Body corporate' becomes 'corporation' in proposed subsections 230(3) and (3A). These amendments are all consequential upon changes to definitions of the particular terms as explained in the explanatory notes relating to section 9.

593. Again as a result of definitional changes, the definition of 'relevant body corporate' in subsection (6) is to be omitted. At the same time, the definition of 'body corporate'

for the purposes of this section is to include 'corporation'. The term will thus include certain types of unincorporated bodies to which the section would not otherwise have extended.

594. The amendment of definition of 'relevant enactment' in subsection 230(6) to make reference to a corresponding previous law is consequential upon the amendment to s.58 to distinguish between corresponding laws and corresponding previous laws. Paragraph 230(4)(a) is to be omitted as a result of the amendment to subsection 230(6).

#### Section 232 - Duty and liability of officers of certain bodies corporate

595. In the definition of 'officer' in subsection (1), 'body corporate' becomes 'corporation', consequent upon definition changes. The definition in subsection (1) of 'Relevant body corporate' is to be omitted, and is replaced throughout the section with 'corporation'. 'Company' becomes 'body corporate' in paragraph (3)(a). 'Body corporate' becomes 'corporation' in subsections (5), (6), (7), (8) and (11).

596. Subsections 232(4A) and (6A) are inserted in order to ensure that the territorial operation of the operative subsections of s.232 comes within the legislative power of the jurisdiction's legislature. Each jurisdiction will be able to regulate the activities of corporations (and officers of corporations) registered within the jurisdiction, no matter where those activities take place. In the case of corporations registered outside the jurisdiction, only activities taking place locally can be regulated under the local Corporations Law.

#### Section 233 - Liability of directors for debts etc. incurred by body corporate acting as trustee

597. The amendment in subsection (3) to the definition of 'relevant body corporate' does away with notions which were previously required to preserve constitutional validity. The term will now refer to companies, and to registrable bodies

other than registrable local bodies (see definition of 'registrable local bodies' s.9). This, in effect, ensures that section 233 conforms with CA s.229A, upon which it is based.

598. A new subparagraph 233 (1) (a) is to be inserted in order to reflect the territorial limitations on the Corporations Law as an applied State or Territory law in each jurisdiction.

Section 234 - Loans to directors

599. 'This jurisdiction' is substituted for 'Australia' in recognition of the territorial limitations on State and Territory legislation.

Section 235 - Register of directors' shareholders etc.

600. "Corresponding law" is replaced by "corresponding previous law" in subsections 235(4) and (5).

Section 236 - General duty to make disclosure

601. "Corresponding law" is replaced by "corresponding previous law" in subsection 236(8)

Section 237 - Benefits for loss of, or retirement from, office

602. Paragraph (4) (a) is to be amended to correct a mistaken cross-reference. Subsection (19) is to be amended as a consequence of the different overall nature of the legislative base of the scheme.

Section 242 - Register of directors, principal executive officers and secretaries

603. Proposed subsection (7A) will relieve existing companies from having to reodge the prescribed forms that have been lodged with the NCSC by virtue of their deemed registration under the new scheme. 'Corresponding law' becomes 'corresponding previous law' in subsection (9).

Section 243 - Register of disqualified company directors and other officers

604. "Law" is substituted for "Act" in the opening words. Paragraphs 243(2)(a) and (b) are amended to include reference to corresponding previous laws, rather than corresponding laws, reflecting the distinction for which s.58 now provides.

Section 246 - Convening of general meeting on requisition

605. Paragraphs 246(8)(a) and (b) are amended to adopt the terminology of "corresponding previous laws" which is introduced by s.58.

Section 260 - Remedy in cases of oppression of injustice

606. This substitution of "ASC Law" for "Commission Act" in paragraph 260(1)(b) reflects the general change in the usage of these terms throughout the Law.

Section 261 - Interpretation and Application

607. The amendment to the definition of 'company' in subsection 261(1) will have the effect of relieving registrable local bodies from the requirements of the charges provisions. Registrable local bodies are registrable Australian bodies which either are incorporated or formed within the jurisdiction, or which have their head office or principal place of business within the jurisdiction. This amendment will reflect the equivalent provisions in the CA (see CA s.199(7), (8)).

608. The amended definition of 'property' in subsection 261(1) reflects the revised constitutional basis of the Corporations Law, which will be subject to the territorial limitations of each State and Territory legislature.

Section 263 - Lodgment of notice of charge and copy of instrument

609. 'Registrable body' is amended to become 'body' in subsections 263(3) and (4). The amendment to add reference to 'Division 3' to subsection 263(3) is made to bring the subsection more closely into line with the equivalent CA provision (CA s.201).

Section 265 - Registration of documents relating to charges

610. Re-enacted subsection 265(4) ensures that charges and related documents cannot obtain the benefit of final registration unless the appropriate stamp duty has been paid. This is achieved by requiring the production of a certificate to the effect that all the documents have been duly stamped. The amendments to subsection (5) are consequential upon this requirement.

Proposed Section 265A - Standard Time for the purpose of section 265

611. This section provides that the standard time for the purposes of section 265 may be declared by notice in the Gazette. This would enable a uniform time to apply for the registration of charges across Australia. This would facilitate the ASC's computerisation of corporate documents.

Section 271 - Company to keep documents relating to charges and register of charges

612. "Corresponding law" (wherever occurring) is replaced by "corresponding previous law"

Section 273 - Registration under other legislation relating to charges

613. As a result of the revised constitutional basis of the Law, the exclusion of laws of other jurisdictions relating to

the registration of charges is not possible. The amendments to section 273 reflect the territorial limitations on State and Territory applied laws, and restrict the operation of the section so that it purports to exclude only particular laws of the jurisdiction relating to the registration of charges. The laws which are to be so excluded by section 273 will be specified in application orders made by the Commonwealth Minister under s.111A.

Section 283 - Accounting standards

614. This section is to be re-enacted with appropriate amendment as section 32 of the covering clauses.

Section 286 - Interpretation etc. of accounting standards

615. Subsection 286(2) is to be re-enacted without amendment to its substance consequential upon the repeal and re-enactment of section 283. The new section 286 which is based on CA s.266E provides that expressions used in approved accounting standards have the same meaning as in the Bill.

Section 286A - Severing invalid provisions

616. This section allows for the severing of any provision of an accounting standard which is inconsistent with the Corporations Law

Proposed Section 286B - Evidence of text of accounting standard

617. The new section provides that a document issued by the Australian Accounting Standards Board or the ASC containing an accounting standard in force under s.32 is prima facie evidence of that standard being in force.

Section 288 - Application of accounting standards approved under Companies Act 1981

618. Section 288 is a transitional provision relating to accounting standards made under the Companies Act and Codes. Its re-enactment in amended form is consequential upon the replacement of section 283(2) by proposed section 32.

Section 291 - Orders under corresponding laws

619. "Corresponding law" is replaced by "corresponding previous law" in subsection 291(1).

Section 300 - Inclusion of comparative amounts for items required by accounting standards

620. "Corresponding law" is replaced by "corresponding previous law" in paragraph 300(1)(b) and subsection 300(2).

Section 304 - Report on company other than group holding company

Section 307 - Public companies

621. As a result of the reintroduction of the concept of recognised companies, paragraph 304(1)(b) and section 307 are to be amended to include reference to recognised companies so as to bring them into line with the CA provision upon which they are based (CA s.270). "Corresponding law" is replaced by "corresponding previous law" in subparagraph 307(c)(i) and (ii).

Section 308 - Options

622. "Corresponding law" is replaced by "corresponding previous law" in subsection 308(5).



Section 314 - Orders under corresponding laws

623. "Corresponding law" is replaced by "corresponding previous law" in subsection 314(1). Paragraph 314(2) (b) similarly adopts the terminology introduced by s.58 of the Law.

Section 317 - Commission may require company to lodge accounts etc.

624. "Corresponding law" is replaced by "corresponding previous law" in subsection 317(1).

Section 322 - Continued application to Division 2 company of requirements of corresponding law

625. Re-enacted section 322 preserves the meaning and effect of the existing section. The amendments to it are made as a consequence of the automatic deemed registration of "Division 2 companies", and to adopt the terminology of "corresponding previous laws" introduced in s.58.

Section 325 - When unlimited exempt proprietary company need not appoint auditor

626. The amendments to 325(1) (a), (2) (b) and (5) (b) are consequential upon the tying of registration to a State or Territory jurisdiction. The effect of the amendments is to preserve the effect of the existing provisions.

Section 336 - Annual activities statement

627. This section was included in the Act purely for reasons of constitutional validity. It is now to be repealed since it is unnecessary.

Section 338 - Information in annual return deemed to satisfy certain other lodgment requirements

628. The substitution of 'Law' for 'Act' is consistent with usage throughout the Corporations Law. The insertion of reference to proposed section 1354 will ensure that, where documents are required to be lodged, the lodgment fees in respect of such documents are still payable, notwithstanding the lodgment of the annual report, which itself takes up those documents.

Section 339 - Division company

629. The amendments to this section are made as a consequence of the automatic deemed registration of "Division 2 companies", and to adopt the terminology of "corresponding previous laws" which is introduced by s.58 of the Law.

AMENDMENTS OF CHAPTER 4Background

630. Chapter 4 provides for the registration under the Companies Law of certain bodies which are not companies, as well as for the registration of companies which are incorporated overseas. The Chapter also contains provisions regarding the reservation and registration of company names, and provisions regulating no-liability companies, investment companies, and the preparation of financial statements by banks and life insurance corporations.

Part 4.1 - Registration of Certain Bodies

631. The modifications which were necessary to CA Part XIII (upon which Part 4.1 is based) in view of the different constitutional basis of the legislation as originally proposed are now unnecessary. As a result, 'Registrable Australian Corporation' has become 'Registrable Australian Body', which term (as defined in s.9) includes within its compass unincorporated bodies as well as bodies corporate. All references throughout the Act to 'registrable Australian corporation' are thus to be amended to refer to 'registrable Australian body'. These amendments will not all be referred to individually in the explanatory memorandum for Chapter 4. The definition of 'foreign company' is similarly widened.

632. With the reintroduction of an applied laws regime, registration of these bodies will take place under the law of particular State or Territory jurisdictions; however amendments are incorporated so that there remains in practical effect a system of national registration of registrable Australian bodies and foreign companies. Of particular relevance to bodies registering under Chapter 4 is proposed s.102A, which in effect provides for the simultaneous registration of such bodies in all jurisdictions.

633. As well, bodies which are already registered under existing or previous 'foreign companies' legislation,

particularly CA Part XIII, will automatically be deemed to be registered under the Corporations Law of their jurisdiction. They will thus be able to take advantage of registration under the new scheme without the need to apply again for registration or to reodge documents.

Heading to Division 1 of Part 4-1

634. 'Corporations' becomes 'bodies'.

Section 340 - Registrable Australian corporation not to carry on business interstate unless registered

635. Re-enacted s.340 recognises the revised constitutional base of the legislation and brings the registration requirement for registrable Australian bodies substantially into line with CA s.512, upon which it is based. These bodies will still be able to carry on business in their 'home' jurisdiction without the need to register. If it is desired to carry on business in more than one jurisdiction, it will be necessary to register under Part 4.1 only once (para 340(c); cf. cl.14(2), s.102A). This simplifies the previous procedure under the CA, by which it was necessary to register in each jurisdiction in which such a body wished to carry on business.

Section 341 - Application for registration

636. The opening words of section 341 are amended to provide for a formal application to be made. This technical change is necessitated by proposed section 102A which refers to 'applications'.

637. 'Act' is amended to become 'law or a corresponding law' in subparagraph 341(e)(i). This reflects the change in terminology by which references to 'this Act' become 'this Law', as well as the revised constitutional basis of the legislation which requires recognition of the law as applied in other jurisdictions in some circumstances.

638. The amendment to paragraph 341(d) is consequential upon amendments to the provisions relating to registration of charges (cf. s.261) which relieve registrable local bodies from the requirements of those provisions.

639. The amendments to paragraphs 341(g) and (h) preserve the effect of the current provisions of the Act. The insertion of references to a 'corresponding law' is necessary so that only one register of registrable Australian bodies will be kept for the whole of Australia (rather than one for each jurisdiction), and so that the registration number of each body will be unique in Australia.

Section 342 - Cessation of business etc.

640. References in this section to carrying on business "interstate" are to be omitted, consistent with the adoption of the applied laws regime. The insertion of subsection 342(1)(A), however, preserves intact the effect of the section, so that a registrable Australian body will only be taken to have ceased to carry on business if it no longer carries on business in any jurisdiction.

Proposed section 343 - When a foreign company may carry on business in this jurisdiction

642. The re-enacted section 343 will recognise the revised constitutional basis of the legislation, limiting the prohibition on a foreign company's carrying on business to 'this jurisdiction'. In addition, the insertion of a reference to registration under a corresponding law will mean (as is the case with registrable Australian bodies) that one registration in any Australian jurisdiction will allow a foreign company to carry on business anywhere in Australia.

### Section 344 - Application for registration

643. The amendment to the opening words of section 344 provides for a formal application for registration to be made by a foreign company wishing to carry on business in the jurisdiction (that is, in effect, in Australia). It is similar to, and is made for the same reasons as, the amendment to the opening words of section 341.

644. The amendments to paragraphs 344(h) and (j) are similar to the amendments to paragraphs 341(g) and (h). They ensure that the registration numbers of foreign companies are unique throughout Australia, and that only one Australian register of foreign companies need be kept.

### Section 349 - Balance-sheets and other documents

645. The insertion into subsection (8) of a reference to a 'corresponding law' is necessary as a result of the revised constitutional basis of the legislation, in order to retain intact the effect of the subsection.

### Section 358 - Names

646. The re-enacted subsection 358(2) preserves the practical effect of the previously existing provision whilst recognising the territorial limitation imposed by the revised constitutional basis of the legislation. It reflects the retention and enhancement under the Corporations Law of the national system of reservation and registration of names (see Part 4.2).

### Section 359 - Registered office

647. With the procedure for simultaneous registration in every jurisdiction of a registrable body, each registration will result in a registered office requirement for the body. Subsections 359(2A) and (4A) provide that a registered body is to have only one registered office, and a change of location of that office effected under the Law of one jurisdiction will be recognised in all jurisdictions.

Section 360 - Certificate of registration

649. Reference to a 'corresponding law' in subsection (2) is inserted so as to preserve the evidentiary status of certificates of registration wherever issued. This change is necessary in view of the revised legislative basis of the legislation, by which registration is tied to a particular jurisdiction.

Section 361 - Notice of certain changes

650. The amendment to subparagraph 361(1)(d)(i) preserves the national operation of that provision, but clarifies it in view of the nature of the new scheme as an applied laws regime.

651. The substitution of 'this Act' with 'this law or a corresponding law' in subparagraph 361(1)(e)(i) is similarly necessitated by the applied laws structure of the new scheme. The substantial effect of the provision remains unaltered.

Section 362 - Publication of name etc.

652. Proposed subsection 362(1A) is necessary in view of the restricted territorial reach of the legislation of each jurisdiction in the new scheme. Re-enacted subsection 362(1) will exempt registrable local bodies from the requirements of section 362. The combined effect of these amendments will be to make the general operation of section 362 consistent with CA 517, upon which it is based. The amendments to subsections (9) and (10) merely reflect the territorial restrictions upon the law as it is applied in each jurisdiction.

Section 363 - Service of documents on registered body

653. Proposed subsection 363(6) will ensure that references in section 363 to provisions of the Corporations Law are read as references to the relevant provisions of the Corporations Law

of each jurisdiction. This will facilitate the operation of the section in providing for rules for service throughout Australia.

Section 364 - Application of certain State and Territory laws

654. The constitutional underpinning which was necessary to link this section to Commonwealth heads of power is to be omitted from re-enacted section 364. Reference to a power to hold land 'in this jurisdiction' is inserted to reflect the territorial limitations on the law as it is applied in each jurisdiction.

Section 365 - Application of certain State and Territory laws

655. Section 365 is to be repealed as it is not appropriate to the applied laws regime.

Division 4 - Transitional

656. The approach to be taken in respect of registrable Australian bodies and foreign companies which are already registered under the Companies Act and Codes will remain consistent with the treatment of existing companies. The proposed Division inserts transitional provisions which deem registrable Australian bodies and foreign companies already registered under the previous law to be registered under the new scheme. Thus it will not be necessary for these bodies to re-apply for registration.

657. This automatic deemed registration will be of considerable advantage in terms of time, cost and administrative efficiency both to the ASC and to the bodies involved.



Proposed Section 365A Bodies registered under previous foreign companies law of this jurisdiction

658. This section specifies the bodies to which the new Division 4 is to apply, namely, to registrable bodies which are registered in the jurisdiction immediately before the commencement of the Part.

Proposed section 365B - Deemed registration under Division 1 or 2

659. This is the operative section, by which the bodies referred to in proposed section 365A are taken to be registered as either registered Australian bodies or registered foreign companies from the date of commencement. No new certificates are to be issued to such bodies as a result of their deemed registration.

Proposed Section 365C - Registered office under previous law

660. This section provides that a body's registered office under the previous law is to be taken to be its registered office under the Corporations Law.

Proposed Section 365D - Transition to single registered office in Australia

661. Where a body becomes registered under the law of more than one jurisdiction as a result of Division 4, it will initially have registered offices in each of those jurisdictions. Proposed section 365D provides that within 6 months of commencement, the registered body must ensure that it has (in practical effect) only one registered office.

662. In the event that the body fails to comply with this requirement, the ASC may by giving notice to the body, specify one of the body's registered offices as its only registered office (more correctly, the single location of all of the body's registered offices).

Proposed Section 365E - Application of sections 359 and 362

663. This transitional provision retains the effect of recognising notices of office hours, change of office location, etc, given under the previous law under which the body was registered.

Proposed Section 65F - Application of section 363 in relation to certain bodies

664. A body registered as a result of Division 4 will be registered only under the Corporations Law of the jurisdiction(s) in which it was previously registered, unlike newly-registering bodies which will be registered simultaneously in every jurisdiction (s.102A).

665. Proposed section 365F recognises the service of documents provisions of the jurisdiction of registration, in order that interstate service is adequately provided for.

Part 4.2 Names

666. The system of national reservation and registration of company names which was established under Part 4.2 of the Act as originally enacted, will be retained and enhanced under the Corporations Law.

667. As a result of the agreement reached between the Commonwealth and the States and Northern Territory, information regarding business names which are registered under State and Territory business names legislation will be provided to the ASC. This information will be incorporated into a 'National Business Names Register', and names which are already reserved or registered whether under the Corporations Law or under business names legislation will not be available for reservation or registration through the ASC. This will reduce the problems of duplication of usage of names in Australia, and will add greatly to the effectiveness of the national scheme of registration of names.

668. The Corporations Law will also provide that names which are already registered in respect of bodies registered under existing or previous companies law (be they companies, registrable Australian bodies or foreign companies) will be ' automatically deemed to be registered under the new scheme. This represents an advance upon the Corporations Act as originally enacted, under which the names of such bodies were deemed to be reserved, but a fresh application for registration of the names was required.

#### Section 367 - Available names

669. The amendments to paragraph 367(1)(aa) and subsection 367(2) refer to the inclusion of names on the national business names register. The effect of these amendments will be to restrict the availability of names which are reserved or registered in any Australian jurisdiction, whether under the Corporations Law or any other business names legislation.

670. Re-enacted paragraph 367(2)(b) will clarify the intended operation of subsection 367(2) in relation to the abbreviations and symbols referred to in sections 368 and 371. Re-enacted subsections 367(3) and (4) introduce minor technical amendments designed to enhance and clarify the intended operation of those subsections. Proposed subsections (4A) and (4B) will ensure that a name which is included on the national business names register cannot be made available to a body corporate other than the body corporate in respect of which it is registered.

#### Section 369 - Use of words "Limited" and "No Liability"

671. The prohibition on carrying on business under a name or title which includes 'limited' or 'no liability' is to be extended to cover all persons, rather than merely corporations, in line with CA s.566, upon which this provision is based.

Proposed section 372A - Certain names taken to be registered at commencement of Law

672. Proposed section 372A will provide for the continued registration of the names of companies, registrable Australian bodies and foreign companies which were registered under the CA and which are deemed to be registered under the Corporations Law.

Section 374 - Name by which body corporate proposes to be registered as a company

673. The amended form of re-enacted subsection 374(1) and paragraph 374(5)(b) is consequential upon the substantial changes to Divisions 2 and 4 of Part 2.2 which now provide respectively for automatic deemed registration of companies and for transfer of registration.

674. The provision for continued registration of names of previously registered companies, and registered bodies (s.372A) makes provision for the continued reservation of those names unnecessary. Re-enacted subsection 374(4) recognises this, and provides for the continued reservation of the names of bodies which names are not deemed to be registered by s.372A, viz registrable Australian bodies and foreign companies which are not registered as such.

675. The amendment to paragraph (5)(b) reflects the amendments to Divisions 2 and 4 of Part 2-2 which make reference to those Divisions in paragraph (5)(b) now unnecessary.

Section 576 - Name by which registrable body proposes to be registered

676. Subsections 376(4) and (5) are to be omitted as they are no longer necessary in the light the automatic deemed registration of names of existing registered bodies under s.372A, and the deemed reservation of the names of such bodies which are not registered under the Corporations Law.

Section 383 - Omission of "Limited" in names of charitable and other companies

677. Re-enacted subsection 383(11) is amended to reflect the distinction which is made between 'corresponding law' and 'corresponding previous law' (s.58) as a result of the revised constitutional basis of the scheme. It is also amended to reflect the automatic deemed registration of 'Division 2' companies.

Proposed section 383A - Names reserved within 2 months before commencement

678. This is a new transitional provision which will ensure that reservations of names which were made before the commencement of the law will remain valid for 2 months from the date of reservation.

Parts 4.3 4.4 and 4.5 - No Liability Companies Investment companies and Australian Banks and Life Insurance Corporations

679. Parts 4.3 to 4.5 are the subject of only minor amendments. These relate mainly to the terminology of the provisions, reflecting the amended definition in section 9 of 'corporation'. The effect of these terminological amendments is to retain the meaning of the provisions affected.

680. 'Corporation' is to be substituted for 'Body corporate' throughout the relevant provisions of Parts 4.3 to 4.5, which results in specific amendments for this purpose to: Subsection 399(1) (omission of definition of 'body corporate', and consequential amendment of 'investment company' and 'net tangible assets'); subsections 399(4), (5) and (6); Section 401; subsection 402(3); Paragraph 404(1)(b); Subsection 404(2); and subsection 406(2).

Section 399 - Interpretation

681. Subsection 399(3) is to be amended so that registrable Australian bodies, as well as companies and foreign companies, may be declared to be investment companies. This is consistent with the approach in CA subsection 490(3), upon which it is based.

682. Proposed subsection 399(7) is a new transitional provision which will ensure that declarations previously made under CA subsection 490(3) will remain in force under the Corporations Law.

Section 401 - Restriction on investment of investment companies

683. The term 'corporation' is to be substituted for 'body corporate'.

Section 402 - Restrictions on underwriting by investment companies

684. The term 'corporation' is to be substituted for 'body corporate'.

Section 404 - Investment company not to hold shares in other investment companies

685. Proposed subsection 404(3) is a new transitional provision which will ensure that orders previously made by the NCSC under CA subsection 495(2) will remain in force under the Corporations Law.

Section 406 - Balance-sheets and accounts

686. The term 'corporation' is to be substituted for 'body corporate'.

AMENDMENTS TO CHAPTER 5Background

687. The amendments to Chapter 5 will return the external administration provisions of the Corporations Law to follow essentially the corresponding provisions in the Companies Act 1981.

Constitutional Underpinnings

688. A number of provisions in Chapter 5 were drafted to rely on the Commonwealth's legislative power with respect to trading and financial corporations and banking. As the Corporations Law will be applied as a State Law these provisions have now been omitted or redrafted.

Arrangements and Reconstructions

689. Part 5.1 deals with arrangements and reconstructions which do not come within the provisions of the Corporations Law relating to the acquisition of shares.

690. The provisions of Part 5.1 of the Corporations Law of a jurisdiction will apply to companies, registered foreign companies and registrable Australian bodies (other than those which are incorporated in the jurisdiction, or which being unincorporated, are formed or have a head office or a principal place of business in the jurisdiction) which have been registered under Division 1 or 2 Part 4.1 of the Corporations Law of the jurisdiction.

Receivers and Managers

691. The amendments to Part 5.2 mean that Part 5.2 of the Corporations Law will apply to the same bodies as those dealt with under Part X of the Companies Act 1981. Part 5.2 will apply to corporations, as that term is defined in section 9.

692. AS regards corporations which are companies, property of the company within or outside Australia may be dealt with under Part 5.2. In the case of a registered foreign company, its property within Australia may be dealt with under Part 5.2. As regards all other bodies coming within Part 5.2 of a Corporations Law of a jurisdiction, property of those bodies within that jurisdiction may be dealt with under Part 5.2.

Winding up bodies other than companies

693. Part 5.7, as originally enacted drew a distinction between Type A bodies and Type B bodies. Type A bodies were defined as foreign companies, corporations (other than companies) with more than 5 members or partnerships or unincorporated bodies that were formed in a Territory or in an excluded Territory and which consisted of more than 5 members. The Corporations Act relied on the Commonwealth's corporations and Territories powers to provide for the winding up of these bodies.

694. A Type B body was defined as a body corporate that was incorporated in a State or a partnership or unincorporated body that was formed in a State or outside Australia and the external Territories and which consisted of more than 5 members (but did not include an exempt public authority). The Corporations Act relied on the Commonwealth's insolvency powers to wind up these bodies.

695. With the Corporations Law being applied as a State law, the distinction between Type A bodies and Type B bodies is no longer relevant. Part 5.7 will now cover the same bodies as those covered by section 469 and section 553-557 of the Companies Act 1981.

696. A Part 5.7 body will be defined in section 9 as a registrable body (other than those that are incorporated in the jurisdiction, or being unincorporated, are formed or have their head office or principal place of business in the jurisdiction) that either carries on business in the jurisdiction or is registered under Division 1 or 2 of Part



4.1 of the Corporations Law of the jurisdiction. In addition, a partnership, association or other body (whether or not the body is a body corporate) that consists of more than 5 members, will also be a Part 5.7 body which can be wound up under that Part.

#### Reciprocity with other jurisdictions

697. The amendments insert a new Part 5.7A dealing with reciprocity between jurisdictions applying the Corporations Law. Orders made under Part 5.7 in one jurisdiction have effect in all jurisdictions (proposed section 588A).

698. Where a company is a recognised company in one jurisdiction, and the body is being wound up in another jurisdiction, the liquidator may exercise powers and functions under the Corporations Law of the first jurisdiction, to wind up the body's affairs in that jurisdiction (proposed section 5888).

699. Outstanding property of a defunct body that was a recognised company in one jurisdiction, vests in the person entitled to the property under the law of the body's place of origin (proposed section 588C).

#### Section 411 - Power to compromise with creditors and members

700. The proposed amendment to subsection 411(1) reflects the wording of subsection 315(1) of the Companies Act 1981 and will allow meetings of creditors to be held anywhere in Australia. Proposed subsection 411(3A) is a consequential amendment and reflects subsection 315(3) of the Companies Act 1981. It requires the court to consider where the members and creditors are located, when it is considering whether to make an order for the holding of a meeting outside the jurisdiction.

701. Proposed subsection 411(8) allows a body corporate authorised by a law of the jurisdiction to administer a compromise or arrangement, to be appointed under subsection

411(7) to administer the compromise or arrangement. Proposed subsection 411(8A) provides that subsection 411(7) does not disqualify a person from administering a compromise or arrangement under an appointment validly made before the commencement of section 411.

Proposed Section 415A - Enforcement of orders made in other jurisdictions

702. Proposed section 415A provides that where a court orders a meeting of creditors (including a consolidated meeting under proposed subsection (1A)) under the Corporations Law in one jurisdiction, that order has effect and may be enforced in any jurisdiction. Similarly, where a compromise or arrangement is binding on creditors in one jurisdiction, that compromise or arrangement is also binding on creditors in another jurisdiction where their debts are recoverable in a court in that jurisdiction.

Section 416 - Interpretation

703. The omission of the definition of corporation in Part 5.2 and the proposed amended definition of corporation in section 9 means that Part 5.2 will apply to the same bodies as Part X of the Code. The new definition of property now reflects the definition of property in subsection 321(1) of the Companies Act 1981.

Section 418 - Persons not to act as receivers

704. The amendment to subsection 418(3) replaces a reference to "an Act or a law of a State or Territory" with a reference to "a law of the Commonwealth, of a State or of a Territory". This amendment is necessary because the Corporations Law will be applied as a State law.

Section 428 - Statement that receiver appointed

705. The amendment to section 428 inserts a reference to a receiver being appointed whether "within or outside this jurisdiction". The amendment is necessary because the Corporations Law will be applied as a State Law.

Section 433 - Payment of certain debts, out of property subject to floating charges, in priority to claims under charge

706. The proposed amendment inserts a definition of registered body in the section. The amendment to subsection (2) ensures that the section applies to companies and registered bodies (other than registrable local bodies) in the circumstances outlined in subsection (2). The amendment to subsection (4) substitutes a reference to "foreign company" with a reference to "registered body". The amendment to subsection (5) is consequential to the amendment to subsection (2).

Section 444 - Notice of appointment and address of official manager

707. The proposed amendments to section 444 replace references to an Australian court with references to a court of this jurisdiction. This amendment is necessary because the Corporations Law will be applied as a State Law.

Section 459 - Winding up of company that has ceased to be a trading or banking corporation

708. This section is to be repealed. It was inserted to provide a link with Commonwealth heads of power and is therefore no longer required.

Section 461 - General grounds on which company may be wound up by court

709. The proposed amendment removes references to Commission Act and inserts reference to ASC Law.

Section 462 - Standing to apply for winding up

710. Subsection 462(1) is to be repealed. This amendment is consequential to the repeal of section 459.

Section 463 - Court may order winding up of company that is being wound up voluntarily

711. The amendment to section 463 removes the reference to section 459 which is to be repealed.

Section 464 - Application for winding up in connection with investigation under Commission Act

712. The proposed amendment replaces references to Commission Act with references to ASC Law.

Section 472 - Power of court to appoint official liquidator

713. Proposed subsection 472(3) provides that a liquidator will have such functions and powers as are conferred by the Corporations Law or by the rules of the appointing Court or as specified in the Court order appointing the liquidator.

Section 500 - Execution and civil proceedings

714. The proposed amendment to subsection 500(1) is a technical amendment only. The proposed amendment to subsection 500(2) inserts a reference to a creditors' voluntary winding up. This is a technical amendment only.

Section 501 - Distribution of property of company

715. The proposed amendment to subsection 501(1) replaces a reference to the Corporations Act with a reference to the Corporations Law.

Section 507 - power of Liquidator to accept shares etc. as consideration for sale of property of company

716. The proposed amendment to subsection 507(7) removes the reference to the law of the Australian Capital Territory. Such reference is no longer required as the Corporations Law will apply as a State law.

Section 556 - Priority payment

717. The proposed amendment replaces reference to Commission Act with a reference to ASC Law

Section 557 - Orders under Section 91 of the Commission Act

718. The proposed amendment replaces references to Commission Act with references to ASC Law.

Section 576 - Outstanding property of defunct company to vest in Commission

719. This provision as amended, will provide that after its dissolution, outstanding property of a company in the jurisdiction or elsewhere vests in the ASC. The amendment to subsection (2) replaces a reference to the Corporations Act with a reference to the Corporations Law.

Section 578 - Liability of Commission and Commonwealth as to property vested in Commission

720. The proposed amendment to section 578 replaces a reference to the Commonwealth with a reference to the Crown in any right. This reference is necessary because the Corporations Law will apply as a State law. After the proposed amendment, section 578 will reflect section 463 of the Companies Act 1981.

Section 581 - Courts to act in aid of each other

721. Proposed subsection 581(1) will require courts in each jurisdiction applying the Corporations Law, to act, in all external administration matters, in aid of and be auxiliary to other Courts exercising jurisdiction under the Corporations Law whether in the same or different jurisdictions.

Section 82 - Application of Part

722. The proposed amendment to subsection 582(1) replaces references to the Corporations Act or any other Australian law with references to the Corporations Law or any other law.

723. The proposed amendment to subsection 582(3) removes the references to Part 5.7 bodies incorporated outside Australia. The amendment is consequential upon the Corporations Law being applied as a State law.

724. Subsection 582(4) is to be omitted. This provision was inserted to preserve and extend the scope of Part 5.7. This provision is no longer required as the Corporations Law will be applied as a State Law.

Proposed Section 583 - Winding up Part 5.7 bodies

725. With the Corporations Law being applied as a State law, the distinction between Type A bodies and Type B bodies is no longer relevant.

726. A Part 5.7 body will be defined in section 9 of the Corporations Law of a jurisdiction as:

(a) a registrable Australian body that:

(i) is registered under Division 1 or 2 of Part 4.1 of the Corporations Law of that jurisdiction, or

(ii) carries on business in that jurisdiction,

other than one that:

(iii) is incorporated in that jurisdiction; or

(iv) is unincorporated, but is formed, or has its head office or principal place of business, in that jurisdiction; or

(b) a partnership, association or other body that consists of more than 5 members.

727. As a result, the range of bodies which can be wound up under Part 5.7 is the same as the range of bodies which could be wound up under Division 6 of Part XII of the Companies Act 1981 by virtue of section 469 of that Act.

728. Proposed section 583 makes the necessary adaptations to the provisions of Chapter 5 so that Part 5.7 bodies can be wound up under Chapter 5.

29. In particular proposed section 583 will provide:

\* that the principal place of business for a Part 5.7 body is, for the purposes of winding up, its registered office;

\* a Part 5.7 body may not be wound up voluntarily;

\* a Part 5.7 body may be wound up if it is unable to pay its debts, has been dissolved, has ceased to carry on business in Australia or has a place of business in Australia only for the purpose of winding up its affairs;

\* a Part 5.7 body may be wound up on just and equitable grounds;

a Part 5.7 body may be wound up if the ASC has stated in a report under Division 1 of Part 3 of the ASC Law, that the body cannot pay its debts and should be wound up or that the it should be wound up in the interests of the public, the members or the creditors.

#### Section 584 - Winding up Type B bodies

730. This section is to be repealed as there is no longer a need to distinguish between Type A and Type B bodies.

#### Section 588 - Outstanding property of defunct Part 5.7 Body

731. Proposed subsection 588(1) provides that section 588 will apply where, after the dissolution of a registrable body, there remains in the jurisdiction outstanding property of the body. The amendment is necessary to remove references to Type A and Type B bodies.

732. The amendment to paragraph 588(2) (a) replaces references to excluded Territories with references to external Territories.

#### Proposed section 588A - Enforcement of winding up orders made in other jurisdictions

733. Under proposed section 588A, where a Court makes an order under Chapter 5 in one jurisdiction, for or in connection with the winding up of a company or a Part 5.7 body, that order has effect and may be enforced in all jurisdictions.



Proposed section 588B - Functions and powers in this jurisdiction of liquidators from other jurisdictions

734. Proposed section 588B deals with a liquidator of a body that is a recognised company in one jurisdiction and which is being wound up under the Corporations Law of a second jurisdiction. The liquidator may exercise powers under Chapter 5 of the Corporations Law of the first jurisdiction to wind up the body's affairs in that jurisdiction.

Proposed section 588C - Outstanding property of defunct recognised company

735. Proposed section 588C provides that where there is property of a defunct recognised company remaining in a jurisdiction after the dissolution of the company, that property vests in the person entitled to the property under the law of the place of origin of the body.

Section 589 - Interpretation and application

736. The proposed amendment to paragraph 589(2)(a) replaces references to Commission Act with references to ASC Law. The amendment to paragraph 589(2)(b) is necessary because the Corporation Law will be applied as a State Law. It replaces a reference to laws or previous laws of a State or Territory with references to previous laws of this or any other jurisdiction.

737. The proposed amendment replaces references to the Corporations Act with references to the Corporations Law. In addition the proposed amendment also inserts a reference to "a previous corresponding law", that is, a corresponding provision of the Companies Code 1981.

Section 599 - Court may disqualify person from acting as director etc

738. The proposed amendments to subsections 599(1), (2), and (3) replace references to companies with references to relevant bodies. The term relevant body is defined in section 9 as being for these purposes, a corporation, a Part 5.7 body or a Part 5.7 body which is being wound up or has been dissolved.

739. Proposed subsection 599(4) provides that a person who is the subject of a section 599 order must not manage a corporation. Proposed subsection (5) points out that proposed section 91A sets out what is meant by managing a corporation.

Section 600 - Commission may order persons not to manage corporations

740. Paragraph 600(1)(a) is to be omitted and a new paragraph 600(1)(b) is to be inserted. Relevant body is defined in section 9 as being, for these purposes, a corporation, a Part 5.7 body or a Part 5.7 body which is being wound up or has been dissolved.

741. Proposed paragraph 600(1)(b) will provide that a relevant body is a section 600 body at a particular time if, within the preceding seven years, a liquidator has, under subsection 533(1) of the Corporations Law or a corresponding law of the Companies Code 1981, reported or lodged a report, with respect to the ability of the body to pay its unsecured creditors.

742. The amendment to paragraph 600(1)(c) replaces a reference to company with a reference to relevant body or body or section 600 body.

743. The proposed amendments to subsections 600(2), 600(3) and paragraphs 600(4)(a) replace references to companies with references to section 600 bodies or relevant bodies.

744. Proposed subsections (5) and (6) provide that a person who is the subject of an order under section 600, must not, without the leave of the Court, manage a body corporate. Proposed section 91A defines what is meant by managing a body corporate.

Proposed Section 601 - Winding up started before commencement of this chapter

745. Proposed section 601 provides that where the winding up of a body corporate started before the commencement of the Corporations Law, that winding up continues under the Companies Code 1981.

AMENDMENTS TO CHAPTER 6Background

746. Chapter 6 of the Corporations Act is based on the Companies (Acquisition of Shares) Act 1980 (CASA).

Jurisdictional nexus

747. The jurisdictional nexus in most provisions of Chapter 6 is provided by the incorporation of the target company in the jurisdiction. Therefore, the definition of "company" in s. 9 has been amended so that in Chapter 6 it means a body corporate that is incorporated, or taken to be incorporated, in the jurisdiction and has a share capital.

748. For this reason, the word "company" has been deleted and the term "body corporate" substituted in those provisions where bodies corporate incorporated in other jurisdictions are intended to be included, e.g. a number of definitions in s. 603, in para 629(a) (downstream acquisitions) which will continue to exempt acquisitions which result from an acquisition of shares in a body corporate which is incorporated in Australia and is a listed body, and in s. 619 (acquisitions of shares in small companies or with consent of shareholders) which is amended to ensure that it does not permit an acquisition which would result in a contravention of a provision of an applied law corresponding to s. 619 in relation to an acquisition of shares in a company to which that law applied.

749. In some provisions it is the location of the stock exchange that conducts a stock market in "this jurisdiction" which provides the nexus, since the requirement is imposed directly on a stock exchange (see e.g. s.675).

Removal of constitutional underpinning

750. In a number of provisions, constitutional restraints can now be removed, and the provisions brought into line with the present co-operative scheme legislation. These include:

- \* the omission of such phrases as "that is a corporation" in sub-ss. 615(4), 709(1) and a number of other provisions;
- \* the omission of a number of subsections, including 615(2) and (3), 709(2), 746(3) and (5), which applied to corporations and duplicated other provisions which refer to persons;
- \* the omission of "to the extent that the Constitution permits" in s. 730(1);
- \* the return of s. 732, which describes unacceptable circumstances, to the wording used in s. 60 CASA, after removal of references to a "corporation";
- \* similarly, s. 740 (the powers of the Court in relation to unfair or unconscionable agreements etc) has been amended along the lines of sub-s. 50(1) CASA, and sub-s. 740(2) (inserted for constitutional reasons) has been deleted.

#### Corresponding law/corresponding previous law

751. As a result of the revision of sub-s. 58(1) of the Corporations Law, a distinction is now drawn between corresponding laws (i.e. the Corporations Law of other jurisdictions) and corresponding previous laws (i.e. the cooperative scheme laws). This is reflected in a number of amendments, including those to subparagraphs (a)(i) and (ii) of the definition of "VA2" in sub-s. 618(2), in paras. 622(1)(b), (2)(c) and (3)(a), and in ss. 625, 626, 627 and 725.

#### Act/Law

752. References to other provisions in the Corporations Law as applied in all jurisdictions are now to the "Law", not the "Act". An example is the amendment to para. 644(3)(a).

Removal of reference to State/Territory

753. To ensure that the Law is applicable in every State or Territory certain references to "State or Territory" have been omitted, and, where possible, the more neutral term "this jurisdiction" substituted. In this Chapter, this is seen in the amendment to sub-s. 663(7) which requires publication of a notice when e.g. an offer to acquire shares in a company is declared to be free from a defeating condition. The amendment inserts the mode of publication where the target is not listed and requires the notice to be published in "this jurisdiction" and in each jurisdiction in which the shares in the company are listed for quotation on a stock market.

Section 603 - Definitions

'appropriate dealer', 'home stock exchange', 'marketable parcel', notifiable securities exchange', 'odd lot', 'recorded' and 'relevant official meeting'

754. These amendments reflect the new constitutional underpinning for the legislation.

'listed body', 'listed company'

755. These amendments reflect the new constitutional underpinning for the legislation and are consequential upon amendments to ss.612 and 629.

'listed rules'

756. This amendment rectifies a typographical error in the text.

'takeover announcement', 'takeover scheme'

757. These amendments clarify the jurisdictional nexus of the provisions using these terms. By virtue of the amendments, these terms refer to certain offers for shares in certain companies incorporated within the particular jurisdiction -see definition of 'company'.

Section 612 - Odd lots

758. This amendment substitutes the term 'listed body' for the term 'listed company', as a consequence of insertion of the new definition of 'listed body'.

Section 613 - Remedial orders

759. These amendments reflect the new constitutional underpinning for the operation of the Corporations Law.

Section 614 - Person to whom Chapter applies

760. Section 614 is being deleted as it is no longer necessary. The issue of the extraterritorial application of Chapter 6 is now dealt with in proposed s.110 of the Corporations Law.

Section 615 - Restrictions on acquisition

761. These amendments remove the former constitutional underpinning of this section, which is no longer necessary in the light of the new legislative scheme being adopted.

Section 618 - Acquisition of not more than 3% of voting shares permitted in each 6 months

762. This section is being amended to refer to actions taken under a cooperative scheme law. The amendment is necessary in light of the alteration to the definition of the term 'corresponding law' in s.58 of the Corporations Law.

Section 19 - Acquisition of shares in small companies or with consent of shareholders

763. These amendments reflect the new constitutional underpinning for the operation of the Corporations Law.

Sections 622, 625, 626 and 627

764. These sections are being amended to refer to actions taken under a previous cooperative scheme law. The amendments are consequential to the amendment to the term 'corresponding law' in s.58 of the Corporations Law.

Section 629 - Downstream acquisition resulting from acquisition of shares in a listed company

765. These amendments are intended to preserve the status quo, in the light of the new legislative basis for the operation of the Corporations Law. They are consequential upon the alteration to the definition of 'company', and the insertion of a definition for 'listed body'.

Section 642 - Offers not to contain certain conditions

766. The use of extrinsic material to assist the interpretation of a provision (in this case, the report of the Companies Securities Law Review Committee in August 1985 on Partial Takeover Bids) is now covered by s.109F of the Corporations Law, and the reference to s.15AB of the Acts Interpretation Act 1901 in sub-s.(6) is being omitted as unnecessary.

Section 644 - Registration of Part A statements and offers

767. This amendment reflects the new legislative basis for the operation of the Corporations Law.

Section 663 - Declaration where takeover offers are conditional

768. This amendment removes references in sub-s.(7) to 'State or Territory' and replaces them with references to 'this or another jurisdiction'. This amendment is intended to enable the text of the Corporations Law to be applied in each other jurisdiction, without need for further amendment.



Section 67 - Acceptance of offers

769. This amendment reflects the new constitutional underpinning for the operation of the legislation. In the case of para. 675(2)(b), the jurisdictional nexus is provided by the operation of a stock market in the particular jurisdiction.

Section 682 - Liability of dealers

770. This amendment is consequential on the amendment to the definition of 'takeover announcement'.

Section 684 - Withdrawal of offers

771. In paras. 684(3)(c) and 684(5)(b)(ii) the word 'Court' has been omitted and the phrase 'Australian Court' substituted. 'Court' is currently defined in s.9 to mean the Federal Court of Australia or the Supreme Court of a State or Territory and was used on the assumption that the jurisdiction would be federal jurisdiction under a Commonwealth Act of national application. These amendments take into account the new legislative basis for the operation of the legislation, under which jurisdiction will be conferred under the laws of the Commonwealth, the States and the Northern Territory. The term 'Australian Court' means a federal court or a court of a State or Territory.

Section 702 - Money or property unclaimed by dissenting shareholders

772. Section 702 provides for money or property, to which a dissenting shareholder is entitled but which is unclaimed to be transferred to the Minister to be dealt with under Part 9.7 of the Act. A transitional provision, sub-s.702(12), has been added. Unclaimed property that has not been transferred to the relevant State Minister under sub-s.42(14) CASA as at the commencement of the Corporations Act, shall be treated as if it were unclaimed property under s.702.

Sections 709, 710, 711, 718, 719, 720, 721, 722, 723, 724, 725, 730

773. These amendments remove the former constitutional underpinning of these provisions, in light of the new legislative basis for the operation of the Corporations Law.

Section 725 - No notice of rights

774. This provision is being amended to refer to action taken under a co-operative scheme law before the commencement of the Corporation Law.

Section 732 - Occurrence of unacceptable circumstances

775. This provision has been amended to remove the former constitutional underpinning, which is no longer necessary in the light of the new legislative basis for the operation of the Corporations Law.

Section 740 - Powers of court in relation to unfair or unconscionable agreements, payments or benefits

776. This provision is being amended to remove the former constitutional underpinning of the provision, which is no longer necessary in the light of the new legislative basis for the operation of the Corporations Law.

Section 746 - Announcements of proposed takeover bids

777. These amendments remove the former constitutional underpinning of sub-ss.(2) and (4), which is no longer necessary in the light of the new legislative basis for the operation of the Corporations Law.

Section 752 - Definition

778. This section appears in Part 6.13 which deals with transitional matters relating to Chapter 6. In this part, the phrase "State or Territory Acquisition of Shares Law" is no longer used since in, say, the New South Wales applied law the

only relevant "State or Territory Acquisition of Shares Law" will be the Companies (Acquisition of Shares) (NSW) Code, because it is the only one of the Codes that affects acquisitions which will be regulated by Chapter 6 of the NSW applied law. Therefore, s.752 has been repealed and the phrase has been omitted in a number of sections in this Part. Those references are being altered to refer to a previous law of the particular jurisdiction corresponding to this Chapter.

Section 753 - Acquisitions pursuant to Part A statements served before commencement of Chapter

Section 754 - Acquisitions pursuant to takeover announcements made before commencement of Chapter

Section 758 - Notices of substantial shareholdings

Section 759 - Information as to beneficial ownership of shares

779. These provisions are amended to reflect the operation of the Corporations law as an applied law and to recognise acts and matters occurring previously under the co-operative scheme legislation.

Section 755 - Application of State or Territory laws to exclude acquisitions not affected

780. This section is being repealed, because this issue is now dealt with in section 68 of the Corporations Act 1989. The effect of s.755 is preserved by that section.

AMENDMENTS TO CHAPTER 7Background

781. For the most part, Chapter 7 of the Corporations Act is based on the Securities Industry Act 1980 and Codes. The fundraising provisions of the Companies Act 1981 and Codes have been relocated in this Chapter. The amendments to Chapter 7 are designed to achieve one or more of the following purposes.

Removal of constitutional underpinning:(a) Extending the scope of provisions dealing with "eligible securities"

782. A number of provisions regulating conduct in relation to securities are framed in terms of "eligible securities". The term "eligible securities" is also used currently as a limiting factor in the terms "eligible investment advice business", "eligible securities business", "eligible securities conduct" and "securities recommendation" so as to bring the provisions employing these definitions within constitutional power.

783. This term is currently defined in s.9 to cover those securities over which the Commonwealth has direct legislative power, namely those issued by the Commonwealth, a Territory, a foreign trading or financial corporation, options over those securities and foreign currency options. This term is used to ensure that certain provisions are within constitutional power. As a result these provisions usually have a narrower application than the corresponding provision in the \$IA.

784. In the light of the new legislative basis for the operation of the legislation, henceforth it will not be necessary for the Corporations Law to refer to "eligible" securities. In several provisions this term will be replaced with the term "securities", which will have the effect of giving that provision similar coverage as the corresponding

provision in the SIA: see e.g. amendments to ss.845(1) to (4), 846(1), and 847(1), 853(a), 886, 948, 949(5), 950(2), 951(3), 952(3), 953(a), 954(1)(a) and (b), 954(2)(a) and (b) and 1114(1)(a), (c), (d) and (f).

(b) Simplification of provisions involving multiple prohibitions

785. Due to constraints in Commonwealth legislative power, a number of provisions in Chapter 7 contain a number of prohibitions directed towards achieving the one objective, each based on a specific head of constitutional power. For example, s.767 is aimed at prohibiting the establishment or conduct of an unauthorised stock market. Sub-section 767(1) prohibits a constitutional corporation establishing such a market, sub-s.767(2) prohibits a person doing so if "eligible securities" are traded on that market, sub-ss.767(3) and (4) prohibit a person from conducting an unauthorised market if a corporation trades in securities or a person trades in eligible securities on that market. Section 768 reinforces s.767 in that it contains three additional prohibitions, each directed at precluding trading in securities on unauthorised stock markets. In contrast, the corresponding provision in the SIA (s.37) simply prohibits a person establishing or maintaining an unauthorised stock market. In the light of the new legislative basis for the operation of the Corporations Law, these provisions are no longer appropriate. Amendments are therefore proposed to several provisions which have the effect of replacing multiple prohibitions with a simpler prohibition having a similar scope to that in the corresponding SIA provision: see e.g. amendments to ss.767, 768, 780, 781, 795, 796, 797, 997, 998, 999, 1000, 1001, 1025, 1064 and 1115.

(c) Removal of other constitutional devices

786. The scope of the operation of many other provisions is currently limited so as to clearly tie the provision to a head of constitutional power. For example, sub-s.815(2) which restricts the use a licensee may put to information supplied to

it by the ASC about a representative is limited in application under sub-s.815(7) to circumstances where the licensee or representative is a corporation or where the licensee's securities or investment advice business concerns eligible securities. These qualifications do not appear in the corresponding provision in the SIA (s.60K) and will not be necessary for the Act to operate as a law for the ACT. Amendments are therefore proposed to several provisions to remove such qualifications and generally bring the scope of those provisions in line with the SIA while preserving the policy of the Act: see amendments to ss.769, 770, 778, 815, 842, 843, 844, 872, 922, 945, 995, 1002 and 1097.

(d) Provisions affected by ss.55 and 81 of the Constitution

787. Several provisions in Parts 7.9 and 7.10 which impose levies on stock exchange members for the purposes of stock exchange fidelity funds have been framed to take into account the potential application of s.81 of the Constitution, which provides (so far as is relevant) that all money received by the Commonwealth forms part of consolidated revenue and can only be appropriated by law. For example, sub-s.902(1) currently requires a person to pay a securities exchange (application for membership) fidelity fund contribution before being admitted to membership of a securities exchange. Such a contribution is payable to the Secretary of the Attorney-General's Department on behalf of the Commonwealth and is then paid into consolidated revenue. The legislation then provides that an amount equal to the contribution is appropriated and payable to the securities exchange. The corresponding SIA provision, s.106, requires the person to pay the contribution directly to the securities exchange.

788. Further, because of the potential application of s.55 of the Constitution which requires tax to be imposed under discrete legislation dealing only with taxation, s.902 is subject to s.919 which provides that a person is not liable to pay a contribution under s.902 unless the contribution is

imposed under another Act. The application for membership contribution is actually imposed under the Securities Exchange (application for Membership) Fidelity Fund Contributions Act 1989. In contrast, s.106 of the SIA directly imposes the requirement to pay the contribution as s.55 of the Constitution is not relevant to a law enacted under the territories power or to State laws.

789. In the light of the new legislative basis for the operation of the Corporations Law, amendments are proposed to the following provisions to remove the constraints discussed above: ss.902, 904, 919, 938, 940 and 941.

(e) Direct imposition of licensing conditions

790. Several provisions in Chapter 7 presently oblige persons licensed as securities dealers and investment advisers to take certain action by making it a condition of the person's licence that the person take that action. For example, s.787 makes it a condition of a licence that, within one day after the happening of an event constituting a breach of a condition of the licence, the licensee must advise the Commission of the breach. Under the corresponding SIA provision, s.52, it is an offence if a licensee does not advise the Commission. These provisions were drafted to impose these obligations as conditions of the licence as there were doubts about the Commonwealth's legislative power to compel licensees, who may be natural persons, to do particular things which are not directly related to their dealing in or advising on eligible securities.

791. As the legislation will operate in each jurisdiction as a State or Territory law, it is now no longer necessary to impose these obligations as conditions of a licence. The following provisions are therefore amended to impose these obligations directly, with breaches of the provision being an offence with the same penalties as that in the corresponding provision in

the SIA: ss.787, 788, 790, 791, 792, 810, 811, 812, 856, 857, 858, 859, 860, 866, 867, 868, 869, 870, 873, 874, 889, 890 and 891. Consequential amendments are made to ss.855(2), 861 and 862.

(f) Removal of "additional operation" provision

792. Some provisions were inserted which purported to give some parts of Chapter 7 an extended operation without prejudicing the operation of the principal provisions. For example, s.994 purports to extend the operation of Part 7.11 to holding companies of constitutional corporations and their securities. These provisions are no longer necessary as the new legislative basis for the operation of the Act has enabled the provisions which they are purporting to extend to be directly given the desirable coverage. Accordingly, ss.823, 924, 994 and 1016 are being deleted.

(g) Application of Laws Amendments - Jurisdictional Nexus

793. The provisions of Chapter 7 of the Act are currently drafted to apply throughout Australia. It will not always be possible for the Corporations Law of any particular jurisdiction to have such an effect. Some provisions, particularly those which impose prohibitions, will be capable of operating as a law of a particular jurisdiction without further amendments. The operation of these provisions will be read in accordance with the usual presumption of statutory interpretation that their effect is usually territorially confined. This would be true of, for example, the provisions prohibiting carrying on a securities business without a licence (s.780) or offering securities without a prospectus (s.1018). Other provisions, particularly those imposing obligations, are being amended to ensure that there is an adequate nexus with the legislating jurisdiction. Generally speaking the approach in relation to the principal elements of Chapter 7 will be as follows:



\* Securities Exchange

Obligations will only be imposed under any Corporations Law in relation to exchanges located in that jurisdiction.

\* Securities Dealers and Advisors

Where the legislation imposes obligations on securities dealers and advisers, those provisions operate with respect to dealers or advisers who are actually licensed under a law of that jurisdiction to operate. New licensees will be taken to have applied for a licence under the laws of all jurisdictions (see new s.102A). A licence granted under the Securities Industry Code of a particular jurisdiction will be deemed to have been granted under the Corporations Law of that jurisdiction, to obviate the need to re-apply.

\* Fundraising

A prospectus will by virtue of the general recognition provision (s.58A) be recognised under the Corporations Law of each jurisdiction. This is similarly the case with structural obligations. Prospectuses lodged under the Corporations Law of a jurisdiction will be taken to be lodged for the purposes of the Corporations Law of all jurisdictions. A person seeking to register a registrable prospectus will as a matter of law need to apply for it to be registered under the Corporations Law of each jurisdiction. However, in practical terms this will involve simply making a single application under the "Corporations Law". Similarly in regard to approved deeds for prescribed interest schemes, a person will need to apply for approval under the Corporations Law of each jurisdiction. The overall effect is to enable the Corporations Law to operate with respect to fundraising across Australia as if it were a single national law.

794. The necessary results are in some respects achieved by amendments to definitions in Chapter 1 without further amending Chapter 7. For instance, the definition of securities exchange for the purposes of Chapter 7 refers to such exchanges located throughout Australia. Generally speaking, provisions purporting to impose obligations on an exchange could only do so if the exchange is located in the legislating jurisdiction. Accordingly for the purpose of such provisions, "securities exchange" is being redefined as an exchange located in the jurisdiction. Similarly, although a securities dealers licence granted under the Corporations Law of any jurisdiction will enable the licensee to carry on a securities business throughout Australia, the Corporations Law of any jurisdiction will only impose obligations on persons who are actually licensed under the law of that jurisdiction. This result is also effected by amendments to various definitions in Chapter 1.

795. In other cases, direct amendments have been made to the text of Chapter 7 to ensure an appropriate territorial nexus. For example, s.1047 requires corporations which issue debentures to keep a register of those debentures. It is being amended so as to impose obligations only on companies and registerable corporations incorporated in the legislating jurisdiction, and to foreign companies registered under the law of that jurisdiction.

#### Amendments to Chapter 7 - Individual Amendments

##### Section 767 - Conducting unauthorized stockmarkets

796. This amendment removes the former constitutional underpinning of this provision, in the light of the new legislative scheme being adopted. Refer to Part (b) of the Introduction.

##### Section 768 - Trading on unauthorized stockmarkets

797. This section is being repealed, as it is unnecessary in the light of the amendments to section 767.

Sections 769 and 770 - Approval of stock exchange or approved securities organisation

798. These amendments remove the former constitutional underpinning of these provisions. Refer to Part (c) of the Introduction. The amendments to sub-s.(1), to remove the words "that proposes to establish or conduct a stock market", reflect the fact that any body that wishes to seek approval as a stock exchange or approved securities organisation is, pursuant to proposed s.102A of the Corporations Law, taken to have applied for such approval under the Corporations Law of every jurisdiction, even if the body does not propose to establish a stock market in each jurisdiction. In addition s.769(3) is also amended to preserve its meaning as a consequence of the revision of the meaning of "corresponding law" in s.58.

Section 771 - Exempt stock market

799. This amendment is consequential upon the new meaning given to "corresponding law" in s.58.

Section 774 - Commission to be notified of amendments to rules

800. These amendments clarify the operation of this provision, by providing cross-references to the sub-sections which impose obligations to provide notices in respect of rule changes. The amendment to sub-s.(7) is consequential upon the amendment to s.58 of the Corporations Law, relating to corresponding laws.

Section 775 - Power of Commission to prohibit trading particular securities

801. Proposed s.775(1A) clarifies the scope of s.771 by making it clear that a reference to trading in securities on a stock market refers to such trading whether in the jurisdiction or elsewhere. The amendment to sub-s.(5) clarifies the operation of the provision, by providing a reference to sub-s.(4). In addition, s.775(7) is amended as a consequence of the amendment to s.58.

Section 777 - Power of Court to order compliance with or enforcement of business rules or listing rules securities exchange

802. This amendment removes the former constitutional underpinning of this provision, by substituting the term "body corporate" for the existing term "corporation".

Section 778 - Gaming and wagering laws not applicable to certain option contracts

803. This amendment removes the constitutional limitations on the operation of the current section. Refer to Part (c) of the Introduction.

Section 779 - Qualified privilege in respect of disciplinary proceedings

804. This amendment is consequential to the amendment in s.58.

Section 780 - Dealers

805. This amendment removes the former constitutional underpinning of this section. Refer to Part (b) of the Introduction.

Section 781 - Investment Advisors

806. This amendment removes the former constitutional underpinning of this section. Refer to Part (b) of the Introduction.

Section 782, 783 and 784

807. These amendments are consequential upon the amendment to the term "corresponding law" in s.58. The effect of the amendments is that an application made to or a licence granted by the NCSC under a co-operative scheme law is deemed to be an application made or licence granted, as the case may be, under the relevant Corporations Law.

Section 785 - Effect of certain provisions

808. This amendment is consequential upon the insertion of new s.102A, which provides that a person applying for a licence under a Corporations Law is taken to have applied also under the law of each other jurisdiction for such a licence. This requirement is imposed so as to enable the Corporations Law of each jurisdiction to apply to that licensee, so as to enable the Corporations Law to operate (as far as is practicable) as if it were a national law.

Section 786A - Security given under previous law

809. Proposed s.786A sets out transitional arrangements for securities maintained by licensees with the relevant corporate affairs regulatory agency as a condition of their licence under s.51(2) of the Securities Industry Act and Codes. Such securities are to continue to have effect with such modifications as prescribed or as the circumstances require as if the security was a security under s.786(2)(d) to which the ASC was a party. Proposed s.786A also enables the regulations under s.786(9) to provide that such a security may be applied in connection with circumstances occurring before the commencement of s.786.

Section 787, 788, 790, 791 and 792

810. These amendments reflect the new legislative basis for the operation of the Corporations Law, under which obligations may be imposed directly upon licensees. Refer to Part (e) of the Introduction.

Proposed section 793 - Commission may extend period for lodging statement

811. This amendment is consequential upon the amendment to s.58.

Proposed section 795 - Agreement with unlicensed persons

812. This new section is being inserted in place of current ss.795, 796 and 797. The current provisions are no longer necessary in the light of the new legislative basis for the operation of the Corporations Law.

Section 796 - Agreements with other unlicensed dealers and investment advisors

Section 797 - Agreements with other unlicensed persons

813. These sections are being repealed, as they are unnecessary following the insertion of new s.795.

Section 803 - Onus of establishing non-application of section 801 or 802

814. This technical amendment, which substitutes the term "court" for the term "Australian court", reflects the new constitutional underpinning of the legislation.

Section 810 - Licensee to keep register of holders of proper authorities

815. The amendment to sub-s.(1) reflects the new legislative basis upon which the Corporations Law will operate, under which obligations can be imposed on licensees directly rather than by way of a condition on a licence. Refer to Part (e) of the Introduction. The amendment to add new sub-s.(8) deals with a transitional matter. Where a person is already maintaining a register under a co-operative scheme law, the register so kept is sufficient for the purposes of the new Corporations Law. This sub-section is necessary in the light of the insertion into the co-operative scheme legislation of provisions mirroring Part 7.3 of the Corporations Law with effect from November 1989.

Section 811 - Licensee to notify Commission of location and contents of register

Section 812 - Inspection and copying of register

816. These amendments reflect the new legislative basis for the operation of the Corporations Law, under which obligations can be imposed directly upon licensees. Refer to Part (e) of the Introduction to Chapter 7.

Section 815 - Commission may give licensee information about representative

817. These amendments reflect the new constitutional underpinning of the operation of the Corporations Law. New sub-s.(4A) makes clear that a reference in sub-ss.(2), (3) or (4) to sub-s.815(1) shall only be taken as a reference to sub-s.(1) of the Corporations Law of this jurisdiction. Sub-s.(7) is being amended to remove the former constitutional underpinning of that provision, which related to eligible securities or the conduct of a securities business by a corporation. These limitations are no longer necessary in the light of the new legislative basis for the operation of the Act. New sub-s.(8) gives sub-s.(6) an extended operation, insofar as it relates to information given in accordance with sub-s.(1) of the Corporations Law of this jurisdiction. In such a case, new sub-s.(8) provides that the information may be given to a court of an external Territory or of a country outside Australia in relation to a proceeding other than a proceeding for an offence.

Section 818 - Liability where identity of principal unknown

818. The amendments to this section and the following sections in Division 4 of Part 7.3 reflect the new legislative basis underlying the operation of the Corporations Law. This section applies where it is established that a person has acted as a representative for some person, at a time while that person is a representative of two or more persons, but it is not proved for the purposes of the proceeding which principal the representative was acting for on the particular

occasion. The effect of the section is that each principal who is a party to the proceeding is deemed to be liable in respect of that conduct as if that principal were the unknown principal. The effect of the amendments is that, in a proceeding in any court upon which jurisdiction is conferred under the Corporations Law of this jurisdiction, that presumption will apply, regardless of whether the representative engaged in the conduct within the particular jurisdiction or elsewhere.

Section 819 - Liability of principals where act done in reliance on representative's conduct

819. This section renders principals liable for the acts of their representative, whether or not those acts were within the scope of the representative's authority, where it is reasonable to do so. The amendments have the effect that the section applies in a proceeding in any court upon which jurisdiction is conferred by the Corporations Law of this jurisdiction. However, new sub-s.(3A), for the purpose of clarifying the jurisdictional nexus, makes clear that before the section operates, one or more of the following connections must be established:

- \* The conduct of the representative was engaged in within the particular jurisdiction; or
- \* The act of the client in reliance on the representative's conduct was done within the jurisdiction; or
- \* The loss or damage was suffered by the client within the jurisdiction.

Section 820 - Presumptions about certain matters

820. These amendments are similar to the amendments being made to s.818, and reflect the new legislative basis for the operation of the Corporations Law. The effect is that s.820



applies for the purposes of a proceeding in any court seized with jurisdiction under the Corporations Law of this jurisdiction, regardless of where the particular conduct took place.

Section 823 - Additional operation of Division

821. Section 823, which provided an additional operation to Division 4, is being repealed. In the light of the new constitutional underpinning for the operation of the legislation, s.823 is no longer necessary. Refer to Part (f) of the Introduction to Chapter 7.

Section 840 - Effect of previous orders under laws corresponding to section 838

822. These amendments are a consequence of:

- \* the amendments to s.58; and
- \* the new method for citing the Corporations Law. The reference to "this Act" is being changed to "this Law". The effect is that an order in force under a previous co-operative scheme law has effect after the commencement of the Corporations Law, for the purposes of the Corporations Law of all jurisdictions.

Section 842, 843, 844

823. These amendments reflect the new legislative basis for the operation of the Corporations Law, which allows for the direct imposition of obligations on dealers. Refer to Part (e) of the Introduction to Chapter 7.

Section 845, 846, 847, 853

824. These amendments reflect the new constitutional underpinning for the operation of the legislation, which is

not restricted by the heads of Commonwealth constitutional power. Refer to Part (a) of the Introduction to Chapter 7. Section 847 is also amended as a consequence of the amendment to s.58.

#### Section 854 0 Interpretation

825. This amendment is consequential upon the amendment to sub-s.855(1), which includes a reference to a licensee. For the purposes of that reference, a licensee is a person who holds a dealers licence under Part 7.3 of the Corporations Law of this jurisdiction.

#### Section 855 - Application of Part

826. This section specifies those persons to whom Part 7.5 applies. That Part deals with dealers' accounts and audit. New sub-s.(1) makes clear that Part 7.5 applies in relation to a licensee in relation to the securities business of that licensee whether carried on in this jurisdiction or elsewhere. The effect is that, where a provision of this Part requires the keeping of accounts, those accounts must reflect the dealer's operations in all jurisdictions. The amendment to sub-s.(2) reflects the new legislative underpinning of the operation of the Corporations Law, which enables obligations to be imposed directly upon licensees, rather than as a condition of their licence.

#### Sections 856, 857, 858, 859, 860, 861 and 862

827. These amendments reflect the new legislative basis for the operation of the Corporations Law, which enables obligations to be imposed on licensees directly, rather than as a condition of their licences. Refer to Part (e) of the Introduction to Chapter 7.

Section 865 - Interpretation

828. This amendment is consequential on amendments to other sections within Part 7.6, which include reference to "a licensee" and to "a book, security, trust account or business of a dealer who carries on business in partnership".

Proposed section 865A - Application of Part

829. This section has been inserted, in light of the new constitutional underpinning for the legislation, to clarify the application of Part 7.6, which deals with money and scrip of clients held by dealers. It provides that, other than section 872, this Part applies in relation to a licensee licensed under the Corporations Law of this jurisdiction in relation to the licensee's securities business, whether carried on in this jurisdiction or elsewhere.

Sections 866, 867, 868, 869 and 870

830. These amendments reflect the new legislative basis for the operation of the Corporations Law, which enables obligations to be imposed on licensees directly rather than by way of conditions on the licence. Refer to Part (e) of the Introduction to Chapter 7.

Section 871 - Trust money not available in respect of dealer's own debts

831. This amendment reflects the new legislative basis for the operation of the Corporations Law. It provides that money in a trust account of the holder of a licence, whether the licence was granted under the law of this jurisdiction or another jurisdiction, is not liable to be attached or taken in execution under the process of any court exercising jurisdiction conferred by the Corporations Law of this jurisdiction.

Section 872 - Money lent to dealer

832. This amendment removes the former constitutional underpinning of this provision. Refer to Part (a) of the Introduction to Chapter 7.

Section 873 - Scrip in dealer's custody

833. This amendment reflects the new legislative basis for the operation of the Corporations Law. Refer to Part (e) of the Introduction to Chapter 7.

Section 874 - Court may freeze certain bank accounts of dealers and former dealers

834. The amendments to sub-para.(1)(a)(ii) and sub-s.(3) make clear that the Court's power under this section to freeze accounts of a dealer extends to accounts held in other jurisdictions. The other amendments to this section reflect the new legislative basis for the operation of the legislation. Refer to Part (e) of the Introduction to Chapter 7.

Section 879 - Interpretation

835. This amendment is consequential on the omission of sub-s.880(2), which reflects the new constitutional underpinning for the operation of the legislation. Sections 879 and 880 determine the persons to whom, and the securities to which, Part 7.7 applies. The effect of the amendments is that Part 7.7 applies to any person who holds a licence under the Corporations Law of this jurisdiction, holds a proper authority from a person who holds such a licence, or is a financial journalist. The Part applies in respect of the holding of those persons in any public company in Australia, or any body corporate or other person included in the official list of any securities exchange in Australia.

Section 880 - Application of Part

836. The repeal of sub-s.(2) is consequential upon the amendment to sub-s.879(1), described above.

837. This amendment reflects the new constitutional underpinning for the legislation. Refer to Part (a) of the Introduction to Chapter 7.

Section 886 - Power of Commission to require certain information

838. These amendments reflect the new legislative basis for the operation of the Corporations Law, which enables obligations to be imposed on licensees directly. Refer to Part (e) of the Introduction to Chapter 7.

Section 892 - Accounts in respect of deposits

Section 895 - Fidelity funds

Section 899 - Payment to the credit of the fidelity fund of a futures exchange or futures association

Section 901 - Management sub - committee

839. These amendments are consequential upon the amendment to s.58.

Section 902 - Contribution to fund

840. This amendment reflects the new constitutional underpinning of the legislation, which enables monies levied under the Corporations Law to be paid directly to the relevant securities exchange, rather than having to pass through the Consolidated Revenue Fund, as was specified under existing s.902. Refer to Part (d) of the Introduction to Chapter 7.

Section 904 - Levy in addition to annual contributions

841. This amendment also removes the former constitutional underpinning of s.904. Refer to Part (d) of the Introduction to Chapter 7.

Section 907 - Application of fund

Section 908 - Claims against the fund

Section 910 - Notice calling for claims against fund

842. These amendments are consequential upon the amendment to s.58.

Section 919 - Contribution or levy not payable unless imposed by an Act

843. This section makes clear that a person need not pay a contribution under sub-s.902(1) or (2) or a levy under s.904, unless that levy or contribution was imposed by the Corporations Law of this jurisdiction. The current s.919 is no longer necessary, as it related to a constitutional limitation upon Commonwealth legislative power which is not relevant to the operation of a State or Territory law.

Section 920 Interpretation

844. The new definition of "Fund provisions" refers to the provisions of Part 7.10 of the Corporations Law of each jurisdiction. The amendments to sub-ss.(3), (4) and (5) reflect the fact that the Corporations Law now operates as a State or Territory law, rather than a stand-alone Commonwealth Act. As such, these provisions as amended will replicate the effect of the corresponding provisions of the Securities Industry Act 1980 and Codes.

Section 922 - Becoming insolvent

845. These amendments remove the former constitutional underpinning of s.922, which is no longer necessary in light of the new legislative basis being adopted.

Section 924 - Additional operation of certain provisions

846. This provision is being deleted, as it is unnecessary in light of the new legislative basis for the operation of the Corporations Law. Refer to Part (f) of the Introduction to Chapter 7.

Section 925 and 926 - Securities Exchange Guarantee

847. The provisions dealing with the establishment of the Securities Exchanges Guarantee Corporation (SEGC), which are currently found in ss.925 and 926, have been relocated in the light of the new legislative basis for the operation of the Corporations Law, to ss.59 and 60 of the Corporations Act 1989. Therefore, those provisions are being deleted. New s.926, which mirrors existing s.122BA of the Securities Industry Codes, requires the SEGC to perform the functions and exercise the powers that are conferred on it by Part 7.10 of the Corporations Law of the particular jurisdiction.

Sections 928, 933 and 936

848. These amendments are consequential upon the amendment to the interpretation of the term "corresponding law" in s.58 of the Corporations Law. The references to a corresponding law in these provisions are being amended to make clear that they refer to a previous co-operative scheme law.

Section 929 - Establishment

849. The subject matter of current s.929 is now dealt with in s.51 of the Corporations Act 1989. Section 929 is therefore being amended along the lines of s.122CA of the Securities Industry Codes.

Section 938 - Levy on reportable transactions

850. The amendments to this section remove the former constitutional underpinning of the section, and reflect the new legislative basis for the operation of the Corporations Law. As such, the amendments bring the text of s.938 into line with the text of the corresponding section of the Securities Industry Code, s.122EB. Refer to Part (d) of the Introduction to Chapter 7.

Section 940 - Levy on particular exchanges

851. These amendments remove the former constitutional underpinning of s.940, and reflect the new legislative basis for the operation of the Corporations Law. The amendments bring the text of s.940 into line with the text of the corresponding Securities Industry Code provision, s.122FB. Refer to Part (d) of the Introduction to Chapter 7.

Section 941 - Levy by participating exchange on members or member organisations

852. These amendments remove the former constitutional underpinning of this provision. Refer to Part (d) of the Introduction to Chapter 7. As a result of the new legislative basis for the operation of the Corporations Law, the text of the section as amended will follow more closely the text of the corresponding provision of the Securities Industry Code, s.122FC.

Section 942 - Levies not payable unless imposed by an Act

853. The current s.942 is being repealed as it is no longer necessary in light of the new legislative basis for the operation of the scheme. Refer to Part (d) of the Introduction to Chapter 7. New s.942 makes clear that a person is not liable to pay a levy or contribution within this jurisdiction unless the levy or contribution was imposed by an Act of this jurisdiction.



Section 945 - Payments into and out of development account

854. This amendment removes the former constitutional underpinning of the provision, in light of the new legislative basis for the operation of the Corporations Law. Refer to Part (c) of the Introduction to Chapter 7.

Sections 948, 949, 950, 951, 952, 953 and 954

855. These amendments remove the former constitutional underpinning of these sections, which is no longer necessary in light of the legislative scheme now being adopted. Refer to Part (a) of the Introduction to Chapter 7. New sub-s.(2A) of s.954 provides that, where a claim has been made and allowed by SEGC under the Corporations Law of another jurisdiction in respect of a transaction, SEGC shall not allow a claim under the law of this jurisdiction in respect of the same transaction. This section prevents double recovery of losses suffered.

Proposed section 961A - Nexus between dealer and this jurisdiction

856. This new section deals with claims made under ss.957 and 958. So as to provide an appropriate jurisdictional nexus, it provides that a claim may not be made under ss.957 or 958 unless on the day of the unauthorised execution the dealer was carrying on a securities business in this jurisdiction or if the dealer was not so carrying on such a business on the day, the last securities business that the dealer carried on before that day was carried on in this jurisdiction.

Proposed section 961B - Preventing double recovery

857. This new section, like proposed sub-s.954(2A), prevents double recovery under more than one Corporations Law. It provides that, where a claim has been made under ss.957 or 958 of the Corporations Law of another jurisdiction, and that claim has been paid, SEGC must not allow a claim under the corresponding section of the Corporations Law of this jurisdiction in respect of the same loss.

Section 962 - Interpretation

858. This amendment reflects the new legislative basis for the operation of the Corporations Law. As such, it follows the text of the corresponding Securities Industry Code provision, sub-s.122Q(2).

Proposed section 966A - No claim unless nexus between dealer and this jurisdiction

859. This amendment reflects the new constitutional underpinning for the Corporations Law, as a State or Territory law rather than a stand-alone Commonwealth Act. Like proposed s.961A, it requires an appropriate nexus between the dealer and this jurisdiction to enable a claim to be made under the relevant provisions of the Corporations Law of this jurisdiction. As such, it corresponds to s.122V of the Securities Industry Code.

Section 977 - Arbitration of amount of cash settlement of certain claims

860. These amendments reflect the new legislative basis of the Corporations Law. As amended, the wording of this section will more closely follow the corresponding Securities Industry Code provision, s.122YH. The amendments to sub-ss.(4), (5) and (6) are consequential upon the amendment to s.58 of the Corporations Law, relating to the term "corresponding law".

Section 988, 989, 990 ,992 and 993

861. These amendments are consequential upon the amendment to s.58, relating to the term "corresponding law". All of these sections are being amended to refer to previous co-operative scheme laws.

Division 1 of Part 7.11 - Additional operation of Part

862. This Division is being repealed, as it is no longer necessary in the light of the new legislative basis for the operation of the Corporations Law. Refer to Part (e) of the Introduction to Chapter 7.

Section 995, 997 and 998

863. These amendments remove the former constitutional underpinning of these provisions. Refer to Part (a) of the Introduction to Chapter 7.

Section 999 - False or misleading statements in relation to securities

864. This amendment removes the former constitutional underpinning of this provision. Refer to Part (a) of the Introduction to Chapter 7.

Section 1000, 1001 and 1002

865. These amendments remove the former constitutional underpinning of these provisions, in the light of the new legislative basis for the operation of the Corporations Law. Refer to Part (a) of the Introduction to Chapter 7.

Part 7.12, Division 1 - Additional operation of Part

866. Division 1 of Part 7.12 is being repealed. It formerly gave an additional operation to Part 7.12 in respect of holding companies. In the light of the new legislative basis for the operation of the Corporations Law, under which holding companies are covered by the primary provisions, Division 1 is no longer necessary.

Section 1017 - Exceptions

867. Section 1017(d) enables the making of regulations to exempt registrable Australian corporations from the prospectus provisions in their jurisdiction of incorporation. It is being omitted as a consequence of amendments to the definition of 'corporation' which will, so far as the fundraising provisions are concerned, have the effect of preserving the status quo on the extent to which such provisions apply to registrable Australian corporations (e.g. building societies and credit unions). The preservation of the status quo in this regard gives effect to an agreement with State Ministers.

Section 1018 - Prospectus in relation to securities

868. This amendment is consequential upon the amendment to s.58.

Section 1020A - Registration of securities

869. The effect of this amendment together with proposed s.102A is that a person seeking to register a prospectus must make a written application for the purposes of the Corporations Law of each jurisdiction. In practicable terms this will be achieved by making a written application under the "Corporations Law" without reference to a jurisdiction, which will be taken to be a reference to the Corporations Law of all jurisdictions. It is only by requiring a person to make an application for registration under all laws that it is possible to ensure that all the laws will apply in relation to registrable prospectuses. The purpose of this is to enable the Corporations Law of all jurisdictions so far as it concerns registrable prospectuses to be administered as if they constituted a single national law.

Section 1025 - Certain notices etc not to published

870. In light of the alteration to the definition of the term "corporation" in s.9 of the Corporations Law, and in light of the new legislative basis for the operation of these provisions, sub-s.(4) is no longer necessary and is therefore being repealed.

Section 1030 - Document containing offer of securities for sale deemed to be prospectus

871. This amendment reflects the new legislative basis for the operation of these provisions. The effect is that para (1)(b) includes a reference to the Corporations Law of other jurisdictions.

Section 1047 - Register of debenture holders and copies of trust deed

872. These amendments reflect the new legislative basis for the operation of the Corporations Law. The following bodies are required to keep a register of holders of debentures under the Corporations Law of this jurisdiction:

\* a company that was incorporated under the Corporations Law of this jurisdiction, that issues debentures, whether in this jurisdiction or elsewhere (new sub-s.(1));

\* a registrable Australian body registered under the Corporations Law of this jurisdiction, that issues debentures in this jurisdiction, or in any jurisdiction pursuant to an application in which an address in this jurisdiction was specified as the address of the applicant for the debentures (new sub-s.(2)); or

\* a registered foreign company under the Corporations Law of this jurisdiction that issues debentures, whether in this jurisdiction or elsewhere (new sub-s.(2a)).

Section 1048 - Branch registers of debenture holders

873. This amendment, which is a consequence of the new legislative basis for the operation of the legislation,

clarifies the application of s.1048. As amended the section will apply to any corporation that is required by s.1047 of the Corporations Law to keep a register of holders of debentures.

Section 1049 - Specific performance of contracts

874. This amendment, reflects the new legislative basis for the operation of the legislation. As amended, it will follow the text of the corresponding Companies Code provision, s.149.

Section 1050 - Perpetual debentures

875. This amendment also reflects the new legislative basis for the operation of the Corporations Law. As amended, the provision will closely follow the wording of the corresponding Companies Code provision, s.150.

Section 1052 - Re-issue of redeemed debentures

876. This amendment is also a consequence of the new legislative basis for the operation of the provisions. As amended, the provision will closely follow the effect of the corresponding Companies Code provision, s.151.

Section 1052 - Qualifications of trustee for debenture holders

877. These amendments clarify the jurisdictional nexus of s.1052(1)(a) and bring the scope of s.1052(1)(b) into line with s.152 of the CA. As the relevant date for the purposes of s.1052(7)(a) will vary from jurisdiction to jurisdiction, that provision is amended to enable the appropriate date for particular jurisdictions to be set by application order.

Section 1054 - Contents of trust deed

878. These amendments clarify the jurisdictional nexus for the application of s.1054(1) and bring the scope of s.1054(2) into line with s.154 of the CA.

Section 1064 - Issue of prescribed interests restricted

879. These amendments remove the former constitutional underpinning of this provision. In the light of the legislative scheme now being adopted, the multiple prohibitions that formerly supported the operation of this section are no longer necessary and are being replaced by a simple prohibition along the lines of s.169 of the CA.

Section 1065 - No issue without approved deed

880. These amendments reflect the new constitutional underpinning for the operation of the legislation. As such, the former constitutional limitations can be removed, and it is necessary to include a reference to a deed approved for the purposes of the Corporations Law of each jurisdiction.

Section 1066 - Approved deeds

881. These amendments are a consequence of the new legislative scheme being adopted to support the operation of these provisions. They are also partly consequential upon the amendment to s.58 of the Corporations Law, dealing with the term "corresponding law". Existing approved deeds will only be taken to be approved deeds under the Corporations Law of the jurisdiction of original approval. However, by virtue of the amendments to s.1065, prescribed interest will be able to be issued throughout Australia pursuant to such a deed.

Section 1067 - Approvals

882. The purpose of this amendment is to require a person seeking approval of a deed or approval as a trustee or representative for the purposes of a deed, to apply to the Commission for such approval under the Corporations Law of

each jurisdiction. It is only by applying under the law of each jurisdiction that it is possible to ensure that the laws of each jurisdiction affect such an approved deed. The purpose of requiring a person to apply under the Corporations Law of each jurisdiction is to enable the Corporations Law of all jurisdictions to be administered as if they were a single national law.

Section 1068 - Lodgement of consolidated copies of deed

882A. These amendments clarify the jurisdictional nexus for the application of s.1068 and include a reference to a previous co-operative scheme law as a consequence of the amendment to s.58.

Section 1069 - Payments to be included in deeds

882B. The amendments to this provision clarify the jurisdictional nexus for the application of s.1069 and inserts appropriate references to a previous co-operative scheme law, as a consequence of the amendment s.58.

Section 1070 - Register of holders of prescribed interests

882C. This amendment clarifies the jurisdictional nexus for the application of s.1070.

Section 1073 - Consequences of contravention

882D. This amendment is a consequence of the new legislative basis being adopted to support the operation of the Corporations Law.



Proposed section 1077A - Exempt securities

882E. This provision clarifies the operation of the Division 6 of Part 7.12, which deals with hawking of securities. It states that this Division does not apply in relation to an invitation to subscribe for or buy exempt securities in relation to this jurisdiction within the meaning of s.69A of the Corporations Law, or an offer of such securities for subscription or purchase. The purpose of s.69A is to maintain the status quo with respect to those securities to which the hawking provisions of the Companies Code apply.

Section 1084 - Powers of Commission

883. This minor amendment, which is a consequence of the new legislative basis being adopted, includes a reference in sub-s.(9) to a co-operative scheme law. It is consequential upon the amendment to the term "corresponding law" in s.58 of the Corporations Law.

Section 1807 - Certificate to be evidence of title

884. This amendment is a consequence of the new legislative basis being adopted to support the operation of the Corporations Law. A certificate issued by the company to specify shares held by a member of the company must state the jurisdiction of incorporation of the company.

Section 1091 - Instrument of transfer

885. In light of the new legislative basis for the operation of the Corporations Law, it has been necessary to redraft sub-ss.(4), (5) and (7) along the lines of the corresponding Companies Code provision, s.183. In addition, new sub-s.(1A) has been inserted to specify that an instrument of transfer is not a proper instrument of transfer for the purposes of this provision unless:

\* in the case of a transfer of marketable securities within the meaning of Division 3 of Part 7.13 - it complies with the requirements of that Division; or

\* in any other case - it shows the jurisdiction of incorporation of the company concerned.

The latter requirement is a consequence of the new legislative scheme now being adopted.

#### Section 1097 - Interpretation

886. The amendments to the definitions of "eligible body" and "issuing body" more closely align these definitions to the corresponding definitions in s.189 of the Companies Code. Because the legislative basis being adopted to support the scheme is similar to the co-operative scheme legislation, the existing definitions in the Companies Code are considered appropriate.

#### New section 1108A - Marketable securities and rights from other jurisdictions; Effect of sections 1105 to 1108

887. This new section corresponds to s.194D of the Companies Code, and enables the stamping of a transfer for the purposes of the Corporations Law of this jurisdiction to be recognised for the purposes of the Corporations Law of each other jurisdiction.

#### Section 1110 - Operation of Division

888. This amendment substitutes the term "Law" for the term "Act", in light of the citation of these provisions as the Corporations Law rather than as an Act.

Section 1112 - Offences

889. These amendments:

- \* establish a jurisdictional nexus for the operation of s.1112 (see para. (g) of the introduction above); and
- \* make minor technical changes to sub-ss.(2), (3) and (5).

Section 1114 - Power of Court to make certain orders

890. This amendment reflects the new constitutional underpinning for the Corporations Law. Refer to Part (a) of the Introduction to Chapter 7.

Section 1115 - Restrictions on use of titles "stockbroker", "shareholder" and "stock exchange"

891. These amendments remove the constitutional underpinning of these provisions, in light of the new legislative basis which is being used for the operation of the Corporations Law. Refer to Part (b) of the Introduction to Chapter 7.

Section 1117 - Concealing etc of books relating to securities

892. This amendment, which provides a jurisdictional nexus for the operation of this provision, is a consequence of the adoption of the new legislative scheme.

AMENDMENTS OF CHAPTER 8Background

893. The provisions contained in Chapter 8 of the Corporations Law are largely based on those contained in the Futures Industry Act 1986.

Removal of Constitutional Underpinning

894. Whereas under the Futures Industry Act a direct prohibition was sufficient to outlaw a particular type of conduct, Chapter 8 as originally enacted relied on multiple prohibitions to outlaw the same type of conduct to ensure the widest coverage of the Act. These multiple prohibitions were based on constitutional heads of power of the Commonwealth. Furthermore the scope of some offence provisions had to be limited so as to connect clearly the provision to a constitutional head of power. As the Corporations Law will now be applied as a State law, these constitutional underpinnings are no longer required and will be removed by the amending Act.

895. In particular the following terms used in Chapter 8 have been removed.

\* Eligible corporation. This term was used for constitutional purposes to qualify various provisions of Chapter 8 by limiting corporations to trading and foreign corporations.

\* Eligible communication services. This term was defined in section 9 to mean postal, telephonic and other like services and was used to bring provisions of Chapter 8 within section 51(5) of the Constitution.

\* Eligible circumstances. This term was used for constitutional purposes to qualify provisions by limiting them to matters relating to interstate trade and commerce, banking and insurance, and Territories.

\* Eligible futures contract. This phrase referred to futures contracts acquired or to be acquired in eligible circumstances or on an eligible futures market.

\* Eligible futures broker. This phrase referred to corporations holding a brokers licence, certain exempt brokers and prescribed persons.

\* Eligible futures broking business. This expression referred to a broking business dealing in futures contracts either on behalf of corporations or in eligible circumstances on behalf of other persons.

\* Eligible futures adviser. This expression referred to futures advisers that were corporate licensees, certain exempt futures advisers and prescribed persons.

\* Eligible futures advice business. This expression referred to businesses that involved advising corporations, giving futures reports to corporations, organising or giving futures reports to other persons in eligible circumstances.

\* Eligible futures conduct. This expression referred to futures conduct in which a corporation was engaged or where such conduct was engaged in on behalf of or for a corporation or in eligible circumstances.

\* Eligible futures market. This phrase referred to futures markets conducted by corporations or futures markets insofar as they were conducted in eligible circumstances.

896. These qualifications were inserted to provide the necessary linkages with Commonwealth Constitutional powers. As these linkages are no longer required, these qualifying terms will be removed.

### Procedures for Obtaining Approval for Certain Bodies

897. Under the Corporations Law a body corporate may apply to be approved by the Minister as a futures exchange or a clearing house or a futures association.

898. Such applications must be in accordance with proposed section 102A. The applicant must either apply for approval in each jurisdiction or its application must be expressed to be made under the Corporations Law (not under a particular jurisdiction) so that it may be treated as an application in each jurisdiction. The application may not be granted unless it is granted in all jurisdictions.

899. As a result where an application is made after the commencement of the Corporations Law it will have been made in each jurisdiction. The approval will be granted under each Corporations Law. Accordingly obligations will be able to be imposed on such approved bodies on in each jurisdiction.

900. Where, however, a body corporate has already been approved as a futures exchange, a futures association or a clearing house under the Companies Act 1981 or a corresponding law, that approval will be recognised under the Corporations Law of the jurisdiction in which the approval was previously granted. In respect of these bodies corporate, obligations will be imposed only under the Corporations Law of the jurisdiction which previously approved them.

### Futures Brokers Licences and Futures Advisers Licences

901. Under Chapter 8 as originally enacted only a body corporate could apply for a futures brokers or a futures advisers licence. Under the proposed amendments to Chapter 8 a natural person as well as a body corporate will be able to apply for such licences. A number of consequential amendments are made to Part 8.3 to take account of this.

902. A person wishing to apply for a futures brokers licence or a futures advisers licence under Part 8.3 of the Corporations Law will need to make an application in accordance with section 102A. The application must either be in general terms so as to be treated as an application under each of the Corporations Law of each jurisdiction or the person must make an application under each corresponding provision of the Corporations Law of each jurisdiction. The application cannot be granted unless all the applications are granted. The effect of this provision is that persons applying for licences under Part 8.3 of the Act will effectively be licenced in each jurisdiction so that the Corporations Law of each jurisdiction will impose obligations on the licensee.

903. Where, however, the licensee was licenced under the Companies Act 1981 or a corresponding law, that licence will be recognised for the purposes of the Corporations Law of the jurisdiction in which the licence was originally granted. However, only the Corporations Law of that jurisdiction will be able to impose obligations on such licensees.

#### Imposition of Levies

904. Certain sections of Part 8.6, as originally enacted, dealing with contributions to fidelity funds of futures organisations and levies of members of futures organisations are drafted to take account of the constitutional limitations of sections 81 and 55 of the Commonwealth Constitution. Section 81 of the Constitution provides so far as is relevant that all moneys received by the Commonwealth form part of Consolidated Revenue and can be appropriated only by law. Section 55 of the Constitution requires taxes to be imposed under discrete legislation dealing only with taxation. Because the Corporations Law will now be applied as a State law these limitations are no longer required. Accordingly, the provisions which required such contributions to be paid to the Secretary of the Attorney-General's Department and hence into the Consolidated Revenue are no longer required. Under

the proposed amendments to these sections, the levies will be imposed directly by the relevant organisations and contributions and levies will be paid directly to the futures organisations.

#### Corresponding Laws/Corresponding Previous Laws

905. A number of the amendments to provisions in Chapter 8 arise from the distinction proposed in s.58 between a 'corresponding law' and a 'corresponding previous law'. These references have been inserted to ensure the recognition of certain acts or matters under the appropriate legislation in each case. After the proposed amendments, references to 'corresponding previous laws' are generally transitional provisions allowing for continuity between the old scheme and the new.

906. References to 'corresponding law' in the Act as originally enacted generally refer to the co-operative scheme legislation, since there was to have been no other current 'corresponding laws' needed beyond the Act itself. These references will generally become references to 'corresponding previous laws'.

907. The following sections in Chapter 8 are amended to replace references to corresponding laws with references to corresponding previous laws: 1126(3), 1127(3), 1131(4), 1132(3), 1136(7) (a), 1138(13) (a) (b), 1144(3), 1158(2), 1203(1), 1228(3), 1229(2), 1233(7), 1233(8), 1240(5), 1242(4).

#### 'Corporations Law'

908. Under the new national regime, the legislative vehicle which contains the substance of corporate law will be referred to as the 'Corporations Law', which encompasses the complete legislative scheme including application provisions, etc. In the following provisions of Chapter 8, this has necessitated amendments to substitute 'Law' for 'Act': 1215(2) (c), 1215(3) (c), 1215(3), 1218(2), 1223, 1266(4) (b), 1271(1) (a), 1271(2).



Courts

909. Amendments to the following provisions replace references to an Australian court with references to a court: 1169, 1184(1), 1185(4)(b), 1186(1), 1186(2).

Within this jurisdiction

910. Because the Corporations law will be applied as a State Law, the usual presumptions will apply so that generally provisions will be read as being territorially confined. Some provisions of the Corporations Law will refer to events or conduct occurring where the location of that conduct does not provide the necessary nexus with State constitutional power. In the following provisions, amendments have been made to ensure that the conduct or event referred to may occur either within the jurisdiction or elsewhere: 1184(1)(a), 1185(1)(a), 1185(1)(b), 1186(1), 1209(3)(a), 1209(3)(b), 1209(4), 1263(a).

AmendmentsProposed Section 1123 - Conducting unauthorized futures markets

911. As originally enacted this provision prevented a corporation establishing or conducting a futures market that was neither a futures market of a futures exchange nor an exempt futures market. Subsection 2 made it an offence for a person to conduct an unauthorised futures market where a corporation dealt in a futures contract on that market. These provisions were inserted in this form in order to connect the offence of conducting an unauthorised futures market with a corporation. This connection being no longer required, proposed section 123 makes it an offence for a person to establish or conduct, or assist in establishing or conducting or holding out that the person conducts, an unauthorised futures market.

Section 1123A - Using eligible communications services in connection with unauthorised futures markets

912. This section was inserted in order to provide a link to the Commonwealth's power to legislate with respect to postal, telegraphic, telephone and other like services under the Constitution. As the Corporations Law will apply as State law this provision is no longer necessary.

Section 1124 - Corporation not to deal on unauthorised futures market

Section 1125 - No dealing on corporation's behalf on unauthorised futures market

913. These sections were originally enacted in order to connect the offence with a corporation. As this constitutional link is no longer required these provisions will be repealed.

Section 1126 - Approval of futures exchange

914. Under the proposed amendment to subsection 1126(1) a body corporate need no longer be proposing to establish or conduct a futures market before it may apply to the ASC to be approved by the Minister as a futures exchange. This omission is consequential to the requirement that such applications must be made in all jurisdictions (by virtue of proposed section 102A) whether or not the applicant proposes to carry on a market in all jurisdictions.

915. Under the proposed amendment to subsection 1126(2) and proposed section 102A, where a body corporate applies for approval under section 1126, that approval cannot be granted unless the body corporate makes a corresponding application under the Corporations Law in each jurisdiction or makes a single application which has this effect, and all the applications are granted.

916. Paragraphs 1126(2) (a) and (b) are to be omitted as the references to eligible corporations are no longer required.

917. Subparagraph 1126(2)(c)(i) is to be amended to take account of the amendments which will allow natural persons to be licensed as futures brokers and futures advisers.

918. Proposed subparagraph 1126(2)(c)(iiia) requires the rules of proposed futures exchange to make satisfactory provision for the exclusion of a body corporate from membership, where a responsible officer of the body corporate would be excluded from membership.

919. Subparagraph 1126(2)(c)(x) is to be omitted as the concept of an eligible corporation has not been retained.

Proposed Section 1128 - When a person may provide clearing house facilities

920. Section 1128 when originally enacted provided amongst other things that a clearing house must be an eligible corporation. That requirement is no longer necessary. Proposed section 1128 provides that a person must not provide clearing house facilities for a futures market unless the futures market is conducted by a futures exchange, and the person is a body corporate which has been approved under section 1131.

Section 1129 - Providing clearing house facilities for a corporation

Section 1130 - Providing facilities for registering futures contracts made by corporations

921. These provisions were alternative prohibitions inserted for constitutional reasons which are no longer required and have accordingly being repealed.

Section 1131 - Approval of clearing house

922. Under the proposed amendment to subsection 1131(2) and proposed section 102A, where a body applies for approval as a clearing house, that approval cannot be granted unless the

body makes a corresponding application under the Corporations Law in each jurisdiction or makes a single application which can be treated in this way and all the applications are granted.

923. Paragraph 1131(2) (a) and paragraph 1131(2) (b) are to be omitted as references to eligible corporations are no longer required.

Section 1132 - Approval of futures association

924. Under the proposed amendment to subsection 1132(2) and proposed section 102A, where a body applies under section 1132 for approval as a futures association, that approval cannot be granted unless the body makes a corresponding application under the Corporations Law in each jurisdiction or makes a single application which can be treated in this way, and all the applications are granted.

925. Paragraphs 1132(2) (a) and (b) are to be omitted as references to eligible corporations are no longer required.

926. The proposed amendment to subparagraph 1132(2) (d) (i) replaces references to corporations with references to persons. This amendment is necessary because natural persons may be licensed as futures brokers and futures advisers.

927. Proposed subparagraph 1132(2) (d) (iiia) provides that a futures association must make provisions in its rules for the exclusion of a body corporate from membership where a responsible officer of the body corporate would be excluded from membership.

Proposed Section 1141 - Gaming and wagering laws not applicable to certain futures contracts

927A. Proposed section 1141 provides that the gaming and wagering laws of the jurisdiction do not affect the validity of futures contracts which are made on a futures market of a futures exchange or of a recognised futures exchange, or on an exempt futures market or as permitted by the business rules of a futures association, of a futures exchange or a recognised futures exchange.

Proposed Section 1142 - Future brokers

928. Under proposed section 1142 a person may not deal in a futures contract on another person's behalf or hold out that the person carries on a futures broking business unless the person holds a futures brokers licence or is an exempt broker. Section 1142 as originally enacted was based on the premise that futures brokers would be eligible corporations. Under proposed section 1142 natural persons may be licensed as futures brokers.

Proposed Section 1143 - Futures advisers

929. Section 1143 as originally enacted contained a number of alternative prohibitions required to establish suitable constitutional links. That section will be replaced with proposed section 1143 which will require that a person must not carry on a futures advice business or hold themselves out as a futures adviser, unless that person is a licensee or is an exempt futures adviser.

Section 1144 - Application for a licence

930. This section has been amended so that a natural person as well as a body corporate will be able to apply for a futures brokers or futures advisers licence. In addition applications for such licenses will need to be made in

accordance with section 102A. That is, the application should be expressed to be made under the Corporations Law generally, so that it may be treated as being an application in every jurisdiction or the applicant should make an application in each jurisdiction. Section 102A further provides that an application under section 1144 may not be granted unless the application is granted in all jurisdictions.

Proposed Section 1144A - Grant of licence to natural person

931. Proposed section 1144A sets out criteria on which the ASC may grant a futures brokers or a futures advisers licence to a natural person. Proposed section 1144A reflects section 66 of the Futures Industry Act 1986.

Proposed Section 1145A - Grant of licence

932. Sub-section 1145(1) has been amended as a consequence of proposed section 1145A. Section 1145 will now set out the criteria for granting licences to bodies corporate. Section 1145 has also been amended to omit references to eligible corporations. The provisions of subsection 1145(5) have been omitted from this section and will be inserted in proposed section 1145A.

Proposed Section 1145 - Effect of certain provisions

933. Proposed section 1145A makes it clear that the criteria set out in proposed subsection 1144A(4) and subsection 1145(4) are not exclusive criteria for determining whether or not to grant a licence.

Proposed Section 1146 - Licences under corresponding previous laws

934. Section 1146 as previously enacted provided that an eligible corporation which held a futures brokers or futures advisers licence in force under a co-operative scheme law was not required to obtain a new licence under the Corporations

Act. Proposed section 1146 has the same effect but is drafted in a manner which takes into account the fact that the Corporations Law will now apply as a State law and that natural persons will be able to be licensed as futures brokers and futures advisers. Licences granted under the Futures Industry Act or Code of a particular jurisdiction will be treated as a licence granted under the Corporations Law of that jurisdiction only.

Section 1155 - Register of futures licences

935. Proposed paragraph 1155(3)(b) will have the effect that where a licensee is a body corporate, the ASC will enter the name of each director and each secretary of the body corporate in the Register of Futures Licensees kept under section 1155.

Section 1156 - Notifying change in particular

936. The amendments to paragraph 1156(c) are consequential upon the amendments that allow a natural person to be licensed as a futures broker or a futures adviser.

Section 1157 - Annual statement of licence

937. The amendments to this section are consequential upon the amendments which allow a natural person to obtain a licence under Part 8.3.

Section 1160 - Agreement about a dealing in breach of section 1142

938. The amendments to this section are consequential upon the insertion of proposed section 1142.

Section 1161 - Agreement with corporation acting in breach of section 1143

939. The amendments to this section are consequential upon the amendments which allow a natural person to obtain a licence under Part 8.3.

Section 1162 - Agreement about advice, or reports, given in breach of subsection 1143(2)

940. The repeal of this section is consequential upon the repeal of section 1143 as originally enacted.

Section 1163 - Agreement with person action in breach of subsection 1143(3)

941. The repeal of this section is consequential upon the repeal of section 1143 as originally enacted.

Section 1172 - Representatives of futures brokers

942. The amendment to this provision is consequential upon the amendments which allow a natural person to hold a futures brokers licence.

Section 1173 - Representatives to futures advisers

943. The amendments to this section are consequential upon the amendments which allow a natural person to hold a futures brokers licence or a futures advisers licence.

Section 1176 - Licence to keep register of holders of proper authorities

944. The amendment to subsection (1) is consequential upon the amendments that allow a natural person to hold a license under Part 8.3.

945. Proposed subsection 1176(8) provides that where a register has been maintained under a previous corresponding law immediately before the commencement of the Corporations Law, the licensee is not required to establish a new register under section 1176 but may keep the existing register in accordance with section 1176.



Section 1177 - Licensee to notify commission of location and contents of register

946. The amendments to subsection 1177(1) are consequential upon the amendments allowing natural persons to hold licences under Part 8.3.

Sections 1178 - Inspection and copying of register

947. The amendments to subsections 1178(1) and 1178(2) are consequential upon the amendments that allow a natural person to hold a licence under Part 8.3.

Section 1181 - Commission may give license information about representative

948. The proposed amendment to paragraph 1181(1)(a) is consequential upon the amendments which allow a natural person to hold a licence under Part 8.3.

949. Proposed subsection 1181(4A) provides that subsection 8(3) of the Corporations Law does not apply in relation to subsections 1181(2), (3) and (4). The effect of this proposed subsection (4A) is that references in subsection (2), (3) and (4) to a provision of section 1181 should not be read as references to the corresponding sections of the Corporations Law of another jurisdiction.

950. Subsection 1181(7) is to be amended to remove references to constitutional linkages which are not required under the Corporations Law.

951. Proposed subsection 1181(8) will ensure that where information is provided in one jurisdiction under this section, the limitations on the use to which that material may be put which are contained in subsection (6), apply in all jurisdictions.

Section 1182 - Holder of authority may be required to return it

952. The amendment to subsection 1182(1) is consequential upon the amendments that allow a natural person to hold a licence under Part 8.3.

Section 1184 - Liability where identity of principal unknown

953. The amendment to paragraph 1184(1)(a) removes the references to eligible futures which are no longer required.

Section 1189 - Additional operation of Division

954. This section is repealed. As originally enacted this section was intended to extend the operation of the Act. This extension is not required as part of the Corporations Law.

Proposed Section 1189A - Power to revoke, without a hearing, licence held by a natural person

955. Proposed section 1189A reflects section 80A of the Futures Industry Act 1986. This provision is necessary in order to allow the Commission to revoke, without a hearing, a licence held by a natural person if the person becomes insolvent, is convicted of serious fraud, becomes incapable of managing his or her affairs or asks the Commission to revoke the licence.

Proposed Section 1190 - Power to revoke without a hearing licence held by body corporate

956. Proposed section 1190 will reflect section 80B of the Futures Industry Act 1986 and will allow the Court to revoke without a hearing a licence held by a body corporate. The Commission will be able to so revoke a licence if the body corporate ceases to carry on business, becomes an externally administered body corporate, or asks the Commission to revoke the licence. The licence may also be revoked where a director, secretary or executive officer of a body corporate

contravenes the Corporations Law because he or she does not hold a licence or because his or her licence has been suspended.

Section 1191 - Power to revoke licence after a hearing

957. Proposed paragraph 1191(ea) provides additional ground for the Commission to revoke a licence, after a hearing, where the licensee is a natural person and the Commission has reason to believe he or she is not of good fame and character. Proposed paragraph 1191(1)(ea) reflects paragraph 80C(1)(e) of the Futures Industry Act 1986 and provides that the ASC may revoke a licence of a natural person where the ASC has reason to believe that he or she is not of good fame and character.

958. The amendments to paragraphs 1191(1)(e) and (f) are consequential upon the amendments which allow a natural person to hold a licence under Part 8.3.

959. Proposed paragraph 1191(1)(g) reflects paragraph 80C(1)(h) of the Futures Industry Act 1986. Under this paragraph a licence may be revoke if a licence held by a director, secretary or executive officer of the body corporate is suspended or revoked or a banning order under section 1194 is issued against such a director, secretary or executive officer.

960. The amendment to subsection 1191(2) inserts a reference to proposed paragraph (ea) in this section so that the ASC when considering the matters referred to in proposed paragraph (ea), may have regard to matters which arose before the licence was granted, unless the ASC was aware of them at the time the licence was granted.

Section 1192 - Power to suspend licence instead of revoking it

961. This amendment to paragraph 1192(1)(a) inserts a reference to proposed section 1189A in section 1192.

962. The amendment to paragraph 1192(1)(d) is consequential upon the amendments that allow natural persons to hold a licence under Part 8.3.

Proposed Section 1192A - Power to make banning order where licence revoked or suspended

963. Proposed section 1192A reflects section 80E of the Futures Industry Act 1986. This section allows the ASC to make a banning order against a natural person where the Commission has revoked or suspended that person's licence.

Section 1193 - Power to make banning order

964. This amendment limits the operation of section 1193 to natural persons who do not hold a licence under the Law. A natural person holding a licence under the Law may be the subject of a banning order under proposed section 1192A. After the proposed amendment section 1193 will reflect section 80F of the Futures Industry Act 1986.

Section 1198 - Effect and publication of orders under this Division

965. The proposed amendment inserts a reference to proposed section 1189A in subsection 1198(2). As a result of this amendment orders made under proposed section 1189A must be published in the Commonwealth Government Gazette.

Proposed Section 1199A - Banned person ineligible for licence

966. Proposed section 1199A reflects section 80N of the Futures Industry Act 1986. Under this section where a banning order prohibits a person from acting as a representative of the futures broker or a futures adviser, the ASC cannot grant a futures brokers or a futures advisers licence to that person.

Section 1200 - Opportunity for hearing

967. The amendment to paragraph 1200(1)(a) inserts a reference to the provisions of proposed subsection 1144A so that the ASC cannot refuse an application for a licence on the grounds contained in paragraphs 1144A(2)(d), (e) or (f) unless the applicant is given an opportunity for a hearing. The amendment to paragraph (d) inserts a reference to proposed section 1189A so that the ASC cannot revoke or suspend a licence otherwise than by virtue of proposed section 1189A, section 1190 or paragraph 1192(1)(a) without a hearing.

968. The proposed amendment to paragraph 1200(1)(e) inserts a reference to proposed paragraphs 1192A(a) and (d), so that the ASC may not, otherwise than by virtue of proposed paragraph 1192(a) or (d), or paragraphs 1193(a), (b) or (c), make an order under section 1194 without providing an opportunity for a hearing.

Section 1201 - Disqualification by the Court

969. The proposed amendment to subsection 1201(1) inserts a reference to section 1189A, so that where the ASC revokes a licence held by a natural person the ASC will be able to apply to the Court for an order against the person under section 1201.

Section 1205 - Undesirable advertising

970. Proposed subsection 1205(2) replaces subsection 1205(2) and reflects subsection 82(2) of the Futures Industry Act 1986. This proposed subsection will prohibit persons from publishing or broadcasting statements relating to futures contracts or the carrying on of futures business unless the ASC has first approved of the form and content of the statement.

Proposed Section 1205A - Application of sections 1206 and 1207  
- exempt broker

971. Proposed section 1205A provides that sections 1206 and 1207 do not apply to an exempt broker except insofar as the exempt broker carries on a futures broking business as a personal representative of a dead futures broker. This amendment was necessary because of the amendments which allow natural persons to become licensed brokers under Part 8.3. This provision has the same effect as subsection 83(1) of the Futures Industry Act 1986.

Section 1209 - Segregation of client money and property

972. Because a natural person may hold a futures brokers licence within the terms of the Act, the definition of client in section 1209 has been amended. The new amended definition now resembles the definition of client in section 86 of the Futures Industry Act 1986.

Proposed Section 1212 - Application of Part

973. Proposed section 1212 provides that Part 8.5 applies in relation to a futures broker in relation to his, her or its business of dealing in futures contracts, regardless of where the business is carried on. The proposed section also provides that Part 8.5 will not affect the operation of Parts 3.6 and 3.7 in relation to a company which holds a futures brokers licence.

Section 1215 - Appointment of auditor by futures broker

974. The amendments to paragraphs 1215(2) (a) and (d) and (3) (a) are technical amendments only. The amendments to paragraphs 1215 (2) (e) and (3) (f) are consequential upon the amendments which allow a natural person to obtain a futures brokers licence under the Law. Proposed paragraph 1215(2) (f) now reflects paragraph 92(2) (f) of the Futures Industry Act 1986. The amendments to paragraphs 1215(3) (d), (e) and (f)

are technical amendments only. Proposed paragraphs 1215(3) (ga) and (g) provide that a firm cannot consent to be appointed as an auditor of a futures broker, act as auditor of a futures broker or prepare a report required to be prepared by an auditor unless no member of the firm is a partner or employee of the futures broker, and, if the futures broker is a body corporate, no member of the firm is an officer of the body, or a partner, employer or employee of an officer of the body or a partner or employee of an employee of an officer of the body. The amendment to paragraph 1215(3) (h) is necessary because of the amendments which allow a futures broker to be a natural person to hold a futures brokers licence.

#### Section 1218 - Futures brokers' accounts

975. Proposed subsection 1218(1) inserts a new definition of the financial year and prescribed day. These definitions are consistent with the definitions contained in section 95 of the Futures Industry Act 1986. The amendment is consequential upon the amendments which allow natural persons to obtain a brokers licence under the Law. The amendments to subsection 1218(3) are consequential upon the amendment to the definition of the financial year and prescribed day inserted by proposed subsection 1218(1).

#### Section 1219 - Auditor's right of access to records, information etc

976. The amendments to section 1219 are consequential upon the amendments which allow a natural person to obtain a brokers licence under the Law.

#### Section 1224 - Power of Court to retrain dealings with futures broker's bank accounts

977. The proposed amendment to paragraph 1224(1) (c) replace a reference to 'this Act' with a reference to 'this Chapter'.

978. Proposed subparagraphs 1224(1)(d)(i), (ii) and (iii) are consequential upon the amendments which allow a natural person to obtain a brokers licence under the Law. The proposed subparagraphs reflect paragraph 101(d) of Futures Industry Act 1986. Under this amendment a Court may make an order restraining dealings with a futures broker's bank accounts where the last futures brokers licence held by the person has been revoked or suspended or where the person no longer carries a futures broking business. In addition where the person is natural person, the Court may make such an order where the person has died or is incapable of managing his or her affairs (subsection 1224(iii)).

Proposed Section 1234 - Contribution to fund

979. This section as originally drafted took account of the potential application of sections 81 and 55 of the Constitution. As those constitutional limitations are no longer relevant, proposed section 1234 will reflect section 112 of the Futures Industry Act 1986. Under the proposed section, a person cannot be admitted to membership of a futures organisation unless the person has paid a minimum contribution of \$500 to the organisations fidelity fund or the person is already a member of a futures exchange. A contributing member of a futures exchange must pay an annual contribution to the fidelity fund.

Proposed Section 1235 - Levy in addition to annual contributions

980. As originally enacted section 1235 was drafted to take account of the potential application of sections 81 and 55 of the Constitution. As these constitutional limitations no longer apply, proposed section 1235 reflects section 113 of the Futures Industry Act 1986. Under proposed section 1235 an additional levy may be imposed directly by futures organisations on its members where the amount of the fidelity fund is insufficient to pay all amounts that are required to be paid under section 1231.



Section 1236 - Contributions and levies not payable in certain cases

981. As originally drafted subsection 1236(1) took account of the effect of section 55 of the Constitution which requires that laws imposing taxation shall deal only with the imposition of taxation. As the levy is now imposed directly by the futures organisation this constitutional limitation is no longer relevant. Under proposed subsection 1236(1) a person will not be required to pay a contribution or levy unless it was imposed by a law of the jurisdiction.

Section 1255 - Exceptions - Licensed futures brokers

982. The amendment to this section takes account of the fact that a natural person may hold a futures brokers licence under the Act.

Proposed Section 1256 - Prohibitions where dealing precluded

983. Under proposed section 1256, it will be an offence for a person to deal in a futures contract when precluded from so dealing by virtue of one of the preceding provisions of Division 2 of Part 8.7. It will also be an offence for a person with inside information to communicate the information to another person whom he or she knows, or ought reasonably to know, will make use of the information to deal.

Section 1258 - Dealing futures broker on behalf of others

984. The amendment to section 1258 removes references to eligible futures brokers, so that the provisions of sections 1258 covering dealings by futures brokers on behalf of others, apply to all futures brokers whether natural persons or bodies corporate.

Proposed Section 1259 - Futures market manipulation

985. Proposed section 1259 will prohibit a person from taking part in, being concerned in or carrying out, whether directly or indirectly, a transaction (whether involving futures contracts or not) that has or is intended to have or is likely to have the effect of creating an artificial price or maintaining at an artificial level a price for dealings in futures contracts on a futures market.

Proposed Section 1260 - False trading and market rigging

986. Proposed section 1260 will make it an offence for a person to create, cause to be created or do anything that is calculated to create a false or misleading appearance of active trading or create a false or misleading appearance with respect to the market for futures contracts. In addition a person must not by any fictitious or artificial transactions or devices maintain, inflate, depress or cause fluctuations in the price of dealings in futures contracts on a futures market. Proposed section 1260 reflects section 131 of the Futures Industry Act 1986.

Proposed Section 1261 - False or misleading statements etc

987. Under proposed section 1261 it will be an offence for a person to make a false or misleading statement or to disseminate information that is likely to induce others to deal in a futures contract or affect their price, if, when the person makes the statement or disseminates the information, that person does not care whether the statement or information is true or false or knows or ought reasonably to know that it is false or misleading.

Section 1262 - Fraudulently inducing person to deal in futures contracts

988. The proposed amendments to section 1262 remove constitutional constraints. By virtue of these proposed

amendments, a person will be prohibited from inducing another person to deal in a futures contract by making a statement that the person knows is misleading, false or deceptive, by dishonestly concealing material facts, by recklessly making a misleading, false or deceptive statement, or by reporting or storing information that the person knows is misleading in a material particular.

Section 1264 - Fraud in connection with dealings in futures contracts

989. The proposed amendments to section 1264 remove certain constitutional constraints. The proposed amendments will make it unlawful for a futures broker (or for the broker's employees or agents) or a person who has an interest in a dealing in a futures contract to deceive or defraud a client, or to make a false or misleading statement to the client or to include such a statement in a record relating to the client.

Section 1266 - Sequence of transmission and execution of orders

990. The proposed amendments to this section substitute references to futures brokers for references to eligible futures brokers.

Section 1267 - Dealings by employees of eligible futures brokers and eligible futures advisers

991. The proposed amendments to section 1267 omit references to eligible futures brokers and eligible futures advisers.

Section 1269 - Restrictions on use of titles 'futures broker' 'futures exchange' etc

992. The proposed amendments to section 1269 are consequential upon the amendments which allow a natural person to hold a futures brokers licence under the Act.

251.

Section 1271 - Concealing etc, books relating to futures contracts

993. The proposed amendments to section 1271 remove references to eligible futures brokers.

AMENDMENT OF CHAPTER 9

Section 1274: Registers

Section 1277: Effect of Territory Laws

994. The proposed amendments to ss.1274 and 1277 are of a technical nature for the purposes of enabling them to operate as a law of the ACT and to make them appropriate to be applied as laws of other jurisdictions.

Section 1278: Auditor or liquidator registered under corresponding law

995. Section 1278 is a transitional provision under which a person registered as an auditor or liquidator under the Companies Act and Codes would have been deemed to be registered under the new legislation for a period of 6 months after the commencement of the provision subject to the cancellation and suspension provisions in s.1280. Such persons would then have been required to re-register.

996. The proposed amendment inserts a new s.1278 which will have the effect of providing for the continued registration of persons registered as auditors or liquidators on an indefinite basis. This provision will apply in relation to persons whose registration was suspended at the commencement of the provision.

Section 127: Application for registration as auditor or liquidator

997. Section 1279 sets out requirements in relation to applications for registration as an auditor or liquidator.

998. The proposed amendment inserts a transitional provision which will enable applications lodged with the NCSC but not dealt with before the commencement of the Corporations Law to be able to be dealt with by the ASC.

Section 1280 - Registration of Auditors

Section 1282 - Registration of liquidators

999. Sections 1280 and 1282 set out requirements in relation to the registration of auditors and liquidators respectively. They are being amended:

- \* to make consequential changes as a result of:
- \* no longer requiring existing registered auditors and liquidators to apply for registration after 6 months (see above); and
- \* maintaining the existing timing for the lodgement of triennial statements (see below); and
- \* to take into account the change of name of the Australian Society of Accountants to the Australian Society of Certified Practising Accountants.

Section 1284A: Security given under previous law

1000. Proposed s.1284A is a transition provision for securities lodged by liquidators for the due performance of their function pursuant to s.22 of the CA (as applied by the States it will be applicable to securities lodged with the relevant Corporate Affairs Commission or Commissioner).

1001. Such securities are to have effect as if they were lodged and maintained with the ASC under s.1284, with such modifications as the circumstances require or as are prescribed. Any modifications which are prescribed can deal with circumstances arising before the commencement of s.1284.

Section 1285: Register of Auditors

Section 1286: Registers of Liquidators and Official Liquidators

1002. Sections 1285 and 1286 are being amended to change references to corresponding laws to corresponding previous laws (as the term corresponding law will now refer to the Corporations Laws of other jurisdictions).

Section 1288: Triennial statement by registered auditors and liquidators

1003. Section 1288 sets out requirements for registered auditors and liquidators to lodge triennial statements. The provision presupposes that existing auditors and liquidators will be required to re-register with the ASC and gives the ASC some discretion to set an appropriate date for the next occasion on which such persons are to lodge such statements.

1004. Consequent upon continuing the registration of existing auditors and liquidators on an indefinite basis, the amendments have the effect of providing that triennial statements will continue to fall due at the same time as they would have if the Companies Act and Codes had continued.

Section 1292: Power of Board in relation to auditors and liquidators

1005. Section 1292 is being amended to change references to corresponding laws to corresponding previous laws (as the term corresponding law will now refer to the Corporations Law of other jurisdictions).

Section 1293: Effect in certain cases of cancellation or suspension of registration under corresponding previous law

1006. Section 1293 is a transitional provision having the effect that where a person is registered as an auditor, liquidator, liquidator of a specified body corporate or an official liquidator under the co-operative scheme and that registration is either:

- \* cancelled before the commencement of this provision; or
- \* is suspended at any time.

1007. As a result of an application made before the provision commenced, the person's registration under Div. 2 is deemed to be either cancelled or suspended while the corresponding registration is suspended and ss.1280(1) or 1282(1) (as appropriate) dealing re-registration of such persons does not apply to them.

1008. Sections 1280(1) and 1282(1) are being omitted as a consequence of amendments to continue the registration of existing auditors and liquidators on an indefinite basis. The proposed amendment inserts a new s.1293 which has the same effect as the old provision but with the references to ss.1280(1) and 1282(1) removed. Thus this amendment is essentially a consequential amendment.

#### Section 1308: False or misleading statements

1009. By s.1308(2) a person who knowingly makes a false or misleading statement in or omits a material particular from a document required to be lodged with the ASC is guilty of an offence.

1010. The proposed amendment prevents a person who makes such a statement from also being proceeded against for an offence under regulations prescribed under s.28 of the covering clauses.

#### Section 1310A: Offences under 2 or more Corporations Laws Section 1210B: Civil liability under 2 or more Corporations Laws

1011. As a result of seeking to have the Corporations Law of the various jurisdictions operate together, as far as practical, as a single national law persons will in some



instances, be subject to identical obligations under the laws of each jurisdiction and potentially civilly liable under the laws of different jurisdictions in relation to the same matter. For example, a person who is granted a dealer's licence after the commencement of the Corporations Law will be subject to licensing obligations such as the lodging of annual statements under s.791 under the Corporations Law of each jurisdiction. Failure to do so theoretically results in an offence under the Corporations Law of each jurisdiction.

1012. Proposed s.1310A has the effect of preventing a person from being punished under the Corporations Law of more than one jurisdiction in respect of any particular act or omission. It will apply not only in relation to circumstances where a person is subject to multiple identical obligations but also generally in relation to the acts and omissions which breach the Corporations Law of more than one jurisdiction.

1013. Proposed s.1310B achieves a similar result in regard to civil liability for loss or damage arising out of a breach of the Corporations Law. It provides that it is a defence to a proceeding if it is proved in relation to a particular matter, that:

- \* the plaintiff has already recovered damages under the Corporations Law of another jurisdiction; or
- \* the plaintiff has already unsuccessfully sued under the Corporations Law of another jurisdiction.

Section 1313A: Offence committed partly in and out of the jurisdiction

1014. Proposed s.1313A is based on s.569 of the CA. It provides that where any act or omission is done or omitted to be done wholly within the jurisdiction would constitute an offence against the Corporations Law, it remains an offence where it is partly done or omitted to be done outside the jurisdiction.

1015. In the context of the proposed national system of applied laws, where a person commits an element of a particular offence in more than one jurisdiction it will be possible to prosecute them in any of those jurisdictions.

Section 1313B: Reciprocity in relation to offences

1016. Proposed s.1313B is based on s.568 of the CA. It provides that a person who does or omits to do an act within the jurisdiction which would be an offence outside the jurisdiction under a provision of another Corporations Law, will be guilty of an offence against the relevant provision of the Corporations Law of the jurisdiction.

1017. In the context of the national scheme, this provision will enable prosecutions to take place in the jurisdiction in which the act or omission occurred irrespective of which jurisdictions Corporations Law would have been breached (but for this provision).

Section 1323: Power of Court to prohibit pay or transfer of money, securities, futures contracts or property

1018. Section 1323 is amended to:

- \* change references to the ACT and the ASC Act to the Corporations Law and the Commission Law; and
- \* enable ss.1323(1)(f) and (g) to operate satisfactorily as laws of the ACT and be applied as laws of other jurisdictions by providing that they enable the ASC to make orders preventing movement of money and other property outside the jurisdiction as well as outside of Australia.

Section 11328: Court may resolve transitional difficulties

1019. Section 1328 is being amended to change references to corresponding laws to corresponding previous laws (as corresponding law will now refer to the Corporations Law of other jurisdictions).

Section 1334: Evidence of laws of States and Territories

1020. Section 1334 is being repealed.

Section 1337: Interpretation

Section 1338: Companies Unclaimed Monies Account

Section 1341: Disposition of money in Account

Section 1343: Disposition of securities if whereabouts of holder are unknown

1021. Part 9.7 of the Act sets out a regime for dealing with the unclaimed property of defunct companies or companies which have been wound up.

1022. The substance of the provisions of the Part will be retained under the national scheme but various provisions are amended to take into account the fact that Pt. 9.7 will be the basis of an applied law regime. In particular, the proposed Companies Unclaimed Money Account referred to in s.1338 is to be established solely under Commonwealth Law. It will, therefore, be unnecessary for s.1338 to be applied and accordingly is being repealed. Equivalent provisions appear in s.63 of the covering clauses of the Act as amended. Similarly s.1341(6) which deals with money in the Companies Liquidation Account established under s.428 of the CA is being repealed and that money dealt with under s.72 of the covering clauses.

1023. Other amendments to Pt. 9.7:

\* make further amendments consequential on the above; and

- \* replace references to the Act with the Corporations Law.

#### Part 9.8: Rules and Regulations

1024. The proposed amendment repeals Pt. 9.8 which enables the making of rules of Court and regulations under the Act.

1025. These matters will be dealt with under Pts. 5 and 6 of the covering clauses of the Act.

#### Section 1346 : Non application of rule against perpetuities to certain schemes

1026. Section 1346 is being amended to remove the constitutional underpinnings and bring its scope in line with s.578 of the CA.

#### Section 1349: Non General transitional provision

1027. Some technical amendments are made to s.1349 to:

- \* ensure that acts done by an authority of the jurisdiction (a corporate affairs commission) for the purposes of the Companies Act and Codes will, like things done by the NCSC, be treated as having been done by the ASC; and
- \* to change references to 'corresponding laws' to 'previous corresponding laws' as a consequence of the proposed amendment to s.58.

#### Section 1350: Effect of Act on existing laws in force in the Capital Territory

1028. Section 1350 which deals with the effect of the Act on the cooperative scheme laws is being repealed. These matters are now dealt with in Pt.13 of the covering clauses of the Act.

## Part 9.10: Fees for chargeable matters

### Introduction

1029. Fees payable under the Corporation Law are to be imposed by s.34 of the covering clauses (and equivalent provisions under State application of law legislation). The extent of these fees will be prescribed by regulations under ss.25 and 26 of the covering clauses but be subject to the ceiling to be imposed in proposed s.1352.

1030. The proposed amendment inserts a new Part 9.10 which sets out various ancilliary provisions in relation to the payment of fees which were previously dealt with in the Corporation (Fees) Act 1989 ('the 1989 Fees Act'). The new Part 9.10 is in many ways based on the Fees Act but it also incorporates many elements of the Co-operative Scheme Legislation Amendment Act 1989 ('the CSLA Act') amendments to the Companies (Fees) Act 1981 ('the 1981 Fees Act') which have never been proclaimed. The Fees Act is being repealed as, to the extent that any fee may have been a tax, the Act as a law for the Australian Capital Territory will not be affected by s.55 of the Constitution requiring taxing legislation to be included in separate legislation.

### Section 1351: Fees payable

1031. Proposed s.1351 will have the effect requiring fees payable under the Corporations Law will be payable to the Commonwealth.

### Section 1352: Limits on fees payable for one matter

1032. Proposed s.1352(1) is based on s.7 of the 1981 Fees Act as inserted by the CSLA Act. It provides that the maximum fee payable in relation to any one matter is \$25,000.

1033. Proposed ss.1352(2) and (3) ensure that fees are not charged under the Corporations Law of more than one jurisdiction in relation to the same matter and in particular

only one fee is payable in relation to applications which by virtue of s.102A of the Corporations Law are required to be made under the Corporations Laws of all jurisdictions.

Section 1353: Fee payable where document taken to be lodged

1034. Proposed s.1353 is based on s.4(3) of the 1989 Fees Act.

It provides that where a requirement to lodge a document with the ASC at a particular time is deemed by s.338 to have been satisfied by the lodgement of the annual return the:

(a) a fee, equal to the amount that would have been payable had the document been lodged at the same time as the annual return, is payable; and

(b) the fee is a debt due to the Commonwealth.

Section 1354: Lodgment of document without payment of fee

1035. Proposed s.1354 is based on s.4(2) of the 1989 Fees Act but takes into account the fact that a fee will not always be ascertainable.

1036. It provides that where a document has been lodged with the ASC without payment of the relevant fee, the document will not for that reason alone be regarded as not having been lodged. If the fee is ascertainable then it becomes a debt due to the Commonwealth by the person that the ASC determines in writing as being the person who should have paid the fee.

Section 1355: Doing of act without payment of fee

1037. Proposed s.1355 is based on s.4(4) of the Fees Act but also incorporates changes introduced in s.10 of the 1981 Fees Act by the CSLA Act but never proclaimed.

1038. It provides that where a fee is payable for an act or thing done by the Minister or the ASC, the Minister or the ASC are not to do that act or thing until the fee is paid. If the amount of the fee cannot be ascertained, then the Minister or the ASC may still do that act or thing. However, if the ASC has asked for a deposit on account of the fee, the act or thing is not to be done until the deposit is paid.

Section 1356: Effect of sections 1354 and 1355

1039. Proposed s.1356 makes it clear that proposed ss.1354 and 1355 are to have effect despite anything else in another part of the Corporations Law.

Section 1357 : Commission may require payment of deposit on account of fee

1040. Proposed s.1357 is based on the unproclaimed s.12 of the 1981 Fees Act.

1041. It provides that where the amount of the fee for the doing of an act or thing by the ASC or the Minister cannot be ascertained, the ASC may require the payment of a deposit on account of the fee.

Section 1359 : Waiver and refund of fees

1042. Proposed s.1359 is equivalent to s.4(6) of the Fees Act. It will enable the Commonwealth to waive, reduce or refund fees that would otherwise be payable or paid.

Section 1360 : Debts due to the Commonwealth

1043. Proposed s.1360 is based on s.4(2)(b) of the 1989 Fees Act. It enables the ASC to take legal action to recover unpaid fees.

Section 1361: This Part not to impose taxation

1044. Proposed s.1361 declares that Part 9.10 does not impose taxation. Any fee payable under the Corporations including any taxation element will be imposed by proposed s.34 of the covering clauses of the Act.

Section 1362: Payment of fee does not give right to inspect of search

1045. Proposed s.1362 makes it clear that nothing in Part 9.10 or done under Part 9.10, (such as the payment of a fee) gives a person a right to search the ASC's registers or inspect documents beyond any right conferred elsewhere in the Corporations Law or under another law.

Table A of Schedule 1

Table B of Schedule 1

1046. The proposed amendment to Tables A and B are consequential upon:

\* converting most of the substantive provisions of the Act into the Corporations Law; and

\* incorporating interpretation provisions based on the Acts Interpretation Act 1901 into the Corporations Law itself rather than relying on that Act.

Schedule 3

1047. Schedule 3 sets out the maximum penalties for breaches of specified provisions of the Corporations Law.

1048. The proposed amendments are consequent upon converting provisions previously expressed as conditions of securities dealers licenses into direct obligations on the licensees which has become possible as a result of the new



264.

constitutional basis of the Act. The penalties to be imposed are identical to those under the corresponding provision of the SIA.

265.

SCHEDULE 2

AMENDMENTS TO CHANGE 'ACT' TO 'LAW'

1049. The schedule sets out provisions of the Corporations Law that will be amended as a result of the conversion of the Corporations Act 1989 into a form whereby it can be applied by each State and the Northern Territory. The provisions will be amended by omitting 'Act' (wherever occurring) and substituting 'Law'.

SCHEDULE 3

SUBSTANTIVE AMENDMENTS OF THE CORPORATIONS LAW

Introduction

1050. Schedule 3 contains a number of substantive amendments to the Corporations Law. These include amendments for the purposes of:

- \* inserting additional transitional provisions;
- \* giving effect to comments made by the Senate Scrutiny of Bills Committee in relation to criminal law aspects of a number of provisions of the Corporations Act 1989;
- \* facilitating the ASC's computerisation process;
- \* correcting more significant drafting errors (minor drafting corrections of a technical nature are dealt with in Schedule 4); and
- \* facilitating schemes of arrangements in relation to large corporate groups.

Section 9 - Dictionary

Definition of "machine copy"

1051. The definition of "machine copy" as presently drafted encompasses traditional copying processes such as photocopying.

1052. This amendment will enable the definition to apply to information generated by computers. By removing the requirement for surface contact or use of photo-sensitive material the amended definition will also be capable of applying to other types of technology and thus generally will facilitate the ASC's computerisation process.

Definition of "retirement village scheme"

1053. This amendment brings the definition of "retirement village scheme" more into line with that in s.215D(3) of the CA and s.4(1) of the SIA by referring to such schemes outside Australia.

Section 79 - Involvement in contraventions

1054. This amendment clarifies the interaction of s.79 with s.1006(2). In an action under s.1005 to which s.1006 applies it will not be necessary to establish any of the factors set out in s.79 as constituting an involvement in a contravention.

Section 87 - Proper authority from futures licensee; invalid futures authority

Section 88 - Proper authority from securities licensee' invalid securities authority

1054A Sections 87 and 88 set out the formal requirements in relation to proper authorities granted by futures licensees and securities licensees respectively.

1055. These amendments insert transitional provisions which in effect provide that authorities that were proper authorities for the purposes of the FIA and SIA immediately before the commencement of ss.87 and 88 are treated as proper authorities under the Corporations Law. Existing proper authorities will not need to be re-issued on the commencement of the Corporations Law.

Section 91 - Being or becoming subject to a prohibition, order or notice under section 229, 230, 599 or 600

1056. These amendments make minor drafting corrections.

Section 237 - Benefits of loss of, or retirement from, office

1057. This amendment corrects a cross referencing error.

Section 244 - Statutory meeting and statutory report

1058. This amendment makes minor drafting corrections which are necessary as a consequence of the removal of the offer to the public test as the criteria for the application of the prospectus provisions.

Section 289 - Accounting records

1059. Section 289 sets out certain requirements in relation to the keeping of accounting records. By s.289(11) directors are required to take all reasonable steps to ensure that companies comply with these requirements. A defence is set out in s.289(12).

1060. Sections 289(11) and (12) are being deleted by this amendment which was sought by the Senate Committee on the Scrutiny of Bills. As a result, directors' duties to ensure that proper arrangements are made for the keeping of accounts will be provided for by the provisions of ss.591(1) and (2).

Section 335 - Annual Return

1061. Section 335 sets out requirements in relation to the lodgment of annual returns by companies. Under s.335(3) a company may comply with these requirements by completing a partially completed annual return form sent to it by the ASC but is not obliged to do so. A company may instead lodge its own form provided it complies with the prescribed form. The amendments to s.335(2) will bring it into line with s.263(1B) of the CA by requiring a company that receives a partially completed annual return from the ASC to lodge that return in a completed form. By proposed s.335(4) (which is based on s.263(1C) of the CA) a company will be taken not to have complied with the annual return requirements unless it

properly completes and returns the partially completed form. These amendments will facilitate computerisation by the ASC and speed up processing of annual returns.

1062. In addition, proposed ss.335(5) and (6) enables the ASC to give written approval, in specified cases, for the use of forms of annual return other than those which it issues. These provisions are based on ss.263(1D) and (1E) of the CA.

#### Section 348 - Liability of local agent

1063. By existing s.348 a local agent of a registered foreign company is answerable for all acts of the company required under the Corporations Law. That agent is personally liable unless the agent satisfies the Court otherwise.

1064. The amendment has the effect of providing that the agent will only be personally liable if the Court is satisfied that she or he should be so liable. This amendment which will restore the ordinary onus of proof was sought by the Senate Committee on the Scrutiny of Bills.

#### Section 349 - Balance-sheets and other documents

1065. Section 349 sets out obligations to lodge certain documents and the time limits within which those obligations must be satisfied. This amendment corrects a drafting oversight which might have enabled foreign companies to avoid lodging returns within a specified time.

#### Section 411 - Power to compromise with creditors and members

1066. Under the Act as originally enacted, schemes of arrangement require the separate meetings of classes of creditors of each of the subsidiaries. In the case of a group involving 30 or more subsidiaries, this could result in the necessity for a large number of meetings (in some cases 150 or more such meetings). As a practical matter, this may make such schemes of arrangement impossible for larger groups of companies.

1067. These amendments thus allow the court an additional flexibility in making orders under s.411 of the Law while at the same time not removing any of the requirements which protect creditors under the present legislation, including the need to ensure classes are properly constituted. In the exercise of its discretion in calling the meetings and in subsequently approving any scheme agreed to, the Court will continue to be able to take into account the interests of creditors, members and the public generally.

1068. Proposed s.411(1A) provides that a court may order a meeting or meetings, on a consolidated basis, of the creditors of the holding company and each of the subsidiaries, or a class or classes of such creditors, where:

- \* a compromise or arrangement is proposed between 30 or more wholly owned subsidiaries of a holding company and the creditors of each of the subsidiaries and the holding company (s.411(1A)(a));
- \* the proposed compromise or arrangement in relation to each subsidiary includes a term that an order will be sought under s.413, transferring the whole of the undertaking and property and liabilities of the subsidiaries to the holding company (s.411(1A)(b)); and
- \* the Court is satisfied that the number of meetings that would be required between creditors would significantly impede the timely and effective consideration by those creditors, of the terms of the compromise (s.411(1A)(c)).

1069. The effect will be to enable the creditors of the subsidiaries to be treated as creditors of the holding company for the purposes of the meetings. Where there are real and distinct differences between creditors there will still need to be different classes of the relevant composite groups of creditors, although the creditors of various subsidiaries and

the holding company with the same community of interest may now be organised into one class.

1070. Proposed s.411(1A) also empowers the Court to approve the explanatory statement required under s.412(1)(a) of the Law to accompany notices of the meeting or meetings.

1071. Proposed s.411(1B) provides that where there are fewer than 30 wholly owned subsidiaries of the holding company, but in all other aspects s.411(1A) would apply, the Court may, where it considers that the circumstances would justify doing so, make an order under s.411(1A).

1072. Proposed s.411(1C) provides, that where an order is made under s.411(1A), the succeeding provisions of Part 5.1 are read to apply appropriately. Consequential amendments are made to ss.411(2), (4) and (13).

#### Section 590 - Offences by officers of certain companies

1073. Section 590 sets out certain offences in relation to the conduct of officers of companies.

1074. The amendments will have the effect of requiring the prosecution to prove that the defendant acted fraudulently in relation to offences under ss.590(1)(c)(i), (1)(c)(v) and (1)(d) rather than the onus being on the defendant to prove otherwise as is the present case. These amendments were sought by the Senate Committee on Scrutiny of Bills.

#### Section 591 - Liability where proper accounts not kept

1075. Section 591 sets out the liability of a director or officer of a company who fails to take reasonable steps to comply with the obligation to keep proper accounts.

1076. The proposed amendments:



- \* make a minor drafting correction to s.591(1);
- \* insert new ss.591(3) and (4) which respectively ensure that:
- \* a person cannot be convicted under both ss.289 and 591 in respect of the same act or omission; and
- \* a person cannot be convicted under both ss.289 and 591 in respect of a particular course of conduct over a particular period.

Section 748 - Regulations

1077. Section 748 enables the making of regulations to:

- \* vary the requirements for Part A, B, C and D statements contained in Pt.6.12;
- \* require the ASC and the securities exchanges to be given signed copies of documents or prescribed notices; and
- \* make provision as to what constitutes a class of shares for the purposes of Ch.6 of the Corporations Law.

1078. It is being repealed at the request of the Senate Committee on Scrutiny of Bills.

Section 996 - False or misleading statement in, or omission from, prospectus

1079. Section 996(1) prohibits the authorisation or causing of the issue of a prospectus in which there is a false or misleading statement or an omission. Certain defences are set out in s.966(2) including proving that the statement or omission was not material.

1080. The amendments will shift the onus of proof onto the prosecution to prove that the false statements or misleading statements or omissions are material. This amendment was sought by the Senate Committee on Scrutiny of Bills.

Section 1006 - Civil Liability for false or misleading statement in or omission from prospectus

1081. Section 1006 sets out the persons against whom civil actions may be brought under s.1005 in relation to a prospectus which is false or misleading.

1082. Proposed s.1006(1) will restrict liability to situations where a prospectus contains a material statement which is false or misleading or from which there is a material omission. This will bring the civil liability provisions in line with s.996 as amended.

1083. The amendments to s.1006(2) clarify the interaction of ss.996, 1005 and 1006 while preserving the existing policy. That is, all persons referred to in s.1006(2) who are involved in the issue of the prospectus will be liable to investors for any loss they suffer as a result of (materially) false or misleading statements or omissions. Such persons will have defences commensurate with their degree of involvement.

1084. By s.1005, a person who authorises or causes the issue of a prospectus which is materially false or misleading or from which there is a material omission in contravention of s.996 will be liable to compensate those who suffer loss as a consequence. Section 1005 also imposes such liability on any person involved in the contravention of s.996. The amendment to s.1006(2) has the effect of deeming any or all of the persons referred to therein as being so involved. Accordingly in an action against such a person, it will not be necessary to establish any of the factors set out in s.79 as constituting an involvement in a contravention. Section 1006(2)(j) is being omitted as persons who authorise or cause the issue of the prospectus will be primarily liable under s.1005 as the person contravening s.996.

Section 1007 - No liability to person with knowledge of relevant matter

1085. This amendment is consequent upon the omission of s.1006(2)(j). It has the effect of ensuring that persons who authorised or caused the issue of the prospectus will continue not to be liable to persons who have knowledge that the statement was false or misleading or was aware of the omitted matter.

Section 1009 - Liability of experts

1086. Section 1009 defines the extent of the liability of experts along with that of auditors, bankers, solicitors and other professional advisers (other than stockbrokers, sharebrokers and underwriters) for false or misleading statements or omissions in prospectuses. Such persons are to have broadly equivalent liability.

1087. The provision is being amended to correct drafting errors by:

\* removing the reference to stockbrokers, sharebrokers and underwriters (s.1006(2)(f)); and

\* giving auditors, bankers and solicitors defences equivalent to those given to experts under ss.1009(3)(b) and (c).

Section 1010 - Liability of person named in prospectus, etc

Section 1011 - No liability for mistake etc, if reasonable precautions taken

1088. The amendments to ss.1010 and 1011 are consequent upon the omission of s.1006(2)(j). They have the effect of ensuring that the provisions continue to apply in relation to persons who authorised or caused the issue of the prospectus.

Section 1018 - Prospectus in relation top securities

1089. Section 1018 prohibits the offer of securities for subscription or purchase or the issue of invitations to subscribe for or buy securities unless there is a complying prospectus. Exemptions for secondary trading in listed securities are set out in:

- \* s.1018(2) - for securities listed prior to commencement of the section (which was inserted on the recommendation of the Joint Select Committee on the Corporations Legislation); and
- \* s.1018(5) - for securities in relation to which a prospectus has previously lodged and where the corporation has complied with the listing requirements applicable to it.

1090. Section 1018 is being amended to ensure that the exemption in s.1018(5) only applies to secondary trading in listed securities.

Section 1022 - General provisions applicable to all prospectus

Section 1024 - Supplementary prospectus

1091. The amendments to ss.1022 and 1024 are consequent upon the omission of s.1006(2)(j). They have the effect of ensuring that the provisions continue to apply in relation to persons who authorised or caused the issue of the prospectus.

Section 1034 - Transitional

1092. Existing s.1034 makes transitional arrangements for certain prospectuses issued prior to the commencement of the Corporations Law.

1093. This amendment substitutes a new transitional provision for such prospectuses which differs from existing s.1034 in the following respects:

\* it takes into account the requirement for most prospectuses to be registered under the Corporations Law (and not merely lodged) by in such cases deeming the prospectus registered by the NCSC to have been registered by the ASC;

\* it applies to "extended life" prospectuses, viz those prospectus in respect to which the NCSC exercised its powers under s.215C of the Companies Act and Codes to make them current for a period exceeding the 6 months specified in s.110(12) therein;

\* it makes it clear that the provision does not alter the date of issue of the prospectus for the purposes of the Corporations Law and, therefore, does not extend the life of a prospectus to more than the 6 months allowed under s.1040 or in the case of the previously mentioned "extended life" prospectuses -to a period beyond that granted by the NCSC; and

\* it enables the making of regulations to clarify the extent to which provisions of the Corporations Law (other than those which expressly apply to prospectuses issued before the commencement of that Law) and provisions of the Companies Act and Codes apply to prospectuses to which s.1034 applies.

#### Section 1044 - Application to close corporations

1094. Present s.1044 deals with the application of the debenture provisions (Pt. 7.12 Div. 4) to close corporations. Consistent with the removal of references to such corporations in the Corporations Law, it is being repealed.

1095. The amendment also inserts a new s.1044 which is intended to correct a drafting oversight in the debenture provisions by bringing the scope of those provisions broadly in line with those in the co-operative scheme legislation. Proposed s.1044 provides that ss.1045 and 1052 to 1060 do not apply in relation to excluded issues, offers and invitations in relation to securities (which are defined in s.66). The corresponding provisions in Div. 5 of Pt. IV of the CA only apply to offers to the public.

Section 1063 - Exceptions and modifications

1096. This amendment makes minor drafting corrections.

Section 1064 - Issue of prescribed interests restricted

1097. Section 1064 as amended by Sch.1 of the Bill will have the effect of prohibiting all persons other than public corporations from offering prescribed interests, in line with s.169 of the CA.

1098. This amendment inserts a transitional provision preserving the grandfather exemptions in relation to certain partnership interests which are presently set out in s.29 of the various State Companies (Application of Laws) Acts (Tasmania, s.27; Northern Territory, s.28) and s.17 of the Companies (Transitional Provisions) Act 1981 (Cth).

1099. The different dates applying in different jurisdictions reflect the dates on which the qualification to the exemption for interests in partnership schemes in the definition of participation interest relating to persons in the business of promoting such interests (which corresponds to para. (g)(i) of the definition of "participation interest" in s.9 of the Corporations Law) was first introduced in that jurisdiction.

Section 1068 - Lodgment of consolidated copies of deed

1100. Section 1068 provides that where a deed is amended by an instrument, the management company must lodge a consolidated copy of the deed with the ASC if so required by the ASC.

1101. The amendment will make it clear that the section refers to amending instruments made before as well as after the commencement of the section.

Section 1078 - Restriction on hawking securities

1102. Section 1078 prohibits the hawking of securities. The corresponding provision in s.552(1) of the CA applies in relation to offers to the public while s.1078 is of general application and in addition prohibits offering securities to persons in different places by use of an eligible communications service. This amendment enables exemptions from s.1078 to be granted by regulation.

Section 1079 - Restrictions on written invitation or offers in respect of securities

1103. Section 1079 sets out the requirements for making written secondary offers of securities. It has a more general application than the corresponding provisions in s.552(3) and (4) of the CA which, like the prospectus provisions of that Act, only apply to offers to the public.

1104. The amendment has the effect of bringing the application of s.1079 in line with that of the prospectus provisions of the Corporations Law by:

\* removing the professional investor exemptions in s.1079(1) in line with the removal of a similar exemption from the prospectus provisions in May 1989 on the recommendation of the Joint Select Committee on the Corporations Legislation; and

providing that s.1079 does not apply in relation to excluded offers and excluded invitations (as defined in s.66).

#### Section 1274 - Registers

1105. Section 1274 sets out the ASC's powers and duties in relation to the keeping of registers and makes provision for public access to lodged documents and related matters. These amendments correct a drafting oversight and introduce new provisions based on provisions already appearing in the CA which will facilitate computerisation of the ASC's registry functions. It is envisaged that the ASC will use computer generated documents and the display of information on visual display units to satisfy most, if not all, company searches.

1106. Proposed s.1274(2)(a)(ia) brings the range of documents available for inspection under the Corporations Law back into line with that available under the co-operative scheme legislation by making documents lodge under Ch.7 (other than the fundraising and transfer of securities provisions) and Ch.8 unavailable.

1107. Proposed ss.1274(4A) and (4B) are based on ss.31(4A) and (4B) of the CA.

1108. Proposed s.1274(4A) provides that a person is not entitled to inspect the original of a document or certificate if the ASC keeps a record of the information in that document or certificate and that information can be provided to the person either in writing or by visual display. In practical terms, this means that if the ASC keeps information about a company on its computer system, a person is not entitled to see the original document or certificate from which the information was extracted if the ASC can provide that information by means of computer print-out or by displaying it on a visual display unit.



1109. Proposed s.1274(4B) deals with the situation where a person requests a copy or extract from a document pursuant to s.1274(2)(c) and the ASC keeps a record of the information set out in that document or certificate (e.g. by means of computer). If the Commission gives information in writing about a document containing the contents of

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

then the ASC is considered to have given:

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

1110. Under proposed s.1274(4C), the ASC will be able to satisfy a request for a certified copy or, a certified extract from a document by certifying a writing or document (such as a computer generated document) given under proposed s.1274(4B)(c). Such a certified writing or document will by proposed s.1274(4C)(d) be admissible in Court as rim f i evidence of the information contained in it in the same way as certified copies or extracts of documents provided by the NCSC are now (CA, s.31(7)).

1112. Proposed ss.1274(15) and (16) enable the ASC to, in effect, issue requisitions to persons regarding information about them which appears or should appear on the ASC's registers. These provisions will assist the ASC in ensuring the accuracy and completeness of the information on its registers.

1113. Proposed s.1274(17) enables the ASC to use registers kept by the NCSC or other authority (such as a Corporate Affairs Commission) as the basis for the registers it is

required to keep. Proposed s.1274(18) ensures that the relevant provisions of Corporations Law apply to documents lodged or otherwise dealt with under the Companies Act and Codes to the extent that those documents have been incorporated into a register kept by the ASC.

Section 1274A - Obtaining information from certain registers

1114. Proposed s.1274A is based on s.31A of the CA. The objective of proposed s.1274A is to clarify the rights of a person to inspect registers maintained by the Commission. At present s.1274(1) provides that the Commission shall 'keep such registers as it considers necessary in such form as it thinks fit'. However, the Act does not expressly provide that a person may inspect or search those registers.

1115. Proposed s.1274A(2) will enable a person to search a prescribed register (other than by computer), whilst proposed s.1274A(3) will enable a person to search a prescribed register by computer to obtain prescribed information. Proposed s.1274A(4) gives the ASC the authority to provide a person with prescribed information that has been extracted from a prescribed register by computer.

1116. The proposed subsections have been drafted in terms of 'prescribed registers' being searched to obtain 'prescribed information'. This approach has been adopted:

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

(b) in the case of 'prescribed registers' - to reflect the fact that some registers maintained by the ASC will contain information of a confidential nature and thus should not be made available to the public..

Section 1323 - Power of Court to bring about payment or transfer of monies, securities, futures contracts or other property

1117. By s.1323 if an investigation, prosecution or civil proceedings is in progress, the Court, on the application of the ASC (or an aggrieved person), will be able to make any one or more of a variety of orders relating to the property of the person concerned. Under ss.1023(1)(g) and (h), these include orders to prohibit a person from removing property from Australia; and to appoint a receiver over a person's property (or part of that property) having such powers as the Court orders.

1118. The recent difficulties with the Estate Mortgage trusts, have highlighted the need to clarify the extent of the Court's power under s.1323(1)(h). In regard to the equivalent provision in s.573(1)(h) of the CA, it was held by the NSW Supreme Court in Re Transphere Pty. Limited (1986) 4 ACLC 426, that a Court could appoint a receiver to property being held on trust by a company. However, there have been doubts about whether this judgment would be followed by Courts in other jurisdictions.

1119. In order to resolve any such doubts, the proposed amendment inserts a new provision s.1323(2A), which makes it clear that the purposes of appointing a receiver under s.1274(1)(h), the property of a person includes property held on trust by that person. Section 1323(1)(g) which enables the Court to make an order prohibiting the person from removing the property from Australia is also clarified in this manner.

Section 1336A - Proceedings by or against NCSC to be  
proceedings by or against Commission

1120. Proposed s.1336A is based on s.9 of the Companies  
(Transitional Provisions) Act 1981 (which has equivalents in  
s.22 of the various State Companies (Application of Laws)  
Acts).

1121. It will ensure that the transition to new national  
scheme does not prejudice existing proceedings or rights of  
proceedings involving the NCSC including existing  
prosecutions. Under proposed s.1336A:

\* a proceeding which had been commenced by or against the  
NCSC may be continued by or against the ASC; and

\* a proceeding which but for the Corporations Law could have  
been commenced by or against the NCSC may be commenced by or  
against the ASC.

SCHEDULE 4

TECHNICAL AMENDMENTS OF THE CORPORATIONS LAW

1122. The amendments in Schedule 4 make minor drafting corrections to various provisions of the Corporations Law. These include the correction of minor typographical errors and cross referencing errors.

SCHEDULE 5

AMENDMENTS RELATING TO BUY-BACKS

Division 4A - Unacceptable  
Self - acquisition Schemes

- 206AAA. Interpretation
- 206AAB. Self-acquisition scheme
- 206AAC. Relevant matters affecting self-acquisition scheme
- 206AAD. Declaration by Commission
- 206AAE. Commission may make interim orders
- 206AAF. Court may reverse Commission's declaration
- 206AAG. Court may act on Commission's declaration
- 206AAH. Effect of Subdivision

Division 4B - Permitted Buy - backs of Shares

Subdivision A - How this Division Works

- 206AA. Outline of structure

Subdivision B - Interpretation

- 206BA. Effect of Subdivision
- 206BB. Interpretation
- 206BC. What constitutes buying back shares

- 206BE. The 10% in 12 months limit
- 206BF. Takeover aspects of proposed resolution
- 206BG. When directors presumed to be aware of proposed or actual takeover bid
- 206BH. Solvency declaration
- 206BJ. Auditor's report on solvency declaration
- 206BK. When buy-back agreement is completed
- 206BL. When shares are transferred
- 206BM. Classes of shares

Subdivision C - Power to Buy Back Shares

- 206CA. Power to buy back shares
- 206CB. Completion of buy-back
- 206CC. Effect of Division
- 206CD. Other obligations and liabilities not affected

Subdivision D - Buy-back Authorisation in Articles

- 206DA. Articles to contain buy-back authorisation
- 206DB. Inclusion, effect and renewal of buy-back authorisation

Subdivision E - Buy-backs by Public Companies

- 206EA. Only certain buy-backs permitted

Subdivision F - Buy-back Schemes

- 206FA. Shares and classes of shares
- 206FB. Buy-back scheme
- 206FC. Withdrawal or variation of buy-back offers

206FD. Avoiding odd lots

206FE. Odd lots to be disregarded for purposes of 10% in 12 months limit

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

206GA. When approval required

206GB. Buy-back offers made under a resolution

206GC. Resolution to approve proposed buy-back scheme

206GD. Notice of resolution to approve proposed buy-back scheme

Subdivision H - Employee - shares Purchases

206HA. Approval by ordinary resolution

206HB. Resolution to approve proposed employee-shares purchase

206HC. Notice of resolution to approve proposed employee-shares purchase

Subdivision J - Selective Buy-back

206JA. Approval, by special resolution passed by special majority, of selective buy-back by public company

206JB. Approval by special resolution where selective buy-back by proprietary company exceeds 10% in 12 months limit

Subdivision K - Notice of Resolution to Approve Proposed Selective Buy-back

206KA. Notice must comply with Subdivision



- 206KB. Contents of resolution and proposed agreement
- 206KC. Availability of agreement for inspection
- 206KD. Valuation of non-cash consideration
- 206KE. Expert's opinion about whether consideration fair and reasonable
- 206KF. Matters affecting expert's objectivity
- 206KG. Expert's consent
- 206KH. Reasons for buy-back
- 206KJ. Solvency aspects
- 206KK. Directors' interests
- 206KL. Effect on control of company
- 206KM. Other relevant information
- 206KN. Notices to be the same

Subdivision L - Creditors may Object to Proposed Buy-backs

- 206LA. Advertising proposed buy-backs
- 206LB. Content of advertisement
- 206LC. Newspapers in which advertisement to be published
- 206LD. Creditor may apply to Court
- 206LE. How application to be dealt with
- 206LF. Buy-backs not to proceed while application pending
- 206LG. Company to comply with order of Court

Subdivision M - Solvency Requirements

- 206MA. Solvency requirements for buy-back scheme

- 206MB. Solvency requirements for other buy-backs
- 206MC. Copy of solvency declaration and auditor's report to be lodged with Commission
- 206MD. Revocation of solvency declaration
- 206ME. Solvency requirements for completion of buy-back under buy-back scheme
- 206MF. Company not to register certain transfers during solvency period

Subdivision N - Share Buy-backs and other Securities Issues

- 206NA. Buy-back consideration not to consist of other securities of the company
- 206NB. No buy-backs during rights issue or placement
- 206NC. No rights issue or placement during offer period or within 3 months after buy-back

Subdivision P - Effect of Buy-back on Shares

- 206PA. Rights attaching to bought back shares
- 206PB. Company not to dispose of bought back shares
- 206PC. Cancellation of shares after transfer to company
- 206PD. Accounting for money spent on buy-back where amount exceeds nominal value of shares

Subdivision Q - Effect of Insolvency

- 206QA. Buy-back offer by externally-administered company void

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- 206QB. Effect of supervening insolvency on buy-back scheme
- 206QC. Directors to indemnify insolvent company where consideration provided, or partly-paid shares acquired, under buy-back agreements
- 206QD. Relief from liability under section 206QC

Subdivision R - Rights of Unpaid Sellers

- 206RA. Specific performance of buy-back agreements
- 206RB. Buy-back agreement unenforceable while company insolvent
- 206RC. Unpaid seller may prove in winding up of company
- 206RD. Ranking of seller's claim in winding up

Subdivision S - Certificates and Declarations of Compliance

- 206SA. Certificate of compliance
- 206SB. Presumptions about certain matters
- 206SC. Who must sign compliance certificate
- 206SD. Offences relating to compliance certificates: buy-back schemes
- 206SE. Offences relating to compliance certificates: other buy-backs
- 206SF. Declaration by Court of substantial compliance

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

- 206TA. Company to notify Commission of buy-backs

206TB. Listed company to notify securities exchanges of buy-backs

Subdivision U - Listed Company to Notify Members about Share Cancellation

206UA. Notifying member whose shares were cancelled

206UB. Notifying members generally

Subdivision V - Register of Buy-backs

206VA. Company to keep register

206VB. Particulars of buy-back schemes

206VC. Particulars of other buy-backs

206VD. Alteration of register where buy-back does not proceed

206VE. Entries in register after cancellation of shares

206VF. Inspection and copies of register

Brief outline of changes

1123. A brief outline of the Share buy-back proposals is set out below. The proposals are the same as those enacted in the Co-operative Scheme Legislation Amendment Act 1989 and include:

- \* Regulation of indirect buy-back transactions over a 10% cross-shareholding threshold which amount to an 'unacceptable acquisition scheme' according to certain criteria.
- \* Self-purchase of both fully-paid and partly-paid shares will be permitted.
- \* The financial assistance validation procedure will be retained other than when used for the purpose of avoiding the buy-back requirements.
- \* Subsidiary companies will continue to be prohibited from purchasing shares in their holding companies (Corporations Act s.185).
- \* A company will be required to derive its self-purchase capacity from its constituent documents.
- \* Public company buy-backs will be limited to 10% in 12 months.
- \* Public companies may repurchase shares within the 10% limit by on-market purchases pair pass proportional offers or selective offers.
- \* Selective buy-backs will be subjected to a 75% approval of shareholders requirement and must be preceded by an expert's report which concludes that the price is fair and reasonable.
- \* Shareholder approval, other than for selective buy-backs, will not be necessary for either public or proprietary company buy-backs under 10%.

\* A company's self-purchase capacity will be subject to a 'sunset' provision so that the power will need to be renewed every 3 years by special resolution of shareholders.

\* Bought back shares must be cancelled and all rights attaching to self-purchased shares will be extinguished.

\* The effect of the solvency declaration will be to make directors personally liable if the company becomes insolvent within 12 months of a self-purchase transaction.

### Dictionary

1124. It is proposed to amend Sec.9 of the Act by inserting definitions of words and phrases used in the Bill. The definitions include the following:

#### "approving holding company"

1125. This term is used in proposed s.206HA which requires a company and, if it has a holding company or holding companies, those companies, to approve a buy-back which is an employee-share purchase by an ordinary resolution passed at a general meeting of the company or companies.

#### "participating employee"

1126. This term is used in Bill cl.206HC which sets out the matters required to be included in a notice of resolution to approve a proposed purchase of employee-shares. The notice of resolution is required, amongst other things, to set out certain details in relation to the beneficial owner of the shares which are proposed to be purchased, with the purpose of establishing that person's credentials as a participating employee in relation to the corporation.

Issue of shares at a premium

1127. It is proposed to insert a new paragraph in s.191 of the Act consequent upon proposed s.206PD which provides that money spent on buy-backs, where the amount paid for the shares exceeds the nominal value of the shares, shall be written off against any amounts standing to the credit of a share premium account before applying the distributable profits of the company.

Company financing dealing in its shares etc

1128. Background Para. 205(1)(a) in the Act reinforces the para. 205(1)(b) prohibition on the purchase by a company of its own shares by further prohibiting a company from giving financial assistance for the acquisition of its own shares. Subsections 205(8) and (9) set out several statutory exceptions to the s-sec.205(1) prohibition to conserve proper commercial transactions.

1129. Subsections 205(10)-(15) set out a validation procedure for transactions which would otherwise breach the prohibition on a company giving financial assistance to others for the acquisition of its shares or shares in its holding company. The validation procedure mitigates the strict application of the para. 205(1)(a) prohibition in cases where the giving of financial assistance will not prejudice the company's financial position.

1130. However, because para. 205(1)(b) strictly prohibits the purchase by a company of its own shares, companies have been increasingly resorting to the s-secs.205(10)-(15) type validation procedure to achieve what is, in effect, a buy-back of shares. A practice of recent times has involved use of the financial assistance validation procedure to enable a company to give financial assistance to purchasers of the company's shares in return for the surrender of control over those shares.

Proposed Amendment

1131. It is proposed to retain the s-sec.205(10) validation procedure for financial assistance transactions other than those which are designed to avoid the sub-para 205(1)(b) prohibition on share buy-backs(Bill para.5(d)).

Consequences of company financial dealings in its shares etc

1132. A consequential amendment is made to Sec 206 of the Act to preserve buy-back transactions carried out in accordance with proposed new Division 4B which lays down the ground rules for buying back shares.

Insertion of DivisionsDivision 4A - Unacceptable Self-acquisition Scheme

1133. Background The case of August Investments Pty. Ltd. v Poseidon and Samin Limited [1971] 2 SASR 71 established that a company may, at least in certain circumstances, effectively purchase a proportion of its own shares by acquiring an interest in one or more of its non-subsidiary corporate shareholders (subject to the restriction now imposed by the Companies (Acquisition of Shares) Act 1980 which restricts the manner of effecting an acquisition that could increase a person's entitlement to voting shares beyond 20%). The net result of the Poseidon rule appears to be that a company can legitimately purchase its own shares indirectly even though it is prohibited from doing so directly.

1134. For example, Company A (the purchasing company) which acquires a controlling interest in Company B (the 'interposed' Company A shareholder) which owns a significant parcel of shares in Company A, is not required to consult its shareholders in relation to its purchase of Company B shares even if one effect of the purchase is to lessen the value of remaining shareholdings. Nor is there any obligation to give creditors notice of the intended acquisition even though the rationale for the buy-back prohibition is based on the rule in



Trevor v Whitworth (1887) 12 App Cas. 409 that creditors are entitled to assume that a company will maintain its capital. The creditors, in any case, would have no right to intervene.

1135. Although one result of the introduction of a buy-back capacity for both public and proprietary companies should be a reduced incentive to resort to the use of non-subsubsidiary companies for buy-back purposes, the incentive may not be removed entirely. For example, if a company intends to defend itself against a takeover bid by directly purchasing its own shares, and subsequently cancelling those shares, it could be confronted with the unintended result of automatically increasing the bidder's stake in the company if the bidder is already a current shareholder. On the other hand, if it purchases its own shares indirectly it will be put in a stronger position vis-a-vis the bidder.

#### Proposed Amendment

1136. It is proposed to limit cross-shareholding arrangements constructed for the purpose of self-acquisition by applying a relevant interest test where a company's indirect ownership of its shares exceeds 10%. However, rather than imposing an outright prohibition, the ASC will be given a discretionary power to intervene where it considers that a particular cross-shareholding amounts to an unacceptable self-acquisition scheme according to criteria set out in the Act (New s.206AAD).

1137. The criteria will refer to such matters as to how many shares the scheme relates, the amount of consideration involved, the degree of disclosure made to shareholders, creditors and securities exchanges, consultation of shareholders and creditors and the takeover aspects of the scheme (New s.206AAC).

#### Proposed s.206AAA: Interpretation

1138. Proposed s.206AAA widely defines certain words and phrases used in proposed Division 4A

Proposed s.206B: Self-acquisition scheme

1139. Proposed s.206AAB describes a self-acquisition scheme in respect of which the Commission is empowered to make a declaration under proposed s.206AAD. The description is drawn in necessarily broad terms and revolves around the purpose behind the scheme, whether it is the sole purpose or is one of a number of purposes. Proposed paras. 206AAB(1)(a) - (e) describe purpose in terms of acquiring control by various means over shares in a company.

1140. It is also proposed to use Division 5 of Part 1.2 of the Act, to extend the meaning of ~ and ~ by using the relevant interest concept for the purposes of defining what is a self-acquisition scheme.

1141. Proposed s-sec. 206AAB(4) excludes transactions associated with buy-backs permitted by proposed new Division 4B from the definition of the self-acquisition schemes which will be subject to the Commission's declaratory powers under proposed ss.206AAD and 206AAE.

Proposed s.206AAC: Relevant matters affecting self-acquisition scheme

1142. Proposed s.206AAC sets out the matters to which the Commission must have regard in considering whether it shall declare a self-acquisition scheme or a connected transaction to be, or form part of, an unacceptable self-acquisition scheme. The matters are those relevant to the self-purchase issue generally, such as disclosure of information to members and creditors and the opportunity for participation in the scheme by those members and creditors.

Proposed s.206AAD: Declaration by Commission

1143. It is proposed to allow the Commission, after considering the matters listed in proposed s.206AAC, to declare a transaction to form part of an unacceptable self-acquisition scheme which it considers will materially

prejudice the rights or interest of the company, its creditors or member or a class of its creditors or members. The Commission may only make a declaration where the relevant transaction crosses the 10% relevant interest threshold described in proposed para. 206AAD(1)(b).

1144. Proposed s-sec.206AAD(2) gives the Commission 90 days in which to declare unacceptable a transaction already entered into. The Commission's declaratory powers in respect of proposed transactions are not subject to a time restriction for the reason that the rights and liabilities of parties are not established until they have actually entered into the transaction.

Proposed s.206AAE: Commission may make interim orders

1145. Once the Commission has made a declaration under proposed s.206AAD it may make one or more of the orders described in proposed paras. 206AAE(1)(a)-(g) which have the effect of restraining a person or the company from carrying out obligations under a self-acquisition scheme or connected transaction which has been declared unacceptable.

1146. Proposed s-sec.206AAE(4) gives a right to appeal to the Court against an order of the Commission.

1147. Proposed s-sec.206AAE(8) prevents the Commission from making an order where it has not given a person the subject of the order an opportunity to appear at a hearing before the Commission and to make submissions and to give evidence.

Proposed s.206AAF: Court may reverse Commission's declaration

1148. It is proposed to allow the Court to reverse the Commission's declaration so that a transaction or proposed transaction is no longer declared to be part of an unacceptable self-acquisition scheme.

Proposed s.206AAG: Court may act on Commission's declaration

1149. Proposed s.206AAG allows the Court to make wide ranging orders, after the Commission has made a declaration under proposed s.206AAD, on the application of the Commission, the company or a member or creditor of the company.

Proposed s.206AAH: Effect of Subdivision

1150. Proposed s.206AAH ensures that the provisions of Division 4A do not have the unintended effect of affecting the operation of Section 205 or 206 of the Act or the provisions of Chapter 6 of the Act. Chapter 6 deals with the acquisition of shares generally.

Proposed Division 4B - Permitted Buy-backs of Shares  
Subdivision A - How this Division works

Proposed s.206AA: Outline of structure

1151. Proposed s.206AA explains how the proposed buy-back capacity exists alongside the Corporations Act ss.205 prohibition on a company acquiring its own shares. The proposed provision is self-explanatory.

Subdivision B - Interpretation

Proposed s.206BA: Effect of Subdivision

1152. Proposed s.206BA provides that the Subdivision B interpretation provisions apply only to Division 4B

Proposed s.206BB: Interpretation

1153. Proposed s.206BB defines certain words and definitions for the purposes of proposed new Division 4B which sets out the share buy-back procedure. Some of the terms defined are set out below with cross-references, as appropriate, to the substantive provisions in which the defined terms are employed.

'buy back'

1154. The meaning of this term is found in proposed s.206BC which says that where a company buys shares in itself, it shall be taken to buy back the shares.

'buy-back'

1155. The term 'buy-back' is descriptive of an acquisition by a company involving the buying back of shares as understood by proposed s.206BC.

'buy-back authorisation'

1156. This term refers to the self-purchase capacity which must be contained in a company's constituent documents as required by proposed s.206DA.

'buy-back scheme'

1157. A buy-back scheme will be one constituted by offers which fall within the limits set by proposed s.206FB.

'employee - shares purchase'

1158. A buy-back which fits into this definition of employee-shares purchase must meet the requirements set out in proposed ss.206HA, 206HB and 206HC which primarily relate to consultation of shareholders.

'odd-lot purchase'

1159. This term is defined to mean a buy-back by a listed body, where the number of shares acquired is an odd lot of shares in the body to distinguish it from both a buy-back scheme and an employee-shares purchase which attract the operation of other provisions of the Bill.

'offer period'

1160. Proposed s.206QB determines the effect of supervening insolvency on a buy-back scheme (namely, declaring buy-back agreements to be void or deeming offers to buy back shares to be withdrawn in certain circumstances) and uses the term "offer period" in pursuance of this result.

'solvency period'

1161. A 'solvency period', being a term used in proposed Subdivision Q of Division 4B, will commence at the same time as the buy-back offer period, but will extend beyond the offer period to the time when purchase money is first paid to sellers in the buy-back scheme.

Proposed s.206BC - What constitutes buying back shares

1162. Proposed s.206BC makes it clear that the use of the expression 'buy back the shares' in the Bill is a reference to a company buying shares in itself.

Proposed s.206BE: The 10% in 12 months

1163. Proposed s.206BE sets out the formula to be applied when calculating what is 10% of a company's shares for the purposes of complying with the limit placed on the number of shares which may be bought back within a 12 month period.

Proposed s.206BF: Takeover aspects of proposed resolution

1164. The CSLRC Discussion Paper on the topic of buy-backs pointed to the experience of overseas jurisdictions which have had to introduce mechanisms to prevent the buy-back power being exercised by company management as a takeover defence strategy without the informed consent of shareholders.

1165. To ensure effective shareholder participation, the exercise of the buy-back power requires shareholder approval by ordinary or special resolution and the notice of the

proposed resolution will be required to inform the shareholders of the takeover aspects of the proposed purchase (for example proposed s-sec.206GD(4)).

1166. Proposed s.206BF sets out the information which must be included in a notice of a proposed resolution to satisfy the requirement to set out the takeover aspects of the proposed resolution.

Proposed s.206BG: When directors presumed to be aware of proposed or actual takeover bid

1167. Proposed s.206BG creates a presumption that directors were aware of a proposed or actual takeover bid in certain circumstances with the result that directors will not be able to avoid the notice requirements of proposed s.206BF and related provisions.

Proposed s.206BH: Solvency declaration

1168. A prerequisite to the exercise of the buy-back power will be the signing of a solvency statement by all of the directors of the purchasing company. Proposed s.206BH sets out the matters which must be included in a solvency declaration required by proposed ss.206MA and 206MB.

1169. Although all directors will be required to sign the statement personally, duly appointed alternate directors will qualify as personal signatories for the purposes of the solvency statement requirements.

1170. Proposed paras.206BH(1)(d), (e) and (f) require the solvency statement to specify all current and proposed buy-back schemes in order to establish a nexus between the directors' knowledge of the facts and their personal liability which may arise on the event of the company's insolvency.

Proposed s.206BJ: Auditor's report on solvency declaration

1171. Where an auditor's report is required by the Bill in relation to a proposed buy-back or proposed buy-back scheme, it must include a declaration of the kind described in proposed s.206BJ. The auditor may add further explanation or relevant information which does not contradict the statement required by proposed s.206BJ.

Proposed s.206BK: When buy-back agreement is completed

1172. Where all the consideration that is required by any agreement constituting a buy-back by a company has been provided, that agreement is taken to be completed by proposed s.206BK.

Proposed s.206BL: When shares are transferred

1173. Proposed s.206BL provides that shares are taken to have been transferred, pursuant to an agreement, upon registration.

Proposed s.206BM: Classes of Shares

1174. Proposed s.206BM provides that, for the purposes of proposed new Division 4B, shares in a company will, unless they are divided into 2 or more classes, constitute a class of shares.

Subdivision C - Power to buy Back Shares

Proposed s.206CA: Power to buy back shares

1175. Proposed s.206CA empowers a company, through its directors, to buy back its ordinary shares subject to the conditions prescribed in proposed new Division 4B which essentially relate to disclosure, consultation of shareholders and creditors and equality of treatment as between shareholders - for example see proposed Subdivision G.



Proposed s.206CB: Completion of buy-back

1176. Subject to proposed new Division 4B, proposed s.206CB ensures that shares purchased by a company pursuant to the buy-back provisions of the Bill can be transferred to the company.

Proposed s.206CC: Other obligations and liabilities not affected

1177. Proposed s.206CC confers independent operation on the buy-back provisions so that the self-purchase capacity is not re-defined by legislative provisions other than those of proposed Division 4B, the constitution of a company, the rules of a securities exchange or any agreement.

Proposed s.206 CD: Other obligations and liabilities not affected

1178. Proposed s.206CD preserves obligations and liabilities, including those arising under Section 232, which arise otherwise than under proposed new Division 4B.

Subdivision D - Buy-back Authorisation in Articles

Proposed s.206DA: Articles to contain buy-back authorisation

1179. Proposed s.206DA requires a company to derive its self-purchase capacity from its articles which might grant the power either at the time of incorporation or later by amendment by special resolution. The function of this restriction on the grant of a self-purchase capacity is to enable shareholders to determine, in principle, whether the company will have a buy-back capacity.

Proposed s.206DB: Inclusion, effect and renewal of buy-back authorisation

1180. The effect of proposed s.206DB will be to cause a company's self-purchase power to lapse every 3 years unless it is renewed by an amendment to the company's articles in the usual manner prescribed elsewhere in the Act.

1181. Proposed s.206DB reinforces the principle that shareholders should decide whether the company should have a buy-back capacity by ensuring that shareholders who have become members after incorporation, or since a renewal of the buy-back power, are consulted.

Subdivision E - Buy-Backs by Public Companies

1182. Proposed s.206EA confines public companies to a 10% in 12 month buy-back capacity except where the buy-back is an employee-share purchase or an odd-lot purchase.

Subdivision F: - Buy-back Schemes

Proposed s.206FA: Shares and classes of shares

1183. It is proposed to restrict buy-backs to the purchase of ordinary fully-paid or partly-paid shares of the company.

Proposed s.206FB: Buy-back scheme

1184. It is proposed that share purchases pursuant to a buy-back scheme may only be made by way of written offers to all shareholders. Proposed s.sec.206FB(11) further requires that an offer made pursuant to a buy-back scheme will be on a proportional basis.

Proposed s.206FC: Withdrawal of variation of buy-back offers

1185. Proposed s.206FC requires Commission approval for the withdrawal or variation of a buy-back to ensure that the rights of all parties are given due consideration if a company intends to withdraw or vary a buy-back offer.

Proposed s.206FD: Avoiding odd lots

1186. Proposed s.206FD deems odd lots of shares remaining after the acceptance of a buy-back offer to have been included in the offer and acceptance. The purpose of the provision is to avoid the creation of unmarketable parcels of shares which would otherwise be an unavoidable consequence of some offers.

Proposed s.206FE: Odd lots to be disregarded for purposes of 10% in 12 months limit

1187. Where an odd lot has been deemed part of a buy-back scheme, the number of shares in that odd lot shall not be counted in calculating the 10% in 12 months limit.

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

Proposed s.206GA: When approval required

1188. The Bill generally allows the management of a company to use its own discretion in exercising the buy-back power up to a 10% in 12 months limit. If that limit is exceeded by proprietary companies (which are permitted to go beyond 10%) or at least one of the company's directors is aware of the matters detailed in proposed sub-paras.206GA(b)(i) and (ii) relating to a takeover bid, then proposed s.206GA requires shareholders to be consulted and any further buy-back offers to be approved by ordinary resolution of the company.

Proposed s.206GB: Buy-back offers made under a resolution

1189. If the Bill requires particular buy-back offers to be made under a resolution of the company, the resolution must satisfy proposed s.206GB.

Proposed s.206GC: Resolution to approve proposed buy-back scheme

1190. So that members may make a fully informed decision where exercise of the buy-back power requires the prior consent of shareholders, proposed s.206GC sets out matters which must be included in a notice of the meeting to vote on a resolution to approve a proposed buy-back scheme and matters that the resolution must specify. One of the matters which the resolution must specify is the price to be paid for the shares the subject of the proposed buy-back scheme, although proposed s-secs.206GC(3) and (4) allow that price to be specified to be

somewhere in a range between a specified minimum and maximum amount and to be determined by the directors, or the price may be determined by the directors in another manner specified in the resolution.

Proposed s.206GD: Notice of resolution to approve proposed buy-back scheme

1191. Proposed s.206GC requires the matters specified in proposed s.206GA to be included in a notice of resolution to approve a proposed buy-back scheme. Those matters include a copy of the solvency declaration by the directors (proposed s-sec.206GD(6)) and the takeover aspects of the proposed resolution (proposed s-sec.206GD(4)).

Subdivision H - Employee-shares Purchase

Proposed s.206HA: Approval by ordinary resolution

1192. Proposed s.206HA requires the prior consent of the shareholders of a company, and of its holding company, by ordinary resolution to a buy-back which is an employee-shares purchase. The agreement to purchase the shares must be in accordance with the resolution(s), which in turn must comply with proposed s.206HB.

Proposed s.206HB: Resolution to approve proposed employee-shares purchase

1193. Proposed s.206HB requires that a resolution to approve an employee-shares purchase must be preceded by a notice which complies with proposed s.206HC, must set out the consideration to be provided for the purchase or the manner in which it is to be determined by the directors and must not be voted on by a party to the agreement or a person associated with such a party.

Proposed s.206HC: Notice of resolution to approve employee-share purchase

1194. Proposed s.206HC sets out the information which should be given to shareholders in the notice of resolution required by proposed s.206HB.

Subdivision J - Selective Share Buy-Backs

Proposed s.206JA: Approval, by special resolution passed by special majority, of selective buy-back by public company

1195. Proposed s.206JA will allow a public company to selectively buy back shares where:

(a) a special resolution is passed by 75% of shareholders voting in person or by proxy;

(b) vendor shareholders and their associates are excluded from voting;

(c) notice is given in the manner required by proposed para 206JA(e); and

(d) an expert's report is obtained as required by proposed para 206JA(f).

Proposed s.206JB: Approval by special resolution where selective buy-back by proprietary company exceeds 10% in 12 months limit

1196. It is proposed to allow proprietary companies to selectively self-purchase beyond the 10% in 12 months limit so long as the purchasing company complies with certain prescribed conditions. Proposed s.206JB requires selective buy-backs to be approved by a special resolution of the company preceded by a notice of resolution complying with the requirements of proposed Subdivision K.

1197. Proposed para.206JB(c) disqualifies a party to the purchase agreement, or a person associated with such a party, from voting on the special resolution to approve the selective buy-back.

Subdivision K - Notice of Resolution to Approve Proposed Selective Buy-Back

Proposed s.206KA: Notice must comply with Subdivision

1198. Proposed s.206KA requires a notice of resolution to approve a selective buy-back to comply with proposed Subdivision K.

Proposed s.206KB: Contents of resolution and proposed agreement

1199. Proposed s.206KB requires the notice of resolution to set out the text of the proposed resolution and a summary of all the material terms of the proposed selective self-purchase contract.

Proposed s.206KC: Availability of agreement for inspection

1200. Proposed s.206KC ensures that shareholders entitled to vote on the special resolution to approve a selective self-purchase can inspect the relevant contract both at the company's registered office at least 14 days before the date of the relevant meeting and at the meeting itself.

Proposed s.206KD: Valuation of non-cash consideration

1201. Where the consideration provided by the company is in a non-cash form or contains a non-cash element or alternative, proposed s.206KD requires the notice of resolution to set out the particulars of the non-cash consideration and a copy of a statement by directors as to its equivalent cash value.

Proposed s.206KE: Expert's opinion about whether consideration fair and reasonable

1202. Proposed s.206KE sets out the matters upon which an expert's opinion must be sought when a public company proposes to selectively purchase shares.

Proposed s.206KF: Matters affecting expert's objectivity

1203. Proposed s.206KF requires an expert's report to disclose any interest that the expert may have in the relevant share buy-back proposal.

Proposed s.206KG: Expert's consent

1204. Proposed s.206KG requires the expert's consent to the manner in which his or her report is set out in the notice before that notice is sent.

Proposed s.206KH: Reasons for buy-back

1205. Proposed s.206KH requires the notice of resolution to set out the directors' reasons for proposing the buy-back, together with the takeover aspects of the proposed resolution.

Proposed s.206KJ: Solvency aspects

1206. Proposed s.206KJ requires the notice of resolution to include the opinion of the directors on the effect of the buy-back on the company's state of affairs as well as a copy of a solvency declaration by the directors that relates to the proposed buy-back. The notice will also need to specify how many partly-paid shares are proposed to be bought-back and the amount of capital which remains unpaid in relation to those shares.

Proposed s.206KK: Directors' interests

1207. Proposed s.206KK ensures that each of the directors has disclosed any interest in the proposed buy-back in the notice

of resolution including any declaration made in accordance with s.231 which requires directors to declare any interest in a contract or proposed contract with the company.

Proposed s.206KL: Effect on control of company

1208. Proposed s.206KL further requires the notice of resolution to set out what the directors consider will be the likely effect on the control of the company if the proposed buy-back is made.

Proposed s.206KM: Other relevant information

1209. Proposed s.206KM ensures that all relevant information is included in the notice of resolution.

Proposed s.206KN: Notices to be the same

1210. Proposed s.206KN ensures that a person entitled to receive a notice under s. 206KA will receive the same notice as other persons so entitled.

Subdivision L - Creditors may object to Proposed Buy-backs

Proposed s.206LA: Advertising proposed buy-backs

1211. Proposed s.206LA requires certain buy-back proposals to be advertised to give creditors notice of the company's intention to self-purchase and access to the information necessary to form a decision on whether to exercise rights under proposed s.206LD (proposed s.206LD will allow creditors to apply to the Court for an order prohibiting the making of buy-back offers or the entering into a buy-back agreement). The advertisement will be required to notify creditors that certain information relating to the proposed buy-back will be available for inspection, free of charge, at the company's registered office.



Proposed s.206LB: Content of advertisement

1212. Proposed s.206LB sets out the details in relation to the consideration to be provided for the proposed buy-back of shares, which are required to be included in a notice published in accordance with proposed s.206LC.

Proposed s.206LC: Newspapers in which advertisement to be published

1213. The advertisement of proposed buy-backs required by proposed s.206LA will be required by proposed s.206LC to be published in a national newspaper and a local daily newspaper in each State or Territory in which the company carries on business.

Proposed s.206LD: Creditors may apply to Court

1214. Proposed s.206LD puts in place a protective mechanism for creditors who might be adversely affected by a buy-back scheme which would seriously reduce the company's margin of financial viability. Under this provision a creditor would be able to apply to the Supreme Court, within 21 days of the advertisement of a buy-back proposal, to seek an order prohibiting the making of the buy-back offers or the entering into of a buy-back agreement.

Proposed s.206LE: How application to be dealt with

1215. Proposed s.206LE sets out the grounds on which the Court may decide to prohibit a company from proceeding with a proposed buy-back of shares.

Proposed s.206LF: Buy-backs not to proceed while application pending

1216. Proposed s.206LF provides that the period of time during which a proposed buy-back of shares was delayed due to the Court proceeding under proposed s.206LD shall not count in determining whether the requirements of proposed s-sec.206LA(2) and para.206LA(3) (b) have been complied with.

Proposed s.206LG: Company to comply with order of Court

1217. It is proposed that a company will be prevented from proceeding with a buy-back scheme or other buy-back, if to do so would contravene an order in force under proposed s.206LE.

Subdivision M - Solvency Requirements

Proposed s.206MA: Solvency requirements for buy-back scheme

1218. Proposed s.206MA requires a solvency declaration by the company's directors in relation to a buy-back scheme as well as an auditor's report. Proprietary companies will not be required to have an auditor's report if the buy-back does not exceed the 10% in 12 months limit.

1219. Proposed s.206MA also requires a solvency declaration to have been signed by directors within 2 months of the buy-back offer. The reason for this requirement is to ensure that directors' liability connected to the solvency declaration does not arise as a result of a solvency declaration made without advantage of the knowledge of relevant facts which may have occurred between the giving of notice of intention to propose a resolution to approve a buy-back scheme (see proposed s.206GA) and the making of the buy-back offer.

Proposed s.206MB: Solvency requirements for other buy-backs

1220. Proposed s.206MB imposes similar solvency requirements to proposed s.206MA to buy-backs not made under a buy-back scheme.

Proposed s.206MC: Copy of solvency declaration and auditor's report to be lodged with Commission

1221. Proposed s.206MC requires solvency declarations and auditor's reports required by the Bill to be lodged with the Commission within certain time periods (the maximum permissible being 7 days).

Proposed s.206MD: Revocation of Solvency declaration

1222. A solvency declaration will be capable of revocation by a director or the directors in the manner provided by proposed s.206MD.

Proposed s.206ME: Solvency requirements for completion of buy-back under buy-back scheme

1223. Proposed s.206ME delays settlement of any of the buy-back agreements comprising a buy-back scheme until the offer period has ended. This provision is intended to ensure equality of treatment for all shareholders, which would not be guaranteed in the event of intervening insolvency where some shareholders had already been paid for the shares sold to the company.

Proposed s.206MF: Company not to register certain transfers during solvency period

1224. Proposed s.206MF logically extends proposed s.206ME, so that a company shall be prohibited from becoming the registered owner of shares which are part of a buy-back scheme until the offer period of that buy-back scheme has ended and the company has provided consideration. This provision is intended to prevent a company from circumventing proposed s.206ME by registering a transfer of shares, thereby creating a debt in favour of a particular shareholder.

Subdivision N - Share Buy-backs and other Securities Issues

Proposed s.206NA: Buy-back consideration not to consist of other securities in the company

1225. It is proposed to prohibit the use of a company's securities as consideration for buy-backs.

Proposed s.206NB: No buy-backs during rights issue or placement

1226. Proposed s.206NB, as a measure against market manipulation, prevents a company from buying back shares during or within 3 months after the last day of a rights issue or a placement of shares.

Proposed s.206NC: No rights issue or placement during offer period or within 3 months after buy-back

1227. Proposed s.206NC expands the principle applied by proposed s.206NB to rights issues or placements during the buy-back offer period or within 3 months after a buy-back.

Subdivision P - Effect of Buy-Back on Shares

Proposed s.206PA: Rights attaching to bought back shares

1228. Proposed s.206PA suspends all rights attached to bought back shares as soon as the buy-back agreement is entered into and until the shares are transferred to the purchasing company.

Proposed s.206PB: Company not to sell bought back shares

1229. Proposed s.206PB prohibits a company from selling shares it has bought back.

Proposed s.206PC: Cancellation of shares after transfer to company

1230. Proposed s.206PC automatically cancels bought back shares and extinguishes all rights attaching to those shares upon registration of the transfer of the shares to the purchasing company.

Proposed s.206PD: Accounting for money spent on buy-back where amount exceeds nominal value of shares

1231. Proposed s.206PD provides that the buy-back acquisition premium cost to the company should be applied by writing off that acquisition premium first against the share premium account (if any) and then against distributable profits (if any) of the company.

Subdivision O - Effect of Insolvency

Proposed s.206OA: Buy-back offer by externally-administered company void

1232. Proposed s.206QA declares void any offer under a buy-back scheme made by an externally-administered company, which is a company.

(a) in respect of which a provisional liquidator has been appointed and not since removed;

(b) that is being wound up; or

(c) that is under official management.

Proposed s.206OB: Effect of supervening insolvency on buy-back scheme

1233. The effect of proposed s.206QB would be to declare a binding buy-back agreement void or deem an offer to buy back shares to be withdrawn if:

(a) any requirements in respect of a solvency declaration and an auditor's report have not been met by the end of the offer period; or

(b) a solvency declaration is revoked before any consideration for the shares bought under a buy-back scheme has been paid;  
or

(C) before any consideration has been paid in relation to the buy-back scheme:

- (a) a provisional liquidator of the company is appointed;
- (b) a court makes an order for the winding up of the company;
- (c) the company resolves that it be wound up; or
- (d) the company is placed under official management.

Proposed s.2060C: Directors to indemnify insolvent company where consideration provided, or partly-paid shares acquired, under buy-back agreements

1234. Proposed s.206QC imposes personal liability on directors who have signed a solvency declaration so that each director will be liable jointly and severally to compensate the company for the total funds (as well as the value of any non-cash consideration) expended on self-purchases in the 12 months prior to insolvency as well as the unpaid amounts on bought-back partly-paid shares (whether or not there is a causal link between the self-purchase and the insolvency subject to proposed s.206QD).

1235. Directors will be relieved of personal liability under proposed s-sec.206QC(5) wherever they can establish that at the time of making the relevant declaration, they had reasonable grounds for the solvency opinion.

Proposed s.2060D: Relief from liability under section 2060C

1236. Proposed s.206QD gives further relief to directors from personal liability under proposed s.206QC where it can be established that the director acted honestly at all times and, having regard to all the circumstances of the case, ought fairly to be excused in relation to the liability.

Subdivision R - Rights of Unpaid Sellers

Proposed s.206RA: Specific performance of buy-back agreement

1237. Proposed s.206RA allows a buy-back agreement to be enforced by a Court order for specific performance against a solvent company.

Proposed s.206RB: Buy-back agreement unenforceable while company insolvent

1238. Proposed s.206RB will prevent buy-back agreements being enforced against an insolvent company and the onus of establishing that an agreement is unenforceable will lie with the company.

Proposed s.206RC: Unpaid seller may prove in winding up of company

1239. Proposed s.206RC would allow a vendor shareholder to claim a debt in a winding up of the purchasing company which arose out of a buy-back agreement.

Proposed s.206RD: Ranking of seller's claim in winding up

1240. Proposed s.206RD provides that a vendor shareholder's claim allowed by proposed s.206RC shall rank after all other claims in the winding up of the purchasing company except other sellers' claims, other sums due to members and claims arising out of the adjustments of rights as between contributors.

Subdivision S - Certification and Declarations of Compliance

1241. Background In its report on share buy-backs, the CSLRC considered whether irregular (i.e. in breach of procedural requirements) self-purchase transactions should be void, voidable or valid and concluded that all completed transactions made on the basis of irregular authorisations

should be valid. The Committee cited concern about possible detriment to bona fide vendors and undue market uncertainty in support of its conclusion.

1242. However, such an approach could be seen to be favouring vendor shareholders over creditors and would also limit the remedies to those seeking damages as a result of the irregularly authorised but valid transaction. It would be difficult to restore the parties to their pre-transaction status because the bought back shares are subject to cancellation and company funds will have been depleted as a result of the share re-purchase. Consequently, this Bill applies Corporations Act s.206 to irregularly authorised transactions with the result that those transactions will be voidable at the option of the company.

#### Proposed Amendment

1243. To mitigate the harshness of Corporations Act s.206 bona fide shareholders will be immune to orders for compensation under s-sec.206(4) if the agreement or transaction was entered into on reliance of a duly signed certificate of compliance. This proposed amendment would mirror the present protective mechanism in s-sec.206(6) in respect of persons receiving financial assistance from a company for the purposes of buying shares in that company.

#### Proposed s.206SA: Certificate of compliance

1244. It is proposed that a compliance certificate to be made and given in accordance with the provisions of Subdivision S will remove a person's liability under Corporations Act s-sec.206(4), except where that person was aware before making the agreement or entering into the transaction that the buy-back had not satisfied all the conditions of proposed new Division 4B.

#### Proposed s.206SB: Presumptions about certain matters

1245. Proposed s.206SB establishes several presumptions in relation to certificates of compliance.



Proposed s.206SC: Who must sign compliance certificate

1246. The compliance certificate must be signed by at least 2 directors of the company, or a director and a secretary of the company.

Proposed s.206SD: Offences relating to compliance certificates: buy-back schemes

1247. Proposed s.206SD prohibits a compliance certificate being given in respect of only a proportion of offers under a buy-back scheme.

1248. Where a compliance certificate accompanies an offer which if accepted will contravene Corporations Act s.205, proposed s-sec.206SD(2) will also be contravened with the result that each officer of the defaulting company will be guilty of an offence unless a defence can be established under proposed s-sec.206SD(4).

Proposed s.206SE: Offences relating to compliance certificates: other buy-backs

1249. Proposed s.206SE creates an offence, of the kind created by proposed s.206SD, in respect of compliance certificates given in relation to other buy-backs which contravene s.205.

Proposed s.206SF: Declaration by Court of substantial compliance

1250. Proposed s.206SF allows the Court to declare, upon application by a party to an agreement or proposed agreement constituting a buy-back, that a condition of proposed new Division 4B has been satisfied.

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

Proposed s.206TA: Company to notify Commission of buy-backs

1251. To assist in maintaining a fully informed market, proposed s.206TA requires certain information to be notified to the Commission.

Proposed s.206TB: Listed company to notify securities exchange  
of buy-backs

1252. Proposed s.206TB further requires listed bodies to provide to the relevant securities exchange a copy of the notice required by proposed s.206TA to be lodged by them with the Commission.

Subdivision U - Listed Company to Notify Members About Share  
Cancellation

Proposed s.206UA: Notifying members whose shares were  
cancelled

1253. Proposed s.206UA ensures that members who have sold back shares to a company are notified that those shares were cancelled immediately after the shares had been transferred to the company, by force of proposed s-sec.206PC(1).

Proposed s.206UB: Notifying members generally

1254. Proposed s.206UB ensures that all members of a listed company are aware of completed buy-back schemes which result in a 5% or more reduction of the company's share capital. Shareholders will need to be aware of completed buy-backs which could result in an automatic upwards adjustment of their percentage shareholding entitlement thereby having implications for their obligations under the substantial shareholdings provisions in the Act.

Subdivision V - Register of Buy-backs

Proposed s.206VA: Company to keep register

1255. In order that shareholders may have access to relevant information, proposed s.206VA requires the purchasing company to establish a register for the purposes of new Division 4B containing the information set out below.

Proposed s.206VB: Particulars of buy-back schemes

1256. Proposed s.206VB requires a purchasing company to enter on its buy-back register details of buy-back offers made pursuant to a buy-back scheme and subsequent purchases.

Proposed s.206VC: Particulars of other buy-backs

1257. Where a buy-back is made other than pursuant to a buy-back scheme, proposed s.206VC requires the purchasing company to enter certain information in its buy-back register.

Proposed s.206VD: Alteration of register where buy-back does not proceed

1258. Proposed s.206VD requires a company to ensure the accuracy of its buy-back register by removing entries which relate to buy-back offers or agreements which have been withdrawn or have become void.

Proposed s.206VE: Entries in register after cancellation of shares

1259. Proposed s.206VE requires a purchasing company to amend its buy-back register to show that particular bought-back shares have been cancelled.

Proposed s.206VF: Inspection and copies of register

1260. Proposed s.206VF allows company buy-back registers to be inspected by members and creditors of the company and by any other person on payment of an amount not exceeding a prescribed amount.

1261. Schedule 1 of the Bill makes an amendment to the Corporations Law s.553 consequential upon proposed s.206RD which ranks a seller's claim arising from a debt due from a buy-back agreement.

SCHEDULE 6

AMENDMENTS RELATING TO ON-MARKET SHARE BUY-BACKS

1262. The amendments proposed in this Schedule will allow public companies another method of buying back shares within the 10% in 12 months annual limit.

Interpretation

1263. 'On-market purchase' will be defined by proposed s.206BD

Insertion of new s.206BD: On-market purchase

1264. Proposed s.206BD defines an on-market buy-back of shares. Proposed s.sec.206BD(2) has the effect of preventing on-market buy-backs by transactions which would, pursuant to the business or listing rules of the relevant securities exchange, be described as 'special'. These transactions are more commonly referred to as 'special crossings'.

Approval, by special resolution passed by special majority, of off-market selective buy-back by public company

1265. Schedule 4B also inserts a reference to on-market purchase in proposed s.206JA so that section recognizes that on-market buy-backs are sanctioned by the Act. It is necessary to amend proposed new s.206JA in this way as it may

come into operation before the 'on-market' provisions, which may be proclaimed at a later date, depending on when appropriate testing rules amendments are prepared by the Australian Stock Exchange.

Advertising proposed buy-backs

1266. A reference to on-market purchase is also inserted proposed s.206LA so that the Bill's advertising requirements will not apply to on-market purchases. The Bill is amended in this way for the same reasons given in relation to the amendment to proposed s.206JA.

SCHEDULE 7AMENDMENTS OF THE AUSTRALIAN SECURITIES COMMISSION ACT 1989

1267. Schedule 7, together with the provisions in Part 4 of the Bill, amends the Australian Securities Commission Act 1989 ("the ASC Act") to convert it from a Commonwealth law applying of its own force throughout Australia, into a law relating to the regulation of corporations, securities and the futures industries in the ACT. As with the Australian Securities Commission Act 1989, it has been agreed that the States and Northern Territory will pass legislation applying provisions of the ASC Act to their own jurisdictions, and conferring powers on the ASC to administer the Corporations Law of their respective jurisdictions.

1268. This schedule contains the bulk of the amendments to the Australian Securities Commission Act 1989 (ASC Act), but should be read together with Part 4 which amends the objects provisions and citation provisions of the ASC Act. The purpose of these amendments is to recast the ASC Act so that it is suitable for application as a uniform law by the States and Northern Territory. In general, the amendments perform one or more of the following functions:

- \* remove the former constitutional underpinning of various provisions, which was required if the Act was to operate nationally as a stand-alone Commonwealth Act;
- \* alter the provisions to reflect the status of the revised legislation, which will operate as a law applied in each State and Territory by virtue of State and Territory application legislation (e.g. a number of amendments are required to the investigations provisions of the ASC Act to reflect the fact that the ASC will largely be administering State, rather than Commonwealth Law);

\* to insert some interpretation provisions, which were unnecessary under the Act as it stood because, as a stand-alone Commonwealth Act, the relevant corresponding provisions of the Acts Interpretation Act 1901 would have applied;

\* to deal with some transitional issues in the light of the agreement reached by Commonwealth, State and Territory Ministers on the future of corporate regulation;

\* to reflect specific parts of the agreement reached by Ministers.

#### Section 5 - Interpretation - Amendments to definitions

##### "affairs" and "company"

1269. These definitions, which previously referred to the Corporations Act 1989 are being amended to refer to "Corporations Law", which term covers the Corporations Law of all jurisdictions.

##### "appropriate officer"

1270. The deletion of this definition is consequential on the deletion of s.249.

##### "contravention"

1271. This definition is being expanded in light of the fact that, under the new legislative scheme, it is necessary for this term to include contravention of the State and Northern Territory Corporations Laws.

##### "examination"

1272. This amendment provides an extended definition of this term for the purposes of Division 9 of Part 3. Division 9 describes how statements, made at an examination under the ASC

Law of any jurisdiction, can be used as evidence in a proceeding within a particular jurisdiction.

"federal proceeding"

1273. This amendment is consequential on amendments to Division 9 of Part 3, and reflects the constitutional underpinning of the revised legislative scheme.

"foreign country"

1274. This term is being extended to cover an external Territory to which the Act does not extend.

"national scheme law"

1275. This definition has been amended to cover corresponding laws of other jurisdictions.

"Panel", "Parliamentary Committee"

1276. These definitions are being amended to specify the sections of the ASC Act which establish the relevant bodies.

"proceedings"

1277. This definition has been amended to cover proceedings in a court or tribunal in the relevant jurisdiction, as a result of the change in the constitutional underpinning for the legislation.

"Review Board", "Standards Board"

1278. The Review Board is being renamed the Australian Accounting Standards Board, at the request of the Board, to reflect more accurately the functions performed by the Board.



Section 5 - Interpretation - new definition

"national scheme law of this jurisdiction"

1279. This term covers the Corporations Law and the ASC Law of the particular jurisdiction.

"non - applied provisions"

1280. This term covers those provisions of the ASC Act which will not be applied in other jurisdictions. These provisions generally relate to the establishment of bodies, such as the ASC and the Companies and Securities Advisory Committee.

"prescribed", "regulations"

1281. These definitions have been inserted in light of the insertion of some additional regulation - making powers in section 251 and 252 of the ASC Act.

Section 5 - Interpretation - Amendments to sub-ss.(2) and (3)

1282. These amendments substitute references to the Corporations Law for references to the Corporations Act 1989, to reflect the new legislative basis for the operation of the ASC. The Acts Interpretation Act will not apply to the ASC Law because of the interpretation regime provided in the Corporations Law. The Acts Interpretation Act will continue to apply to the non-applied provisions to the extent that this Part, and Parts 1.2 and 1.3 do not make provision for the interpretation of the non-applied provisions.

Proposed section 6A - Acting appointment

1283. This provision, which is based on s.33A of the Acts Interpretation Act 1901, provides that a person who has been empowered by the ASC Law to appoint another person to act in a particular position may make certain provisions with respect to that appointment, e.g. that the appointer may determine the terms and conditions of the appointment. The provision also

deals with miscellaneous other matters relating to acting appointments.

Proposed Section 6B - Alterations of names and constitutions

1284. This provision is based on s.25B of the Acts Interpretations Act 1901. It provides that, where a body established by the ASC Act has its name changed by law, then references in the Act to that body are deemed to have been changed to the new name.

Proposed Section 6C: Presentation of Papers to the Parliament

1285. This section, which is based on s.34B of the Acts Interpretations Act 1901, deals with miscellaneous matters relating to the presentation of papers, under a provision of the ASC Act, to the Parliament.

Proposed Section 6D - Periodic Reports

1286. This section, which is based on s.34C of the Acts Interpretations Act 1901, relates to the provision of periodic reports by bodies established by the ASC Act. It provides that, where no period is specified within which the report must be furnished, the report must be furnished as soon as practicable. The provision also deals with other miscellaneous matters relating to the provision of periodic reports.

Section 11 - Functions and Powers

1287. This provision is being amended to reflect the new legislative basis for the ASC's operations. The ASC will have such powers and functions as are conferred by the Corporations Act 1989, the Corporations Law of the ACT and the ASC Act (new sub-s.(1)) and by a national scheme law of any other jurisdiction (new sub-s.(7)). To provide for a smooth transition from the NCSC to the ASC, the ASC is being given the same powers and functions as were conferred on the NCSC by the co-operative scheme legislation (new sub-s.(1A)).

However, in exercising those functions, the ASC will not be subject to any directions formally given to the NCSC unless they are given by the Minister under s.12 (new sub-s.(1B)). The ASC is also empowered to enter into agreements with a State or Territory for the performance of further functions as an agent of that State or Territory (new sub-ss.(8) and (9)). The ASC has the power to do acts in the ACT which are conferred on it by a national scheme law or pursuant to an agreement with a State or Territory, (new sub-s.10).

#### Section 12 - Directions by Minister

1288. This amendment reflects the new constitutional underpinning of the ASC Act.

#### Section 13 - General powers of investigation

1289. The amendments to sub-ss.(1) and (2) reflect the new constitutional underpinning of the Act. New sub-s.(3) empowers the ASC to investigate suspected contraventions of the co-operative scheme legislation. New sub-s.(5) is a transitional provision which provides for the ongoing conduct of existing NCSC investigations when the ASC commences full operation.

#### Section 14 - Minister may direct investigations

1290. These amendments remove the former constitutional underpinning of s.14. The Minister, where satisfied that it is in the public interest in respect of the particular jurisdiction to do so, may direct the ASC to investigate a matter relating to corporations or the securities or futures industries.

#### Proposed section 14A - Directions under relevant previous laws

1291. Proposed s.14A deals with special investigations being conducted as at the date that the ASC commences full operation. Where a direction is in force requiring the NCSC to conduct a special investigation as at that date, and the

special investigation has not yet begun, the direction has effect as if it were a direction to the ASC under sub-s.14(1), subject to such modifications as are specified in an application order or as the circumstances require. If the investigation had commenced the Commission is required to comply with the direction, and the investigation is taken to be an investigation under s.14 of the ASC Act.

Section 15 - Investigation after report of receiver or liquidation

1292. This section is being amended to reflect the new legislative basis for the ASC's operation. Also, consistent with the ASC's responsibility for investigating suspected contraventions of co-operative scheme law, this section is being amended to require the ASC to investigate a matter raised in a report by a receiver or liquidator under a co-operative scheme law.

Section 28 - When certain powers may be exercised

1293. This provision is amended to better reflect the new national scheme. The ASC will be able to require the production of various books relating to the affairs of a corporation if:

(a) for the purposes of the performance or exercise of any of the ASC functions under a national scheme law;

(b) for the purposes of ensuring compliance with a national scheme law;

(c) in relation to an alleged contravention of a national scheme law or an alleged contravention of a law of the jurisdiction concerning the affairs of a body corporate or that involves fraud or dishonesty.

Section 29 - Commission may inspect books without charge

Section 35 - Application for warrant to seize books not produced

Section 36 - Grant of warrant

Section 37 - Powers where books produced or seized

1294. Each of these provisions is amended as a consequence of the proposed amendment to section 28.

Section 40 - When certain powers may be exercised

1295. This section is being amended to reflect the constitutional underpinning of the new legislative regime. The ASC will be able to use its powers conferred by ss.41 and 44 throughout Australia where it is necessary to do so in the interests of a national scheme law of the particular jurisdiction. It is also empowered to use its powers in the interests of the due administration of a national scheme law of another jurisdiction, provided the exercise of those powers occurs within the particular jurisdiction.

Section 42 - Additional operation of section 41

1296. This amendment repeals section 42, as it is no longer relevant. Section 42 was originally inserted to provide further constitutional underpinning for the exercise of Division 4 of Part 3. It is no longer necessary in the light of the new legislative basis for the ASC Act.

Section 43 - Exercise of certain powers of the Commission in relation to securities

1297. These amendments reflect the new constitutional underpinning of the ASC Act.

Section 45 - Additional operation of section 44

1298. Section 45 is being repealed, as it is no longer necessary. Like s.41, it was originally inserted to provide further constitutional underpinning for the ASC Act as a

stand-alone Commonwealth Act. In the light of the new legislative basis for the ASC Act, s.45 is no longer necessary.

Section 46 - Exercise of certain powers of Commission in relation to futures contracts

1299. These amendments correspond to the amendments to s.43, and reflect the new constitutional underpinning of the ASC Act.

Section 49 - Commission may cause prosecution to be begun

1300. This amendment reflects the new constitutional underpinning of the ASC Act. Where, as a result of an investigation or a record of an examination conducted under the ASC Law of any jurisdiction, it appears to the Commission that a person may have committed an offence against a national scheme law of this jurisdiction and ought to be prosecuted for the offence, the Commission may cause a prosecution to be begun.

Section 50 - Commission may cause civil proceedings to be begun

1301. These amendments reflect the new constitutional underpinning of the ASC Act. This section extends to investigations or records of examinations conducted under the law of this jurisdiction or any other jurisdiction, and relates to where the Commission believes it to be in the public interest for a person to begin any civil proceeding. Where, as a result of any such investigation or record of examination, the Commission believes it to be in the public interest for such a proceeding to be commenced, the Commission may cause the proceeding to be commenced in the person's name.

Section 51 - Power to hold hearings

1302. These amendments reflect the new legislative basis for the ASC's operations and provide for certain transitional matters. Where the NCSC was holding a hearing prior to the commencement of the ASC Act, the ASC is empowered to continue

the NCSC's hearing and the hearing is taken to be a hearing under sub-s.51(1).

Section 53 - Request by person appearing at hearing that it take place in public

Section 54 - Certain hearings to take place in private

Section 56 - Who may be present when hearing takes place in private

Section 57 - Involvement of person entitled to appear at hearing

Section 59 - Proceedings at hearings

1303. Each of these provisions is amended as a consequence of the proposed amendments to section 51.

Section 61 - Reference to Court of question of law arising at hearing

1304. Sub-s.61(2) is being deleted as it is unnecessary in the light of the new legislative basis for the operation of the ASC Act.

Section 62 - Protection of members etc

1305. This amendment is consequential to the insertion of new s.119A, which deals with delegations by members. New sub-s.62(1A) extends to a delegate of a member the same protection and immunity, in the performance or exercise of any delegated function or power in relation to a hearing, as the member enjoys under sub-s.62(1).

Section 67 - Concealing books relevant to investigation

1306. This provision is amended to reflect the new national scheme.

Section 68 - Self-incrimination

1307. This amendment reflects the new legislative basis for the ASC Act.

Section 76 - Statement made at an examination; proceedings against examinee

1308. These amendments reflect the new legislative basis for the ASC Act. As the ASC Act is now to operate as an applied State and Territory law, rather than a stand-alone Commonwealth Act, the references to a federal proceeding in section 76 can be and are being altered to refer to any proceeding in a court in the relevant jurisdiction. Similar amendments are being made to the remaining provisions in Division 9 of Part 3.

Section 77 - Statements made at an examination;: other proceedings

1309. This amendment reflects the new legislative basis for the ASC Act.

Section 79 - Objection to admission of statements made at examination

1310. This amendment reflects the new legislative basis of the ASC Act.

Section 80 - Copies of , or extracts from, certain books

1311. This amendment reflects the new legislative basis of the ASC Act.

Section 81 - Report under Division 1

1312. This amendment reflects the new legislative basis of the ASC Act.

Proposed section 83A - Exercise of powers etc for purposes of investigation under corresponding law

1313. Proposed s.83A empowers the ASC to exercise its powers under the ASC Law of this jurisdiction within this jurisdiction in relation to an investigation that is being



conducted under the ASC Law of another jurisdiction, as if that investigation was being conducted under the ASC Law of this jurisdiction.

Section 86 - Giving documents to natural persons

1314. This amendment is consequential upon the insertion of new s.109X in the Corporations Act 1989. That section, which is based on s.28A of the Acts Interpretation Act 1901, deals with service of documents.

Section 88 - Application of Crimes Act and Evidence Act

1315. This amendment provides that the provisions of the Crimes Act 1914 dealing with offences relating to the administration of justice as they apply to an examination or hearing are taken to be an offence against the ASC Act.

Section 91 - Recovery of expenses of investigation

1316. These amendments reflect the new legislative basis for the operation of the ASC Law. Under amended sub-s.(1), the Commission may make orders requiring a person to pay the expenses of an investigation where a person is convicted of an offence against a law of this jurisdiction, or a judgement is awarded against a person in a proceeding in a court of this jurisdiction, began as a result of an investigation under an ASC Law of any jurisdiction. However, pursuant to new sub-s.(1A), the Commission may not make such an order where the costs or expenses have already been paid pursuant to an order made under a corresponding law. Under amended sub-s.(4), the Commission is empowered to recover, in a court of this jurisdiction, any amount payable under any ASC Law as is not paid in accordance with the order.

Section 95 - Commission to establish offices

1317. This amendment ensconces in the ASC Act an important aspect of the agreement reached between Ministers on the future of corporate regulation. New sub-s.(1) requires the

Commission to establish a regional office in each jurisdiction. The current provision simply empowers the ASC to establish such regional offices as it thinks fit.

#### Section 96 - Regional Commissioners

1318. This section is being recast to reflect the nature of the agreement reached by Ministers on the nature of the ASC's regional operations. New sub-s.(1) provides that the Commission shall appoint a different Regional Commissioner for each jurisdiction and that person shall be employed by the Commission under sub-s.120(3). New sub-s.(2) provides that the Regional Commissioner for a jurisdiction shall manage the regional office established in that jurisdiction. The current sub-s.(2), which related to arrangements being entered into with a State or Territory for a State or Territory instrumentality to perform ASC functions in that jurisdiction, is being deleted in the light of the agreement reached by Ministers.

#### Section 102 - Delegation

1319. This amendment omits paragraph 102(4)(c), which is unnecessary in the light of the agreement reached by Ministers on the future of corporate regulation.

#### New Section 119A - Delegation by members

1320. This section provides for the delegation by members of their functions and powers to persons nominated by them. This provision will enable hearings to be conducted without a member of the Commission being present, if the member has delegated the function of requiring a person to attend a hearing under s.58.

#### New Section 122A - Transfer of staff to Australian Public Service

1321. This provision, as a transitional matter, deals with the transfer of staff who have Australian Public Service mobility

rights from the NCSC to the ASC. The staff of the ASC are persons appointed or employed under the Public Service Act 1922, s.120(1) of the ASC Act.

Section 127 - Confidentially

1322. These amendments reflect the constitutional underpinning of the new legislative scheme.

Section 134 - The Commission's money

1323. This amendment is consequential upon the insertion of new sub-s. 11(7) which enables the ASC to enter into an arrangement with a State or Territory to perform functions on behalf of that jurisdiction. Monies received by the ASC on behalf of a State or Territory pursuant to such an arrangement do not form part of the ASC's money for the purposes of s.134.

Section 135 - How Commission's money to be applied

1324. These amendments reflect the new legislative basis for the ASC Act.

Section 147 - Membership

1325. This section deals with membership of the Companies and Securities Advisory Committee. As part of the agreement reached between Ministers on the future of corporate regulation, the Commonwealth agreed that, as far as is practicable, each State and Territory will have a representative on the Advisory Committee. The amendments insert new sub-ss.(5) and (6) to include a requirement for the Commonwealth Minister to observe, as far as is practicable, this part of the agreement.

Section 148 - Functions

1326. The reference to close corporations is being removed, because the Close Corporations Act 1989 is not expected to come into operation at the same time as the Corporations Act

1989. The remaining amendments reflect the new legislative basis for the ASC Act. New sub-s.(3), to reflect the new legislative basis for the Act, makes clear that the Advisory Committee's primary function under the ASC Act of the ACT is to advise on national scheme laws of the Capital Territory. New sub-s.(2) then broadens the role of the Committee to cover the laws of the other jurisdictions. It requires the Advisory Committee to have regard to the implications of any recommendations made by it in relation to a national scheme law of the Capital Territory, for the laws of jurisdictions other than the Capital Territory.

#### Section 172 - Membership

1327. This section deals with membership of the Corporations and Securities Panel. The amendment to sub-s.(3) is consequential upon the amendment to s.173 (see below). The other amendments reflect part of the agreement reached between Ministers on the future of corporate regulation. New sub-s.(4A) provides a formal mechanism for a State or Territory Minister to nominate persons for membership of the Panel. New sub-s.(4B) requires the Commonwealth Minister to ensure, so far as practicable, that at least one member of the Panel is a person who has been nominated by each State and Territory Minister under new sub-s.(4A).

#### Section 173 - President

1328. This amendment enables the appointment, as President of the Panel, of a person who is a part-time member. It is considered that the work of the Panel may not be of sufficient volume to justify a full-time appointment. In addition, a number of suitable appointees have indicated that they would only be willing to accept such an appointment on a part-time basis.

#### Section 174 - Functions and powers of panel

1329. This amendment makes clear that the Panel may perform functions and exercise powers conferred on it by a national scheme law of any jurisdiction.

Section 184 - Constitution of Panel in relation to particular matters

1330. This section and the following section appear in a part of the ASC Act which will be applied in each State and Territory jurisdiction. The amendment, to insert a new sub-s.(5), is a consequence of the application of this Division by the other jurisdictions. It therefore reflects the legislative basis for the operation of the ASC legislation.

Section 185 - Disclosure of interests by members

1331. As with the previous amendment, this amendment reflects the new legislative basis for the operation of the ASC legislation.

Section 196 - Reference to Court of question of law arising at hearing

1332. This section appears in a Division which will be applied by each State and Territory. As such, it is unnecessary to provide specifically that the Courts of those States and Territories have jurisdiction to hear and determine a question of law referred to it under s.196. Sub-s.(2) is therefore being removed.

Section 197 - Protection of members

1333. An amendment is made to reflect the constitutional basis of the new national scheme.

Section 204 - Functions and powers of Disciplinary Board

1334. This amendment is to clarify that the Disciplinary Board may perform functions and exercise powers conferred on it by a national scheme law of any jurisdiction.

Section 213 - Confidentiality

1335. These amendments, which mirror the amendments to s.127 of the ASC Act (dealing with confidentiality of information disclosed to the ASC), reflect the new constitutional underpinning for the legislation.

Section 221 - Protection of Members

1336. A minor amendment is made to reflect the constitutional basis of the new national scheme.

Section 12 - Accounting Standards Review Board

1337. Most of the amendments to provisions in this part change the name of the Review Board to the "Australian Accounting Standards Board". The name, which has been approved by the Ministerial Council, is considered to reflect more accurately the functions of the Board.

Section 226 - Functions and powers

1338. The amendments to insert new sub-ss.(4) and (5) reflect the new legislative basis for the operation of the ASC and in particular the Australian Accounting Standards Board. As Part 12 will not be applied by the States and Territories, the amendments clarify that the Board's primary function relates to the national scheme laws of the ACT. However, new sub-s.(4) requires the Board to have regard to the implications of any recommendations it makes for the operation of the laws of other jurisdictions. Similar amendments were made to s.148 in relation to the Advisory Committee.

Section 233 - Confidentiality

1339. The amendment to paragraph (2)(a), like the amendment to paragraph 213(2)(a), reflects the new legislative basis of the ASC Act.

Part 13 - Jurisdiction of Courts under national scheme laws

1340. This Part is being omitted. The jurisdiction of Courts under the national scheme laws is now dealt with in Part 10 of the Covering Clauses.

New section 243A - Offences under two or more ASC Laws

1341. This new section is inserted as a consequence of the new legislative basis of the ASC Act, which rather than operating as a stand-alone Commonwealth Act will be applied in each State and Territory. New section 243A is designed to prevent a person being punished in more than one jurisdiction for the one offence. It provides that, where an act or omission constitutes an offence under the ASC Law of this jurisdiction and another jurisdiction, and the offender has been punished for that offence under the law of the other jurisdiction, the offender is not liable to be punished for the offence under the law of this jurisdiction.

New Section 243B - Offences committed partly in the partly out of the jurisdiction

1342. This section is also inserted as a consequence of the new legislative basis for the operation of the ASC Act. It deals with offences committed partly within and partly outside the jurisdiction. It applies only where a person has done or omitted to do an act within the jurisdiction. Where the person does or omits to do an act outside the jurisdiction, which taken together with the act or omission within the jurisdiction would have made the person guilty of an offence against the Law of this jurisdiction, the person is guilty of that offence. This new section corresponds to s.569 of the Companies Act 1981

New Section 243C - Reciprocity in relation to offences

1343. This new section is also inserted as a consequence of the legislative basis for the operation of the ASC Act. It is based on existing s.568 of the Companies Act 1981. It

provides that where a person does or omits to do an act within this jurisdiction, and if done within another jurisdiction that act or omission would have constituted an offence against the Law of that jurisdiction, the person is guilty of an offence against the corresponding provision of this jurisdiction's Law. For example, Chapter 6 of the Corporations Law creates offences in relation to acquiring shares in a "company", meaning a body corporate originally incorporated or deemed to be incorporated under the Corporations Law of this jurisdiction. If a person acquires shares in that company outside that jurisdiction in breach of Chapter 6 of the first jurisdiction's law, s.243C operates to make the person guilty of an offence against the second jurisdiction's law also. This enables the prosecution of the offence to be pursued more efficaciously.

#### New Section 243D - Cash Transactions Reports

1344. This provision imposes a duty on a cash dealer to provide the Cash Transactions Report Agency with information that may be relevant to the investigation and prosecution of persons for an offence against the ASC Law or the Corporations Law.

#### Section 245 - Validity of certain actions

1345. As s.245 is to be applied by the State and Territories and as all appointments to officers will be made under non-applied provisions of the Australian Securities Commission Act 1989, it is necessary to amend s.245 to alter the reference to "this Act" to refer to the Australian Securities Commission Act 1989.

#### Section 246 - Liability for damage

1346. This amendment reflects the new legislative basis for the operation of the ASC Act. It recognises that the ASC will be performing functions under laws of the States and Northern Territory.



Section 248 - Judicial notice of Commission's seal and members' signatures

1347. This amendment simplifies the definition of "court" for the purposes of this section. As a result of the change in the legislative basis for the operation of the ASC Act, it is no longer necessary to specify that the term "court" includes a federal court and a court of a State or Territory.

Section 250 - Arrangement with the States and Territories

1348. This section was inserted to enable the Minister to make arrangements with States or Territories in relation to the administration of a national scheme law, or the performance or exercise of a function or a power of the ASC or the Advisory Committee.. This section is no longer necessary in the light of the agreement reached by Ministers on the future of corporate regulation, and is therefore being repealed.

Section 250 - Acquisition of State and Territory books

1349. This section provided for the compulsory acquisition by the Minister or the ASC (with the Minister's approval) of books in the possession of a State or Territory relating to the regulation of companies or the securities and futures industries. In the light of the agreement reached by Ministers on the future of corporate regulation, this section is no longer necessary and is therefore being repealed.

Section 251 - Regulations

1350. The amendments to s.251 serve two purposes. The power to make regulations under or for the purposes of the non-applied provisions of the ASC Act is being removed and placed in a separate section, new s.252. Section 251 therefore will only empower the Governor-General to make regulations under or for the purposes of the applied provisions of the ASC Act. Secondly, new sub-ss.(3), (4) and (5) deal, with more particularity, with the types of matters that regulations under the applied provisions may deal with.

In particular, new sub-s.(3) enables the regulations to provide that the ASC Law has affect, as modified by the regulations, in relation to transitional matters, in particular investigations, authorisations, requirements, informations and warrants obtained under a previous co-operative scheme law.

New Section 252 - Regulations for the purposes of non-applied provisions

1351. This new section empowers the Governor-General to make regulations prescribing matters required or permitted by the non-applied provisions to be prescribed, or necessary or convenient to be prescribed for the purposes of the non-applied provisions.

LOCATING CHANGES TO CORPORATIONS ACT AND ASC ACT

1352. The following table sets out the paragraph of the explanatory memorandum which explains the proposed changes to existing provisions of the Corporations Act 1989 and the ASC Act 1989 contained in Schedules 1, 3 and 7.

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