1991

PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

HOUSE OF REPRESENTATIVES

CORPORATIONS LEGISLATION AMENDMENT BILL 1991

EXPLANATORY MEMORANDUM

Circulated by Authority of the Attorney-General,
the Honourable Michael Duffy, M.P.

27207/91 Cat. No. 91 3660 X

Printed by Authority by the Commonwealth Government Printer

CORPORATIONS LEGISLATION AMENDMENT BILL 1991

INTRODUCTION

This explanatory memorandum:

(a) contains an outline of the amendments proposed by the Bill to the new national companies and securities scheme and a statement of the financial impact of the Bill (paras 1 to 9);

(b) contains a description of the framework of the new national scheme (paras 11 to 26);

(c) contains a summary of the principal features of the Bill (paras 27 to 57); and

(d) deals sequentially with each clause of the Bill (paras 58 to 428).

OUTLINE

The Corporations Legislation Amendment Bill 1991 (the Bill) amends the Corporations Act 1989, the Corporations Law (as set out in s.82 of that Act) and the Australian Securities Commission Act 1989 for the purposes set out below.

2. The Bill forms part of the arrangements for the new national scheme for corporate regulation which came into operation on 1 January 1991. By virtue of the Corporations Act 1989 of the Commonwealth and the corresponding Corporations Acts of the States and Northern Territory, amendments of the Corporations Law, and of those provisions of the Australian Securities Commission Act which are applied by the States, will come into operation automatically in each State and Territory. Some amendments proposed to the Corporations Act 1989, such as the Family Court amendments referred to below will require corresponding amendments of State Law to have effect outside the A.C.T.

3. In accordance with the arrangements under the Heads of Agreement on Corporate Regulation between the Commonwealth and the States, the Ministerial Council for Corporations has been consulted on the Bill and has approved its introduction into Parliament.

4. The major amendments proposed in the Bill deal with:

* the winding up of the National Companies and Securities Commission and the disposition of its assets and liabilities, and related and other consequential matters;

* the removal of abuses in corporate financial reporting by requiring the consolidation of accounts of companies and the entities they control;

* reform of the regulation of insider trading in the light of the recommendations of the Report of the House of Representatives Committee on Legal and Constitutional Affairs, 'Fair Shares for All:

Insider Trading in Australia', and in the light of the Government's response to that Report, and taking into account comments from the public and State Ministers on the Ministerial Council;

* the conferment on the Family Court of Australia and the Family Court of Western Australia of jurisdiction in relation to civil matters arising under the Corporations Law, which corresponds to the jurisdiction those courts had prior to 1 January 1991 in relation to the Co-operative Scheme Companies and Securities Codes;

* the provision of a capacity for the ASC to regulate compliance with trust deeds;

* the facilitation of an efficient and accurate ASC information base by not requiring the lodgment of unnecessary documents and requiring retiring directors to notify a changeover in ownership of a company;

* the provision of a statutory moratorium until 31 December 1991 in relation to the requirement for a company to set out its Australian Company Number or a body to set out its Australian Registered Body Number on its business documents and negotiable instruments.

5. The remaining provisions of the Bill are concerned with various technical and clarifying amendments, and drafting corrections, of the Corporations Act, the Corporations Law and the Australian Securities Commission Act.

Financial Impact Statement

6. The financial impact of the various key provisions of the Bill is as follows.

7. The parts of the Bill dealing with the winding up of the NCSC are expected either not to have any significant financial impact, or to lead to a reduction in costs through greater efficiency in the administrative framework.

8. The amendments relating to the improvement in accuracy of information lodged with the ASC will assist in providing savings to business by removing the administrative and cost burdens which arise from reliance on out-of-date or inaccurate information.

9. The draft provisions relating to the consolidation of company accounts and the reform of insider trading regulations may mean some increased costs for those persons required to comply with the new requirements. However, this will be more than offset by the benefits to investors from the provision of more accurate financial information, and a more fairly operating market. This will result in significant savings for, and the restoration of confidence in, the market as a whole.

ABBREVIATIONS

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

AASB	Australian Accounting Standards Board
Applicable provisions:	The provisions of the Corporations Law or ASC Law or regulations, or other Commonwealth Laws applied by a State Application Act (see below). In the case of A.C.T. it also includes certain Commonwealth laws applying by their own force.
ASC	Australian Securities Commission
ASC Act	Australian Securities Commission 1989
ASRB	Accounting Standards Review Board
the Bill	Corporations Legislation Amendment Bill
CA	Corporations Act 1989
CL	Corporations Law
NCSC	National Companies and Securities Commission
NCSC Act	National Companies and Securities Commission Act 1989
1990 Act	Corporations Legislation Amendment Act 1990
State	Includes the Northern Territory, unless otherwise indicated
State Application Acts	Corporations (Name of State/Territory) Act 1990 of each of the States and the Northern Territory, respectively.

FRAMEWORK OF NEW NATIONAL SCHEME

11. The purpose of this part is to give an outline of the framework of the new national scheme.

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

12. The administrative and legislative framework of the new national companies and securities scheme, which commenced on 1 January 1991, stems from the Heads of Agreement on future corporate regulation in Australia. That Agreement was approved by Commonwealth State and Northern Territory Ministers responsible for companies and securities administration and regulation in Alice Springs on 28/29 June 1990.

13. In those Heads of Agreement Ministers agreed on the establishment of a new scheme for the regulation of companies, securities and futures industries under which the Corporations Act 1989 and the Australian Securities Commission Act (ASC) 1989 would form the basis of the substantive legislation of the new scheme. However, Ministers agreed that those Commonwealth laws would be amended to limit their effect to the Australian Capital Territory. The Australia-wide effect of the new scheme would come about by an application of laws regime. Under that regime each of the States and the Northern Territory would pass complementary legislation applying the Commonwealth laws as laws of those jurisdictions.

14. The Alice Springs Heads of Agreement will form the basis of a new formal agreement between the Commonwealth and the States and the Northern Territory on future corporate regulation. Work on drafting the new formal agreement is currently in train. It has been agreed that when the Agreement is approved by all Governments, the Commonwealth will introduce amending legislation to annex the Agreement to the Commonwealth legislation. The principal features of the Heads of Agreement agreed to by Ministers are set out below.

Administration

15. The principal objective of the new scheme is the establishment of a single national regulatory framework. Consistent with that approach, the ASC is established as the principal administering authority under the new scheme, replacing the NCSC and former State Corporate Affairs offices. Under the new scheme the States have no responsibility for the matters transferred to the ASC's authority. The ASC is formally accountable and responsible to the Commonwealth Attorney-General and the Commonwealth Parliament, and does not have any formal responsibility or accountability to State Ministers or State Parliaments. Under the Heads of Agreement, it has been acknowledged, however, that the ASC will maintain existing standards of service in each State and the Northern Territory and will regularly report on those levels in accordance with established performance indicators.

Roles of Commonwealth and States in relation to the Ministerial Council for Corporations

16. The Ministerial Council continues with its existing membership, although with a revised role in the light of the new national arrangements. The Commonwealth Attorney-General is permanent Chairman of the Council. Consistent with the operation of the ASC as a national Commonwealth agency, the Council has no control or power of direction over the ASC. On the other hand, in relation to legal policy issues the Council is to be consulted in relation to all legislative proposals involving amendment of companies and securities laws.

17. However, the Commonwealth has 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, that is, principally "traditional" company law type matters, the Ministerial Council is to approve the legislation before its introduction into the Commonwealth Parliament, but the Commonwealth is not obliged to introduce any such proposal with which it does not concur. In addition, for the purposes of Ministerial Council

voting on those legislative proposals for which the Commonwealth and States share responsibility, the Commonwealth has 4 votes and each State and the Northern Territory has 1 vote. The Commonwealth also has a casting vote. At the time of introducing legislative proposals into the Commonwealth Parliament, the Commonwealth is to table in the Parliament outcome of the advice of the Ministerial Council arising out of its consideration of the proposal. 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.

Legislative Framework

18. The Corporations Legislation Amendment Act 1990 ("the Amendment Act"), which was introduced into the Commonwealth Parliament on 8 November 1990 and passed in December 1990, gave effect to the Commonwealth's obligations under the Heads of Agreement. The States and the Northern Territory passed complementary legislation, (in N.S.W. for example the Corporations (NSW) Act 1990) to give effect to their corresponding obligations under the Heads of Agreement.

19. That legislation, which brought the new national scheme into operation, commenced on 1 January 1991.

20. To give effect to the legislative scheme set out in the Agreement, the Amendment Act altered the Corporations Act 1989 and the Australian Securities Commission Act 1989 to remove their former Commonwealth constitutional underpinning as laws applying over all Australia, and substantially recast those Acts as laws applying for the Australian Capital Territory.

21. The consequence of this is that the original Commonwealth Corporations Act 1989 has been retained but now serves a different function. The Amendment Act converted the Corporations Act in such a way as to separate the machinery provisions, which relate to the application of the law and the supporting legislative infrastructure (called the covering provisions), from the substantive laws to be applied. Parts 2

- 13 of the Corporations Act establish the legal framework in which the substantive companies and securities law will operate as part of a new national scheme of applied laws. These Parts provide for the way in which the law of the new scheme 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. The complementary State and Territory Application Acts contain corresponding provisions.

22. The major feature of the Corporations Act of the Commonwealth, and the States Application Laws, is the use of these legal devices to establish an innovative constitutional framework that creates a uniform legal text that has the appearance, and for most practical purposes, the effect of a single national law. This text, which sets out the substantive law relating to companies, the securities and futures industries to apply throughout Australia is called the "Corporations Law". To establish the Corporations Law the Amendment Act inserted into the Corporations Act a new Section 82 which sets up the opening provisions of the Law. Section 7 of the Amendment Act created the text of the Corporations Law out of the existing Corporations Act (as modified by the various Schedules of the Amendment Act). Section 5 of the Corporations Act (as amended) applies the Corporations Law set out in Section 82 of the Act in the Australian Capital Territory as a law for the government of the Capital Territory.

23. A similar approach is adopted in part 4 of the Amendment Act to convert the ASC Act into a law for the Capital Territory, some provisions of which are applied by complementary Application Legislation in each State and the Northern Territory as the ASC Law of the State or Territory.

24. The national operation of the new scheme comes about by each State and the Northern Territory having complementary Application Legislation applying the Corporations Law (as set out in the Commonwealth's Corporations Act) as the law of each of those jurisdictions. This ensures its Australia-wide application. Section 7 of the State Application Acts apply

the Corporations Law "as in force for the time being". The Corporations Law thus has been applied in a way that ensures that any further amendments to the Corporations Law by the Commonwealth Parliament (in accordance with the arrangements described in paras 16 and 17 above) will automatically apply in the States and the Northern Territory.

25. In this way the Corporations Law states the uniform text of the new national law applying in all jurisdictions.

'Federalisation' of Administrative Law, Investigations and Prosecutions

26. A further major innovation that is adopted in the State laws is the "federalising" formula. Under this device, the applied State and Territory laws have the characteristics of, and are to be treated, so far as practicable, as if they were Commonwealth rather than State or Territory Laws. The "federalisation" approach involves the State Application Acts applying Commonwealth administrative review, criminal law and prosecution legislation in relation to the national scheme laws. The State laws confer powers on Commonwealth authorities and officers to exercise their powers and functions under those Commonwealth laws applied in the States, as if the Corporations Law or ASC Law of the jurisdiction was Commonwealth legislation.

SUMMARY OF THE PRINCIPAL FEATURES OF THE BILL

27. The Bill contains amendments to the new national scheme legislation designed to significantly improve the environment for investment in corporations and the securities markets. The Bill also contains provisions to improve and clarify the operation of the legislative machinery, and the national administrative, enforcement and jurisdictional infrastructure of the new national scheme.

28. The two major policy reforms of companies and securities regulation dealt with in this Bill concern the requirement for the consolidation of accounts of companies and the entities they control, and the strengthening of insider trading regulation.

Consolidation of Accounts

29. There have been widespread abuses of the existing company accounting and reporting requirements under which the true financial position of a group of companies has been able to be disguised by "off-balance sheet" reporting. This has enabled the financial statements of the company to be manipulated in such a way as to mislead investors and the market generally regarding the real level of liabilities or performance of a company or the group as a whole.

30. These abuses have been possible because company reporting requirements apply to companies and their "subsidiaries". The definition of 'subsidiary' has a rather technical meaning in the Law which does not reach non-corporate entities. Further, group accounts have not been required to be consolidated. One of the consequences of these practices has been a significant loss of investor confidence, both amongst Australian and overseas investors, in the reliability of corporate financial information in Australia.

31. To address these problems, clause 7 of the Bill provides for amendments (set out in Schedule 3) to require that a

company's directors must produce a single profit and loss account and balance sheet for all companies and other incorporated or unincorporated entities controlled by that company (see particularly proposed section 295A and 295B). The Bill will include a broad definition of control which focuses on the reality of control rather than technicalities. (These matters are explained further in paras 203 to 245 below.)

32. In order to reinforce the requirement to comply with accounting standards, and to bring about greater consistency in accounts, a related amendment is to be made to section 298 of the Corporations Law. Currently, the law provides that the directors need not ensure that financial statements are made out in accordance with an accounting standard if to do so would fail to give a true and fair view. This has provided the scope for some companies to use some dubious accounting treatments in reliance on the more general, and more vague, 'true and fair' test, rather than to comply with a relevant appropriate accounting standard.

33. Under the amendments, financial statements will have to both comply with the accounting standards and give a true and fair view. In this way the obligations under the law in relation to accounting standards will be brought into line with the obligations under the Law applicable to the requirements of Schedule 5 of the Corporations Regulations. (Paras 248 to 252 provide further explanation of these provisions.)

Insider Trading

34. Insider trading has become a matter of increasing concern within the securities industry and amongst the wider community, contributing to the deterioration of public confidence in the securities markets more generally.

35. The report of the House of Representatives Standing Committee on Constitutional and Legal Affairs (the Griffiths' Committee) "Fair shares for all: Insider Trading in Australia" in November 1989, recommended significant reform in

relation to the legislation and administrative actions regarding the enforcement of the existing insider trading provisions. The Governments response to the Report, tabled on 11 October 1990 accepted the majority of the Committee's recommendations for legislative amendments, and in December 1990 draft legislation and an accompanying explanatory paper was released for public exposure.

36. The provisions in this Bill represent the outcome of the Governments' consideration of that report in the light of public submissions on the exposure draft.

37. The key elements of the new provisions are that:

* the definition of an "insider":

* will encompass corporations as well as natural persons, and

* there will be no need for the prosecution to establish a connection between the person in possession of inside information and the company to which the information relates: instead the proposed provision will prohibit any person, including a tippee, who is in possession of inside information using it to trade in or subscribe for securities of the company.

* a statutory definition of inside information is to be included, based on a "reasonable person" test: information will be defined as being generally available where it is disclosed in a manner which would, or would be likely to, bring it to the attention of persons who commonly invest in securities of a kind whose price or value might be affected by the information, and where a reasonable period of time for the dissemination of information has elapsed;

* The offence will be extended to trading in prescribed interests, such as units of unit trusts, and other relevant securities; and

* monetary penalties will be increased to:

* in the case of a natural person, an amount equal to double the amount of profit realised or loss avoided as a result of the insider trading, or $100,000, whichever is greater; or

* in the case of a body corporate, $1,000,000.

38. Further explanation of the proposed amendments and the variations between the amendments and the exposure draft provisions are set out in paras 306 to 389 of the memorandum below.

Other amendments of the Corporations Law

39. Other significant amendments to the CL are proposed to be made in Schedule 2 the Bill. One of these involves rationalising the ASC information base, such as the removal of unnecessary requirements for the lodgement of documents such as the return of allotments of subscriber shares. This will produce savings to both business and for the ASC (see para 178 of the memorandum below).

40. A further proposed amendment, the addition of a new section 242A in the CL, will facilitate the maintenance of an accurate ASC information base relating to company officers. It will require the retiring directors, where more than half retire or resign at one time, to notify the ASC of that fact. This will overcome the present problems which arise when a company is in effect 'sold' and the incoming directors do not lodge the appropriate forms as they are required to do by CL s.242. This will also assist the position of the outgoing directors who, until the incoming directors lodge the appropriate notice may otherwise remain as the directors on the public record (see paragraph 183 of the memorandum below).

41. In accordance with the decision of the Ministerial Council at its meeting in February 1991, the Bill proposes a statutory moratorium in relation to the requirement for companies to include their Australia Company Number on their business documents and negotiable instruments. The amendments

to CL s.219 seek to further minimise any cost and confusion for the business community in relation to the A.C.N. requirements by extending the time in which business has to adjust to the requirements. Companies and bodies will not have to comply with this requirement until after 31 December 1991. There is a corresponding proposed amendment to CL s.362 in relation to the Australian Registered Body Number. (See paras 179 to 181 and 189 to 191 of the memorandum below). The Attorney-General has announced that further amendments to clarify the operation of the A.C.N. requirements following the consideration of representations on the matter will be included in a Bill to be exposed in June 1990.

42. To enable it to more effectively administer the unit trust industry and other prescribed interest schemes, and to protect the interests of unit holders, the ASC will be given the power to regulate compliance with trust deeds by managers and trustees. The Bill proposes an amendment to CL s.1073 to treat a breach of a covenant of a deed as a contravention of the CL. This will enable the ASC to investigate non-compliance with the provisions of deeds and to exercise its powers of civil enforcement (see para 196 of the memorandum below).

43. The Bill also contains proposed amendments to the Corporations Act and the ASC Act to deal with various machinery and transitional matters.

Winding up of NCSC

44. As the functions of the NCSC have been assumed by the ASC, and the further existence of that body is redundant, the NCSC is to be abolished. (These proposed provisions are explained in more detail in paras 93 to 116 of the memorandum below.)

45. Part 6 of the Bill includes consequential amendments of the CL and the ASC Act, and inserts new transitional provisions into the ASC Act. This Part will provide for the winding up of the NCSC and the disposition of its assets,

rights and liabilities, and will deal with related consequential and transitional matters.

46. The NCSC Act 1979 is to be repealed, and provision is to be made for the preparation of a final report and financial statements. Trust assets vested in the NCSC under the NCSC Act or Section 462 of the Companies Code will be vested in the ASC. Where the former Section 462 assets are vested in the NCSC, the corresponding provisions of the Corporations Law apply to those assets as if they had been vested in the ASC under the Law. However, moneys in respect of property vested in the NCSC before 1 January 1991 when realised will be paid to the relevant State/NT Minister. Other assets and liabilities of the NCSC will be transferred to the Commonwealth.

47. These financial provisions deal with the legal ownership of NCSC assets and liabilities. They do not affect the joint commitments by the Commonwealth and the States under the clause 31 of Heads of Agreement to accept financial responsibility for actual and contingent liabilities of the NCSC on a 50/50 basis, nor do they affect the obligation of the Commonwealth to account to the States for 50% of the value of NCSC assets calculated in accordance with the Heads of Agreement.

48. Other arrangements dealt by the legislation consequent on the abolition of the NCSC are:

* the substitution of the ASC for the NCSC in relation to rights of action arising under co-operative scheme laws, pending co-operative scheme legal proceedings, and instruments.

* the Commonwealth being substituted for the NCSC in relation to rights of action or pending proceedings not involving co-operative scheme matters; and

* the continuation in force of requirements on former NCSC staff to maintain the secrecy of information acquired by them in the course of their official

duties, unless they are properly authorised by law to disclose it.

Jurisdiction of Family Court

49. Part 9 of the Corporations Act is to be amended as set out in Schedule 1 of the Bill to confer cross-vested jurisdiction under the Corporations Law on the Family Court of Australia and the Family Court of Western Australia. (Further explanation of these provisions is set out in paras 137 to 159 of the memorandum below).

50. The amendments propose to restore to the Family Courts the jurisdiction those Courts had in relation to companies and securities legislation immediately prior to the commencement of the Corporations Law on 1 January 1991.

51. Prior to the introduction of the Corporations Law, the Family Courts had jurisdiction to deal with matters under the co-operative companies and securities legislation by virtue of the general scheme for the cross vesting of jurisdiction of Australian Courts. However, the Corporations Act excluded the general cross vesting scheme and replaced it with a special regime for the vesting and cross vesting of jurisdiction between the Federal Court and the State and Territory Courts on Corporations Law matters in which all those Courts have full co-ordinate jurisdiction under the law.

52. In the present Bill, the approach has been taken to give the Family Courts the same status under the Corporations Law as they had under the general cross-vesting legislation in relation to jurisdiction under the former Companies and Securities Codes. Those Courts are not given the full and direct co-ordinate jurisdiction conferred on the other courts for the reason that it is appropriate for the Family Courts to deal with Corporations Law matters when they arise in an ancillary way in relation to Family Law proceedings.

53. For this reason the obligations upon the Family Courts to transfer, in appropriate cases, Corporations Law matters to other Courts, follow closely the provisions of the general

Jurisdiction of Courts (Cross Vesting) Legislation : see particularly proposed new CA section 53A.

54. A Family Court will be able to transfer a case to any appropriate State Supreme Court or the Federal Court having jurisdiction under the Corporations Law.

Federalising approach

55. Various amendments are proposed in Schedules 1, 5 and 7 of the Bill to the provisions of the Corporations Act and the ASC Act to make more explicit and clarify in relation to the A.C.T. the "federalisation" mechanism under the State Application Acts. Under that mechanism the Commonwealth laws relating to the investigation and prosecution of offences, and the review of administrative decisions, apply to matters arising under the State Corporations Laws and ASC Laws as if those Laws were Commonwealth and not State laws.

56. The remaining provisions of the Bill propose various technical and clarifying amendments and minor drafting corrections to the Corporations Act, the Corporations Law and the ASC Act and ASC Law.

Commencement and application of certain changes

57. A number of amendments contained in the Bill are proposed to commence from the date when the new national scheme began operation. The relevant commencement provisions are set out in clause 2 and Schedule 6 of the Bill. The purpose of providing retrospective application for the proposed amendments to the CL, as set out in Schedule 2 of the Bill, is to promote commercial certainty by avoiding the possibility of an unexpected and unnecessary loss of rights, or the imposition of additional liabilities, on the business community and other persons. This is particularly the case in respect of those provisions which are intended to put beyond doubt whether unintended change took place as at 1 January 1991, such as the provisions recognising the national effect of the registration of company charges under the Corporations Law of each jurisdiction (see paras 165 and 184 of this

memorandum). Other amending provisions to commence on 1 January 1991, such as those set out in Schedules 1 and 7 of the Bill, relate to the legislative machinery of the new national scheme. The relevant amendments seek to reinforce the valid national operation of the new scheme, or are for the avoidance of doubt by making explicit what was intended to be implicit in the operation of the new national scheme laws when they came into force on 1 January 1991.

CORPORATIONS LEGISLATION
AMENDMENT BILL 1991

PART 1 - PRELIMINARY

Cl.1 Short Title

58. When enacted, the Act may be cited as the Corporations Legislation Amendment Act 1991

Cl.2 Commencement

59. With the following exceptions the provisions of the Bill will commence on the day it receives the Royal Assent:

* the specified proposed amendments of the CA set out in Schedule 1 of the Bill to come into operation by virtue of subclause 3(3), which relate to the conferment of jurisdiction on the Family Courts, will commence on a day to be fixed by Proclamation. These proposed amendments are not subject to the usual requirement for amendments to automatically commence after the expiration of 6 months from Royal Assent, because they rely on the subsequent passage of legislation by the States for their effective operation under the national scheme arrangements (Sub-clause 2(3));

* the remaining amendments to the CA set out in Schedule 1 will apply from the day the new national scheme commenced, namely 1 January 1991 (subclause 2(2));

* the amendments to come into force by the operation of clause 7 (Schedule 3 - Consolidated accounts) and clause 8 (Schedule 4 - Insider trading) will commence on a day to be fixed by Proclamation, but no later than the expiration of 6 months from Royal Assent (sub-clauses 2(4) and (5)).

* specified miscellaneous technical amendments of the ASC Act (new paragraph 6A(ba) and amendments of sections 43,46, 49 and 102) are to come into operation on Royal Assent (sub-clause 2(7)).

* the proposed amendments of the ASC Act which relate to the insider trading amendments of the CL to be effected by clause 8 will commence on the same day as those CL amendments (sub-clause 2(8)).

* the provisions of Part 6 of the Bill dealing with the winding up of the NCSC will commence on a day to be fixed by Proclamation, provided that the NCSC Act is not repealed before the relevant consequential amending provisions are in force (sub-clauses 2(10) and (11)).

* Part 16 of the ASC Act (which is added by Section 23 of the Bill) will come into operation on a day to be fixed by Proclamation (sub-clause 2(11))· Neither of the amendments referred to in sub-clauses 2(10), (11) and (12), are expressed to be subject to the requirement for automatic commencement after 6 months as set out in sub-clause 2(5)). It would not be appropriate to make those provisions subject to that requirement because it is possible that not all the administrative action necessary to complete the winding up processes will be completed within 6 months of the commencement of the Bill so that all relevant provisions can come into operation at that time.

* the remaining proposed amendments of:

* the Corporations Act set out in Schedule 1; and

* the ASC Act set out in Schedule 7;

are expressed to commence on the day the new national scheme came into operation, namely 1 January 1991. These provisions principally deal with technical and machinery matters relating to the way the new national

administrative and enforcement framework of the scheme operates. The purpose of commencing the relevant provisions as from that date is because the provisions seek to establish consistency of expression and coverage with the relevant corresponding provisions of the State Application Laws that came into force on 1 January 1991. The effect of applying the Commonwealth provisions, as proposed to be amended, from the same date will avoid any argument that might otherwise arise that an inconsistency in language as between the Commonwealth and State laws meant that they had a different operation in relation to each other.

PART 2 - AMENDMENTS OF THE CORPORATIONS ACT 1989

Cl.3 Principal Act

60. The Corporations Act 1989 is to be referred to in Part 2 as the Principal Act.

Cl.4 Amendments

61. This provisions will bring into operation the proposed amendments set out in Schedule 1 of the Bill. Schedule 1 of the Bill sets out proposed amendments to the CA. These amendments relate to:

* making more explicit and reinforcing the 'federalisation' formula, such as new Division 2A relating to administrative law, and the provision of examples relating to investigations and offences; and

* the conferment of jurisdiction on the Family Courts.

PART 3 - AMENDMENTS OF THE CORPORATIONS LAW

Cl.5 Corporations Law

62. The expression 'Corporations Law' ('CL') in Part 3 means the Corporations Law as set out in s.82 of the CA.

Cl.6 Miscellaneous substantive and technical amendments

63. This provision will bring into effect the proposed amendments of the CL as set out in Schedules 2 and 5 of the Bill. Schedule 2 makes various amendments of a substantive nature to the CL. These amendments concern:

* the clarification of exempt bodies for the purposes of each jurisdiction;

* the moratorium on the Australian Company Number and the Australian Registered Body Number requirements;

* the requirement for retiring directors to notify the ASC;

* the national effect of the registration of charges;

* conferring power on the ASC to investigate compliance with trust deeds;

* various minor drafting changes.

Schedule 5 makes various technical and typographical amendments to the CL.

Cl.7 Consolidated accounts of a company and the entries it controls

64. This provision will bring into effect the proposed amendments of the CL set out in Schedule 3 of the Bill. Schedule 3 amends the CL to require the consolidation of accounts of companies and entities they control, and to deal with related matters.

Cl.8 Insider Trading

65. This provisions will bring into effect the proposed amendments of the CL set out in Schedule 4 of the Bill. Schedule 4 amends the CL to reform the regulation of insider trading.

Cl.9 Commencement and Application of certain charges

66. This provision will bring into effect the proposed amendments of the CL set out in Schedule 6 of the Bill. Schedule 6 contains provisions dealing with the commencement and application of certain amendments of the CL made by the Bill.

PART 4 - AMENDMENTS OF THE AUSTRALIAN SECURITIES COMMISSION ACT 1989

Cl.10 Principal Act

67. The Australian Securities Commission Act 1989 ('the ASC Act') is referred to as the Principal Act in Part 4.

Clause 11: Amendments

68. This provision will bring into operation the proposed amendments set out in Schedule 7 of the Bill. Schedule 7 contains various technical amendments to the ASC Act which:

* make explicit and re-inforce the federalising formula;

* are consequential on the insider trading amendments; and

* make minor drafting changes.

PART 5 - AMENDMENTS TO THE CROWN DEBTS (PRIORITY ACT) 1989

Clause 12: Principal Act

69. The Crown Debts (Priority) Act 1981 (the Act) is referred to in Part 5 as the Principal Act.

Clause 13: Certain rights of the Crown not affected

70. The Bill replaces the present incorrect reference in section 4 of the Act to the 'Corporations Law' with the appropriate reference to the Corporations Act 1989.

PART 6 - ABOLITION OF NATIONAL COMPANIES AND SECURITIES COMMISSION

Background

71. Proposed Part 6 deals with the transfer of legal rights and obligations, the distribution of assets and liabilities and other transitional arrangements consequent on the abolition of the National Companies and Securities Commission.

72. That part deals with the legal framework for the winding up of the NCSC and does not affect the obligations on the Commonwealth and States under the Heads of Agreement under that agreement clause 31 specifies the following in relation to the winding up of the NCSC:

* Clause 31.1: Actual and contingent NCSC liabilities will be assumed by the Commonwealth and the States on a 50/50 basis on 1 January 1991;

* Clause 31.2: On 1 January 1991 the Commonwealth will take over all assets of the NCSC at 30 June 1990 market values and pay to the States 50% of the valuation; and

* Clause 31.3: Allowance will be made for dispositions and acquisitions post 30 June 1990 at actual realisation or cost.

73. It is not considered necessary or desirable to set out in the legislation the precise obligations of the various Governments under the Heads of Agreement. The various co-operative scheme funding arrangements were not dealt with in legislation, but in the Formal Agreement and the Fee Sharing Agreement. Further, the transfer of assets and liabilities in relation to the transfer of Commonwealth legal aid functions to the States in recent years was largely conducted without detailed legislation.

74. Proposed Part 6 provides the legislative backing for the continuation of legal rights and obligations of the NCSC, the transfer of the NCSC's assets and liabilities and a number of other transitional matters.

75. Notwithstanding that a particular right of action, asset or liability may be transferred in law to the ASC, there may be a separate obligation on a State to reimburse the Commonwealth for a liability or on the Commonwealth to account to the States for an asset.

Division 1 - General

76. Clause 14 abolishes the NCSC by repealing the National Companies and Securities Commission Act 1979

Clause 15 – Annual report and financial statements

77. Clause 15 imposes requirements in respect of the preparation of a report and financial statements in relation to the operations of the NCSC. As soon as practicable after the commencement of the section the ASC must prepare a report on the operations of the NCSC during the period of 6 months ending on 31 December 1990 and financial statements for that period in a form approved by the Commonwealth Attorney-General, and submit those financial statements to the Auditor-General (subclause 15(1)).

78. On receipt of those financial statements, the Auditor-General is obliged to report to the Attorney-General:

* whether he/she believes the statements are based on proper accounts and records;

* whether they are in agreement with the accounts and records;

* whether he/she believes the dealings with money and assets by the NCSC have been in accordance with the NCSC Act and Part 6 the amending Bill; and

* other matters that the Auditor-General considers should be reported to the Minister (subclause 15(2)).

79. The Auditor-General must send a copy of this report to the ASC and the ASC must submit its report and financial statements, together with the Auditor-General's report, to the Commonwealth Attorney-General and State Ministers responsible for the Corporations Law (subclause 15(3)).

80. Both reports and the financial statements are to be laid before both Houses of Parliament by the Minister with 15 sitting days after he/she receives them (subclause 15(4)).

81. The ASC and the Auditor-General, in meeting the requirements of the section, are entitled to rely on accounts and records of the NCSC available to the ASC and any other information provided to the ASC by a former officer or employee of the NCSC (subclause 15(5) and (6)).

82. Within 3 months after 30 June 1991 the ASC must prepare a report of the operations of the NCSC for the preceding 6 months of that day and financial statements in respect of that period (subclause (7)).

83. Part 6 is to commence on a day fixed by Proclamation (subclause 2(7)) and it is envisaged that this will be on or before 1 July 1991. If it is not proclaimed by that date and in consequence the NCSC Act is not repealed by then, the ASC must prepare a report and financial statements within 3 months after the repeal of the Act in relation to the operations of the NCSC from 1 July 1991 to the date of the repeal (subclause (8)).

84. The reports and financial statements prepared under subclauses (7) and (8) are to be dealt with as if they had been prepared under paragraph (1)(a).

85. Subclause (10) defines a number of terms for the purposes of the clause:

* 'Commission' means the Australian Securities Commission;

* 'NCSC' means the National Companies and Securities Commission;

* 'NCSC Act' means the National Companies and Securities Commission Act 1979

* 'operations of the NCSC' includes matters relating to preparations for the repeal of the NCSC Act or the disposal of the NCSC's assets; and

* 'State Minister' means a person who, for the purposes of the Corporations Law of a jurisdiction, is the Minister for that jurisdiction.

Clause 16 – Ombudsman investigations

86. Under clause 16, outstanding complaints made to or investigations commenced by the Ombudsman in relation to action taken by the NCSC are to be treated as if that action had been taken by the ASC.

Division 2 – Amendments of the Corporations Law

Clause 17 – Corporations Law

87. For the purposes of amendments to the Corporations Law to account for the winding up of the NCSC 'Corporations Law' is to be taken to mean the Corporations Law set out in section 82 of the Corporations Act 1989

Clause 18 - Amendments

88. Subclause 18(1) amends CL section 577, which deals with the disposal of interests in property of a defunct company vested in the ASC by virtue of section 576, by inserting new subsections (6)-(9). Subsection 577(6) is to provide that

where assets are vested in the ASC by proposed section 254 of the ASC Law and the assets were previously vested in the NCSC under a corresponding previous law of this jurisdiction, but not under section 43 of the NCSC Act, the corresponding previous law of this jurisdiction is to apply in relation to those assets. The effect of this is that assets vested in the ASC that had been vested in the NCSC prior to 1 January 1991 when realised is to be paid to the jurisdiction under whose law the property originally vested.

89. Subsection 577(7) is to provide that section 577 is to apply, despite CL section 601, where assets are vested in the ASC by section 254 of the ASC Law and they were previously vested in the NCSC after 31 December 1990 under a corresponding previous law, other than section 43 of the NCSC Act, in consequence of the winding up of a company which started before the commencement of the CL. In such circumstances section 601 would otherwise require the assets to be dealt with under the previous law. The effect of this is that property vested in the ASC, which had vested in the NCSC after 1 January 1991, when realised will be paid to the Commonwealth.

90. Similarly, subsection 577(8) is to provide that, notwithstanding CL section 601, section 577 and not the previous corresponding law is to apply where assets are vested in the ASC in consequence of the winding up of a company which started before 1 January 1991.

91. Subsection 577(9) will ensure that the previous corresponding law will continue to operate in relation to money that had been paid to a Minister before the commencement of section 254 of the ASC Law.

92. Subclause 18(2) amends CL section 601 to enable the section to apply with such modifications as are necessary as if references to the NCSC in the previous law were references to the ASC, in relation to time after the commencement of section 254 of the ASC Law.

Division 3 – Amendments of the Australian Securities Commission Act 1989

Clause 19 – Principal Act

93. In Division 3 'Principal Act' is taken to mean the Australian Securities Commission Act 1989

Clause 20 - Liabilities etc. imposed on Commonwealth by other ASC Laws

94. Clause 20 inserts a new proposed section 6E after section 6D of the ASC Act. Proposed section 6E provides that where Part 16 of the ASC Law of another jurisdiction transfers liabilities of the NCSC to the Commonwealth, makes the Commonwealth party to proceedings, or creates a right of action against the Commonwealth, those assets are transferred, the Commonwealth becomes a party, or a right of action is created by section 6E. This provision in the Commonwealth Act is necessary to receive the truster of assets rights or liabilities to the Commonwealth by State laws.

Clause 21 - Confidentiality

95. Section 127 of the ASC Act, which deals with the confidentiality of information in the ASC's possession, is to be amended by the insertion of a new subsection (7) which provides that the section does not apply to information in relation to which section 127A applies. Section 127A, discussed below, is to provide a separate regime in relation to the disclosure of information by former members, staff or agents of the NCSC.

Clause 22 - Secrecy

96. Clause 22 inserts a new proposed section 127A into the ASC Act to deal with the disclosure of information acquired by persons associated with the NCSC by virtue of that association. The section is to apply to persons who were at any time:

* appointed for the purposes of a law specified in an application order;

* engaged as a member of the staff of the NCSC; or

* authorised to perform or exercise any function or power of the NCSC or any function or power on behalf of the NCSC.

97. Such persons must not, except to the extent necessary to perform or exercise official duties, functions or powers, make a record of or disclose to any person, any information acquired by virtue of his/her appointment, engagement or authorisation. Nor may the person make use of any such information, for purposes other than the performance or exercise of official duties, functions or powers (subsection 127A(1)).

98. The penalty for contravention of the subsection is $5,000 or imprisonment for one year, or both.

99. However, nothing in proposed subsection 127A(1) precludes a person from:

* producing a document, or disclosing a matter or thing that came to his/her notice in the performance or exercise of official duties, functions or powers, to a court in criminal proceedings or any proceedings under the NCSC Act or any prescribed law or a national scheme law;

* producing a document or disclosing information to a person where it is in the opinion of the ASC in the public interest or where it is required or permitted by any Act to be produced or disclosed; or

* producing a document or disclosing information to the ASC (subsection 27A(2)).

100. Laws prescribed for the purposes of subsection (2) are set out in subsection 127A(3).

Clause 23 - New Part providing for the transactional arrangements for the winding up of the NCSC

101. A new Part 16 is to be inserted by clause 23.

PART 16 - TRANSITIONAL

Background

102. Proposed Part 16 to be inserted in the ASC Act contains the core provisions which deal with the continuation of rights of action by or against the NCSC and the transfer of the assets and liabilities of the NCSC. The general scheme of the provisions is that:

* assets held by the NCSC or its delegates under trust and assets vested in the NCSC under section 462 of the Companies Act 1981 other than those payable to a Minister are to be transferred to the ASC;

* other NCSC assets are to be transferred to the Commonwealth except where the Attorney-General declares that particular assets should instead be vested in the ASC;

* all liabilities and rights of action arising under the co-operative companies and securities scheme (scheme liabilities and rights of action) are to be transferred to the ASC; and

* other NCSC liabilities and rights of action are to be transferred to the Commonwealth.

103. Separate non-legislative arrangements have been established to deal with Commonwealth/State accounting for such transfers.

Proposed Section 253 - Interpretation

104. Proposed section 253 defines a number of terms for the purposes of the Part:

* 'asset' is defined as property of every kind, including but not limited to chooses in action and rights, interests and claims of every kind in or to property whether by virtue of an instrument or otherwise, liquidated or unliquidated, certain or contingent, accrued or accruing.

* 'authorised officer' means the Minister, the Chairperson of the ASC or a authorised member of the staff of the ASC;

* 'commencement' means the commencement of a particular provision;

* 'liabilities' means liabilities of every kind, including, but not limited to, obligations whether arising by virtue of an instrument or otherwise, liquidated or unliquidated, certain or contingent, accrued or accruing;

* 'NCSC Act' means the National Companies and Securities Commission Act 1979

* 'NCSC instrument' means an instrument to which the NCSC was a party, that was given to or in favour of the NCSC, in which reference is made to the NCSC or under which money is or may become payable or property is transferred or may become transferable to or by the NCSC.

* 'section 462 assets' are assets held by the NCSC to which section 462 of the Companies Act, which concerns the disposal of property of defunct companies which has been vested in the NCSC, or a corresponding law of any jurisdiction.

* 'trust assets of the NCSC' are assets received or held by the NCSC under section 43 of the NCSC Act and section 462 assets.

Proposed section 254 - Trust assets of NSCS

105. Proposed section 254 transfers the trust assets, as defined in proposed section 253, of the NCSC to the ASC and, subject to any declaration by the Attorney-General to the

contrary, any liabilities associated with those assets become liabilities of the ASC.

Proposed Section 255 – Money of the NCSC

106. Proposed section 255 provides that money held by the NCSC, at the commencement of the provision that was paid by the Commonwealth to the NCSC under section 26 of the NCSC or was received by the Commission from a State or Territory in accordance with section 27 of the NCSC Act is to be transferred to the Commonwealth and is to be paid into the Consolidated Revenue Fund.

Proposed Section 256 – Other assets and liabilities of NCSC

107. This proposed new section provides that any other assets or liabilities of the NCSC are to be transferred to the Commonwealth (subsection (1)). However, the Attorney-General may declare that a specified asset or liability is not to be transferred to the Commonwealth (subsection (2)), in which case, it becomes an asset or liability of the ASC (subsection (3)). Any liabilities associated with an asset transferred to the ASC which are specified in the declaration become liabilities of the ASC (subsection (4)).

Proposed Section 257 – Effect of transfer of assets and liabilities to the Commission

108. Proposed section 257 provides, in relation to assets or liabilities transferred to the ASC under section 254 or 256, that:

* where an asset was held on trust by the NCSC, it is to be held by the ASC on trust and subject to the terms of the trust on which the asset was held by the NCSC; and

* liabilities of the NCSC to make payments are taken to be liabilities incurred by the ASC in the performance or exercise of its functions and powers.

Proposed Section 258 – NCSC instruments

109. Proposed section 258 ensures that NCSC instruments continue to have effect but operate in the future as if the reference in the instrument to the NCSC was a reference to the appropriate new body. That body is the ASC in respect of instruments relating to assets or liabilities transferred to the ASC under section 254 or 256 and the Commonwealth otherwise.

Proposed Section 259 – Pending proceedings

110. In proceedings, other than co-operative scheme proceedings, to which the NCSC was a party that were pending prior to its winding up the Commonwealth is to be substituted for the NCSC as a party to the proceedings, with the same rights in the proceedings as the NCSC had (subsection 259(1)). Further, a right of action, other than a right of action under a co-operative scheme law, in favour of or against the NCSC is to be taken to be a right of action for or against the Commonwealth (subsection 259(2)).

111. Proposed subsection 259(3) defines:

* 'co-operative scheme law' as a relevant previous law of this or any other jurisdiction; and

* 'co-operative scheme proceedings' as proceedings arising under with a co-operative scheme law, including proceedings relating to trust assets of the NCSC.

Proposed Section 260 – Certificates relating to assets, liabilities and instruments

112. Proposed section 260 provides for an authorised officer to certify that assets or liabilities have become those of the ASC or the Commonwealth by virtue of sections 254 and 256, or a corresponding law, and that an instrument is an NCSC instrument (subsection 260(1)), and any certificate so made is in all courts and for all purposes evidence of the matter stated in it (subsection 260(2)).

113. For the purposes of court proceedings judicial notice is to be taken of the signature of authorised officers on certificates relating to assets, liabilities and instrument, subsection 260(3). This provision is to facilitate the evidentiary effect of the certificate.

Proposed Section 261 – Exemption from taxation

114. Stamp duty or any other tax is not to apply to an instrument certified by an authorised officer to have been made or given in relation to the operation of Part 16 or a corresponding law by virtue of proposed section 261.

Proposed Section 262 – Pending proceedings etc, by or against the NCSC

115. The ASC is to be substituted for the NCSC in co-operative scheme proceedings to which the NCSC was a party pending after its winding up by proposed subsection 262(1) and is to have the same rights in the proceedings as the NCSC had. Further, a right of action in favour of or against the NCSC arising under a co-operative scheme law of this jurisdiction is to be taken to be a right of action in favour of or against the ASC (subsection (2)).

116. 'Co-operative scheme proceedings' means proceedings under a relevant previous law of this jurisdiction, including proceedings relating to trust assets of the NCSC (subsection (3)).

SCHEDULE 1 - AMENDMENTS OF THE CORPORATIONS ACT 1989

Subsection 3(3) - Object

117. The reference to the Australian Capital Territory in subsection 3(3) of the Act is removed and replaced with a reference to "a Territory".

Subsection 4(1) – Definition of "Commonwealth Law"
Subsection 4(1) - Interpretation

118. "ASC Law" and "ASC Regulations" are defined to have the meaning of those respective expressions in the ASC Act.

119. The expression "Commonwealth administrative laws" is defined for the purposes of the proposed new "Division 2A - Administrative Law" to be inserted into the Act (see para 130 below). The relevant administrative laws are:

* the Administrative Appeals Tribunal Act 1975;

* the Administrative Decisions Judicial Review Act 1977;

* the Freedom of Information Act 1982;

* the Ombudsman Act 1976;

* the Privacy Act 1988.

and will include regulations made under those Acts. The definition corresponds to the definition of 'Commonwealth Administrative Law' in section 3 of the State Application Acts, which will also be subsequently amended to include references to regulations made under those Acts. The further references to the regulations are for the avoidance of doubt and are intended to make explicit what was intended to be implicit in the operation of the present provisions.

120. The words in subsection 4(1) of the Act "Acts and unwritten laws of the Commonwealth" have been clarified to ensure they refer to laws relating to the exercise of prerogative powers rights and privileges. The amended definition will now more closely correspond to the definition of 'Commonwealth Law' in s.3 of the State Application Acts and is merely intended to make explicit what is implicit in the existing provision.

Subsection 6(3), (4), (5) and (6) – Application of regulations in force under section 22

121. Amendments are made to the above provisions to bring them into line with the corresponding provisions in section 8 of the State Application Acts. The provision provides that regulations cannot have a retrospective effect to the extent that they would disadvantageously affect the rights of a person or to impose a liability on a person (other than a government or government authority).

Definition of Corporations Law, and Corporations Regulations of the A.C.T. not to be affected by later Commonwealth Laws
New Subsection 9(1)A
Subsection 9(1)
Subsection 9(2)

122. Section 9 of the Act which provides that the Corporations Law and Regulations of the A.C.T. is not to be affected by later Commonwealth laws otherwise than by express amendment, is to be amended to also include a reference to the Act, the ASC Law and ASC Regulations of the A.C.T. A definition of 'reserved law' is to be inserted which includes the references to those national scheme laws and regulations. The provision now corresponds more closely to section 5 of the State Application Acts. The effect is that all national scheme laws are to be ordinarily quarantined from amendment by later legislation not forming part of the national scheme.

Section 39 – Effect of Part

123. A drafting change is to be made to replace the present section 39 of the Act with a new section which retains the provisions of that section, incorporates the present provisions of section 41 of the Act, and makes further changes to add appropriate references to the proposed new "Division 2A - Administrative Law".

Section 40 - Object

124. A new subsection 40(2) is added to provide specific examples, which are not exhaustive, of the purposes for which an offence against an applicable provision of another jurisdiction is to be treated in the A.C.T. as an offence against a law of the Commonwealth. These purposes include:

* investigation and prosecution;
* arrest, custody, bail, trial, conviction;
* proceedings, appeals and reviews relating to the above matters;
* sentencing, punishment and release;
* fines, penalties and forfeitures, reparation, proceeds of crime, and spent convictions.

125. This amendment will bring subsection 40(2) into line with the corresponding provisions of subsection 28(2) of the State Application Acts, which 'federalise' applicable provisions of the State CLs. The purpose of the amendment is to give guidance as to the extent of the federalising formula.

Section 41 – Effect of Division

126. This provision is to be repealed as it is now unnecessary in the light of the proposed above-mentioned amendment to subsection 39.

Subsection – 42(1)
Subsection – 42(2)

127. The proposed amendment is to make a drafting change to subsections 42(1) and (2) to make it clear that the Commonwealth laws applying to offences against the applicable provisions of other jurisdictions apply, not as laws of that jurisdiction, but as if those applicable provisions were laws of the Commonwealth. This will bring the provision more closely into line with the corresponding provision e.g. of the State Application Acts (e.g. see subsections 29(1) and (2)). The amendment is for the avoidance of doubt and is intended to

make explicit what was considered to be implicit in the present provision.

Subsection 43(4) – Functions and powers under Commonwealth laws as applying because of section 42

128. A drafting change is to be made to subsection 43(4), consistent with existing subsection 43(3) by referring to the 'exercising' of powers as well as the performing of functions. This provision now corresponds in that respect to subsection 31(4) of the State Application Acts.

Subsection 45(3)

129. The provision is omitted because it is unnecessary. This will bring the position into line with the State Application Law which similarly does not contain such a provision.

After Section 45, New Division 2A – Administrative Law

130. A new Division 2A is to be added to the Act to complete the federalising formula in relation to the administrative law regime under the new national scheme. This proposed new Division complements the corresponding provisions in the State Application Acts (e.g. Division 3 of Part 8 of the Corporations Act (NSW) 1990). Those provisions of the State Application Acts provide that Commonwealth national scheme laws and administrative laws apply to the applicable provisions of the respective jurisdiction, and that the national scheme and administrative laws so apply as if the applicable provisions were laws of the Australian Capital Territory. In the State Application Acts this has the effect of applying the Commonwealth administrative law regime to the national scheme laws of those States. In this way, the operation of the applicable provisions of State law are "federalised" in relation to administrative law.

Section 45A - Object

131. The provisions of proposed new Division 2A provide that, for the purposes of Commonwealth administrative laws applying

within the A.C.T., the applicable laws of jurisdictions other than the A.C.T. have effect and are to be treated within the A.C.T. as Commonwealth laws and not laws of those jurisdictions (section 45A).

132. This has the effect that the Commonwealth national scheme and administrative laws applying in the A.C.T. will, for example recognise and give the same status in the A.C.T. to acts or things done, prohibitions, or powers to exercisable under the federalised Commonwealth laws as applied in other jurisdictions, or will enable acts or things to be done or powers to be exercised, or prohibitions to be enforced in the A.C.T. in respect of the federalised Commonwealth laws of other jurisdictions.

New Section 45B – Application of Commonwealth Administrative laws in relation to applicable provisions of other jurisdiction

133. Proposed new section 45B complements section 36 of the State Application Acts. It will apply within the A.C.T. the Commonwealth administrative laws to matters arising under the federalised national scheme laws and administrative laws of the States as if those federalised laws were Commonwealth and not State laws.

New Section 45C – Functions and powers under Commonwealth Administrative Laws as applying because of Section 45B

134. Proposed new section 45C complements subsections 37(2), (3) and (4) of the State Application Acts. It will confer the same functions and powers on officers or the authorities of the Commonwealth in connection with the federalised Commonwealth laws applied in other jurisdictions as those officers and authorities have in the A.C.T.

New Section 45D – Reference in Commonwealth Administrative law to a provision of such a law

135. Proposed new section 45D complements Section 38 of the State Application Acts. This will deal with the technical

point of how references in a Commonwealth administrative law to other Commonwealth laws are to be construed for the purposes of federalised administrative laws applying in other jurisdictions.

New Section 45E – How acts etc, under applicable provisions of other jurisdictions are to be treated

136. Proposed new section 45E will complement section 35 of the State Application Acts. It will have a similar operation in relation to administrative law matters that section 45 of the Act has in relation to offences. It will have the effect that, for the purposes of Commonwealth and A.C.T. law, matters arising in relation to the federalised administrative law apply in another jurisdiction, will be treated in the same way as if it arose under Commonwealth and not State law.

PART 9 - JURISDICTION AND PROCEDURE OF COURTS

Background

137. Prior to the introduction of the Corporations Law, the Family Court of Australia and the Family Court of Western Australia had jurisdiction to deal with matters under the co-operative scheme of companies and securities legislation by virtue of the general cross-vesting scheme for the jurisdiction of courts, established by the Jurisdiction of Courts (Cross-vesting) Act 1987 (and equivalent provisions in other jurisdictions).

138. Under the Corporations Law, a special cross-vesting regime has been adopted, rather than relying on the general cross-vesting scheme, to take account of the unique character of the jurisdictional apparatus under the applied law regime of the national companies scheme. Under that regime the Federal Court and the State Supreme Courts have full co-ordinate jurisdiction in respect of civil matters arising under the Corporations Law of each jurisdiction. The Corporations Law cross-vesting scheme currently does not extend to the Family Courts, largely because, in the time available, it was not possible to draft separate satisfactory

arrangements to give effect to the special status of the Family Courts in relation to companies and securities matters.

139. The following proposed amendments to Part 9 provide the Family Courts with jurisdiction under the Corporations Law under arrangements similar to the general cross-vesting scheme. The provisions for the transfer of proceedings instituted in the Family Courts differ from those that apply to other superior Courts under the Corporations Law, and require the Family Courts to transfer proceedings under similar criteria to those applying in section 5 of the Jurisdiction of Courts (Cross Vesting) Act 1987. These provisions will enable the Family Courts to exercise appropriate jurisdiction in Corporations Law matters, such as where a matter under the Law arises in an ancillary way to Family Law proceedings. The conferment of jurisdiction on the Family Courts under the Act will be complemented by provisions to be introduced into the State Application Acts.

Section 50 - Interpretation

140. A technical error in the definition of 'Full Court' in subsection 50(1) is to be corrected, to ensure that it applies to Territory, as well as State, Supreme Courts.

141. New definitions are to be inserted in subsection 50(1) to take account of the inclusion of the Family Courts in the jurisdiction of court provisions:

* 'Family Court' means, for the purposes of Division 1 of Part 9, the Family Court of Australia; and

* 'State Family Court' in relation to a State, is defined as a court of that State to which section 41 of the Family Law Act 1975 applies because of a Proclamation made under subsection 41(2) of that Act. Currently, the Family Court of Western Australia is the only court in respect of which such a proclamation has been made.

142. The definition of the 'Corporations Law' in subsection 50(2) is to be modified to include rules of court made by the Family Court of Australia (subparagraph 50(2)(a)(vii)) and State Family Courts (subparagraph 50(2)(a)(viii)).

Proposed Section 51A – Jurisdiction of Family Court and State Family Courts

143. Proposed section 51A confers jurisdiction on the Family Court of Australia with respect to civil matters arising under the Corporations Law of the Capital Territory (subsection 51A(1)).

144. Jurisdiction is also conferred on State Family Courts with respect to civil matters arising under the Corporations Law of the Capital Territory (subsection 51A(2)). The conferral of this jurisdiction, like that conferred on State Supreme Courts in subsection 51(2), 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 section 9 of the Administrative Decisions (Judicial Review) Act 1977.

145. Pursuant to proposed subsection 51A(3) the jurisdiction conferred on State Family Courts by subsection 51A(2) is not limited by any limits to which any other jurisdiction that State Family Courts may be subject (such as territorial limits or limits as to locality).

Section 52 - Appeals

146. Section 52 is to be repealed and a new section substituted which takes account of the inclusion of the Family Courts in the Division in the hierarchy of appeals. The section ensures that, notwithstanding the cross-vesting of jurisdiction, the normal hierarchy of appeals is to apply. In consequence, an appeal may not be instituted from a decision of:

* the Federal Court to a Court of a State or Territory or to the Family Court (subsection 52(1))· The appeal from a single judge of the Federal Court will be to the Full Federal Court as usual;

* a Court of the Capital Territory to a Court of a State or to the Family Court (subsection 52(2))· The normal avenue of appeal from the Supreme Court of the Capital Territory is to the Full Federal Court, see paragraph 24(1)(b) of the Federal Court of Australia Act 1976;

* the Supreme Court of a State to the Federal Court, to a Court of the Capital Territory or of another State, to the Family Court or to a State Family Court of that State (subsection 52(3)). The normal avenue of appeal from the decision of a single judge of a State Supreme Court is to the Full Court of that State Supreme Court;

* the Family Court to the Federal Court or to a Court of a State or Territory (subsection 52(4)). An appeal from the decision of a single judge of the Family Court normally goes to the Full Family Court; and

* a State Family Court to the Federal Court, to a Court of the Capital Territory or of another State or to the Supreme Court of that State. The normal avenue of appeal in such circumstances would be to the Full Family Court (subsection 52(5)).

Subsection 53 – Transfer of Proceedings

147. Subsections 53(3), (4) and (5) are to be omitted and replaced by sections 53B, 53C and 53D, which apply for the purposes of the transfer of proceedings both under section 53 and proposed section 53A.

Proposed section 53A – Transfer of proceedings by Family Court and State Family Courts

148. Proposed section 53A establishes a regime for the transfer of proceedings in respect of civil matters arising under the Corporations Law instituted in the Family Court or the State Family Courts. As already noted, it differs from the regime in section 53 that applies in relation to such proceedings instituted in other superior courts. The section 53A regime is similar to the provisions for the transfer of proceedings under the general cross-vesting arrangements established by the Jurisdiction of Courts (Cross-vesting) Act 1987 (and equivalent provisions in other jurisdictions). The provisions ensure that proceedings begun inappropriately in the Family Court or the State Family Courts, or related proceedings begun in separate courts, will be transferred to an appropriate Court.

149. Under proposed subsection 52A(2) the Family Courts must transfer proceedings to either the Federal Court or to a State Supreme Court if they consider that:

* the proceeding arises out of or is related to, another proceeding pending in one of those Courts and that the Court in which the other proceeding is pending is the most appropriate Court to determine the matter; (paragraph (a))

* one of those Courts is the most appropriate Court to determine the proceeding having regard to:

* whether the proceeding, or a substantial part of it, apart from the Division, would have been incapable of being instituted in the Family Court or the State Family Courts; and

* the extent to which the matters for determination in the proceedings are matters not within the Family Courts jurisdiction apart from cross-vesting arrangements; and

* the interests of justice (paragraph(b)).

* it is otherwise in the interests of justice (paragraph (c)).

150. The Family Court or the State Family Courts must transfer proceedings under proposed subsection 53A(3) to another Family Court if it appears to the first Court that:

* the proceeding arises out of, or is related to, another proceeding pending in that other court and the other court is the most appropriate court to determine the matter;

* it is otherwise in the interests of justice that the proceeding be determined by the other Family Court.

151. Proposed subsection 53A(4), provides for the transfer of related proceedings, so that all related proceedings can be heard and determined in the one Court. The provision is needed because proceedings related to proceedings transferred under proposed subsections 53A(2) and (3) might not themselves satisfy the criteria for transfer under those subsections.

Proposed Section 53B – Further matters for a court to consider when deciding whether to transfer a proceeding

152. Proposed section 53B replaces subsection 53(3) of the Corporations Act, which is being repealed as discussed previously and applies it to the transfer of proceedings or applications under both section 53 and section 53A. The criteria a court must have regard to in determining whether to transfer a proceeding or application under those sections 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.

Proposed section 53C – Transfer may be made at any stage

153. Proposed section 53C replaces subsection 53(4) of the Corporations Act, which is being repealed as discussed previously and applies it to the transfer of proceedings or applications under both section 53 and section 53A. A court may transfer proceedings or applications under those subsections at the application of a party made at any stage, or of the courts own motion.

Proposed section 53D – Transfer of documents

154. Proposed section 53D replaces subsection 53(5), which is being repealed as discussed previously, and applies it to the transfer of proceedings or applications under both section 53 and section 53A. Where a transfer to another court occurs under those sections, the Registrar of the transferring Court must transmit all documents that had been filed to the Court accepting jurisdiction (paragraph 53D(a)).

155. The court which has accepted the transfer of the proceeding or application must proceed as if the proceeding had been instituted or application originally made in that Court (paragraph 53D(b)).

Section 54 – Conduct of proceedings

156. Amendments in consequence of the inclusion of the Family Courts in the civil cross-vesting arrangements are to be made to section 54. Reference to the rules of the Family Court in proposed section 61A is to be made in subsection 54(1). The Family Court is to be included in paragraph 54(a) and (b) and State Family Courts in paragraph 54(d).

Section 56 – Exercise of jurisdiction pursuant to cross-vesting provisions

157. The Family Court is to be included in subsection 56(2), confirming that it may exercise cross-vested jurisdiction and hear and determine proceedings transferred under any

Commonwealth or State law relating to the cross-vesting of jurisdiction.

Section 59 – Enforcement of judgments etc

158. Amendments consequential on the inclusion of the Family Courts in the civil cross-vesting arrangements are to be made to section 59. The Family Court is to be included in subsection 59(1) and the Family Court and the State Family Courts are to be included in subsection 59(2).

Proposed section 61A – Rules of the Family Court

159. Proposed subsection 61A(1) enables the Family Court to make rules of court in relation to matters arising under the Corporations Law of the Capital Territory with respect to the proceedings of the Family Court. Where the Family Court exercises jurisdiction under the Coporations Law of another jurisdiction, the Court is required to use those rules with such alterations as all necessary (proposed subsection 61A(2)).

160. In relation to proceedings under the Corporations Law of the Capital Territory in another jurisdictions Family Court, the Court is directed by subsection 61A(3) to apply the same rules of court as it has established in respect of matters arising under its Corporation Law.

Paragraphs 64(1)(a) and (b) – Jurisdiction of Courts

161. A drafting change is to be made to paragraph 64(1)(a) and (b) of the Act to clarify the scope of the jurisdiction of State and Territory Courts in criminal matters in relation to offences against the CL of the Capital Territory. The proposed amendment is to take account of the specification of criminal matters in proposed new section 40 of the Act.

Paragraph 76(1)(a) - National Scheme Laws Prevail over Co-operative Scheme Acts

162. The reference in paragraph 76(1)(a) of the Act to the commencement of the national scheme laws of the Capital

Territory is replaced with a reference to the commencement of section 76.

Updating References to Co-operative Scheme laws and Regulations
Section 80(1)
Section 80(2) and (3)
Sub-section 80(3)
Sub-section 80(4)
Paragraph 80(5)(b)
Subsection 80(6)

163. The effect of these proposed amendments is to clarify that the reference to 'instrument' in section 80 does not refer to national scheme laws and regulations of the A.C.T. and to make consequential drafting changes. The inclusion of references to such national laws within the meaning of "instrument" for the purposes of section 80 would be meaningless and possibly lead to unintended results. It is the intention that where a national scheme law refers to a co-operative scheme law it does so deliberately and the reference is not meant to be updated.

After subsection 80(4)

164. Proposed new subsection 80(4A) is a transitional provision which deems references in instruments to the NCSC to include references to the ASC. In cases where this would be inappropriate, the power in new subsection 80(6) allows the making of regulations which will enable particular references to be excluded. This amendment will be deemed to have taken effect on 1 January 1991 (see subclause 2(3)).

SCHEDULE 2 - MISCELLANEOUS SUBSTANTIVE AMENDMENTS OF CORPORATIONS LAW

Paragraph 8(5)(c) - Charges

165. Paragraph 8(5)(c) is being amended to ensure that a reference in section 273 of the CL, (which relates to registration under other legislation relating to charges)

includes a reference to that provision of the CL of each jurisdiction. This is intended to ensure the national effect of the registration under the provisions of any single Corporations Law. This amendment will be deemed to have taken effect on 1 January 1991 (see also proposed section 1363).

Section 9 - Definitions

166. The following miscellaneous amendments are to be made to section 9:

* paragraph (c) of the definition of 'clients' segregated accounts' is to include a reference to moneys deposited under a corresponding previous law in relation to section 1209 of the CL;

* paragraph 9 of the definition of 'company' is to include a reference to the definition of financial year;

* the definition of 'financial statements' is to refer to a 'previous' law corresponding to Part 3.6 of the CL;

* the definition of 'person' has been amended to take account of proposed new section 85A of the CL;

* the words after paragraph (b) of definition of prescribed interest are to be amended as a consequence of the proposed new definition of exempt prescribed interest in section 68A of the CL;

* new definitions are to be inserted of 'exempt prescribed interest' which is to take its meaning from new section 68A, and 'individual', which is to mean a natural person;

* the definition of 'securities law' is to be amended to include a reference to a previous law corresponding to Chapters 6 or 7.

Paragraph 66(3)(a) - Excluded Issue Offers an Invitations

167. A new para 66(3)(a) is to be included to make it clear that an offer to purchase or an invitation to buy securities of an amount of $500,000 or more is an excluded offer or invitation. This replaces an exemption to the same effect presently in the Corporations Regulations. Presently paragraph 66(3)(a) excludes offers for subscription and invitations to subscribe.

Section 66A - Exempt Bodies

168. Various amendments are made to section 66A as set out below:

* the exempt bodies in relation to N.S.W. referred to bodies incorporated under the Associations Incorporation Act 1984 of NSW are to be exempt bodies in relation to New South Wales for the purposes of subsection 66A(1).

* in relation to Victoria, the following bodies as exempt bodies for that State: incorporated associations under the Associations Interpretations Act 1981 of that State building societies under the Building Societies Act 1986, various societies dealt with in the Co-operation Act 1981, co-operative housing societies under the Co-operative Housing Societies Act 1958 and friendly societies under the Friendly Societies Act 1986.

* in relation to Queensland a credit society or other body registered under the Credit Societies Act 1986 or a building society foreign building society under the Building Societies Act 1985 - 1900, and a friendly society within the meaning of the Friendly Societies Act 1991 of Queensland, are exempt bodies;

* in relation to bodies referred to in respect of Western Australia under paragraph 66A (4)(e) an amendment will be made to correct the citation of the

relevant Act.

The effect of these provisions is to make express reference in the CL to exceptions from the definition of 'corporation' that have effect by virtue of the operation of section 6 of the State Application Acts. The purpose of including the provisions in the CL is to make those exemptions plain on the face of the legislation : given the 'grandfathering' of such laws by section 6 of the State Applications Acts, it does not give any new exemption.

Proposed section 68A – Exempt prescribed interests in relation to a jurisdiction

169. A new provision (section 68A) is to be inserted, in relation to the application of the CL in Western Australia, to exempt from the operation of that Law offers or invitations of prescribed interests in relation to members of Western Australian co-operative companies, or the prospective members of such companies where the offer of the prescribed interest is accompanied by the offer of a share in the co-operative, or acceptance of the offer would otherwise result in the person becoming a member of the co-operative. It will also exempt from the operation of the CL those interests once created. These interests were exempt from the operation of the Western Australian Companies Code by virtue of section 581A of that Code. This provision, which will come into operation as of 1 January 1991, will preserve the exemption in relation to those interests.

Proposed section 85A – Persons etc

170. A new interpretation provision is to be inserted to treat expressions used to denote persons generally as including references to a body politic or corporate as well as an individual.

Section 100 – Address of Registered Offices etc

171. It is proposed to amend section 100 so that:

* under paragraph 100(d) a separate prescribed form of consent by the occupier to the use of premises as a registered office by the body corporate is not longer required. Instead an offer of the body to state that the occupiers consent has been obtained is necessary; and

* the ASC may require the officer of the body to produce the above-mentioned consent of the occupier of the premises (proposed new section 852A).

Proposed section 109A – Exercise of certain powers between passing and commencing of amendments of Law

172. A new interpretation provision is to be inserted into the CL to enable a power of appointment or power to make an instrument, to be exercised after a Bill conferring that power under the CL is enacted, but before the provision conferring the power comes into operation. The provision is similar in effect to section 4 of the Acts Interpretation Act 1901.

Section 109P – References to Companies etc

173. A consequential drafting change has been made to this provision to take account of the proposed insertion of new section 85A into the CL.

Section 109Q – References to Commonwealth Laws

174. A new subsection 109(2) is to be inserted to make it clear that, for the purposes of the CL, a reference to the Corporations Act, the Law of the A.C.T., and the ASC Act are taken to be laws of the Commonwealth, and not Territorial Laws. This is of similar effect to subsection 3(3) of the Act.

Proposed section 109ZBA - Power to make instruments etc may be exercised by reference of classes

175. A new interpretation provision is to be inserted into the CL so that power to make an instrument or a resolution may be exercised by referring to a class or classes of matters.

Proposed section 111H – Effect of certain instruments made before 1 January 1991

176. A savings provision is to be inserted into the CL to preserve the effect of any application order which was expressed to come into operation on 1 January 1991 and which was purportedly made in reliance on powers set out in Part 1.3 of the CL.

Section 186(2) – Prohibition on carrying on business with fewer than statutory minimum number of members

177. Subsection 186(2) is being amended to ensure that a holding company and its wholly-owned subsidiary need not be registered in the same jurisdiction. This amendment will be deemed to have taken effect on 1 January 1991 (see proposed section 1363 of the CL).

Section 187 – Return as to Allotments

178. Subsection 187(1) is to be amended so that a company will not be required to lodge a return of an allotment of shares that are deemed to be allotted under subsection 187(6). Such a return is unnecessary as the subscriber shares set out in the memorandum will have been notified on the application for registration of the company. By virtue of a related amendment proposed to be made to subsection 87(6), such shares shall be disregarded for the purposes of the requirement to lodge a return under section 187. The removal of the reference to the deemed allotment of the subscriber shares, of course, in no way affects the longstanding rule of law that the allotment of such shares in the memorandum takes effect on the registration of the company (Re Bonang Gold Mining Co Ltd. (1893) 14 LR NSW Eq 262 and 347). The reference to deemed allotment was imported into section 187 and its predecessors for the purposes of establishing the requirement under the section to provide a return of allotment.

Section 219 – Publication of Company's Name and Registered Number

179. As a result of a decision by the Ministerial Council for Corporations, subsection 219(3) is to be amended so that companies will not be required to include their Australian Company Number on any public document or negotiable instrument that is signed or issued before 1 January 1992.

180. However, it is proposed that companies will still be required to include their Australian Company Number on any public document that is intended to be lodged or required to be lodged with the ASC under the CL. The proposed new subsection 219(2A) sets out this requirement. Consequential amendments are proposed to be made to subsection 219(4) and paragraph 219(5)(b) to take account of the inclusion of new subsection 219(2A).

181. A corresponding amendment is to be made to section 362 of the CL in relation to the Australian Registered Body Number.

Section 242- -Register of directors, principal executive officers and secretaries

182. Subsection 242(7) is being amended to require notification to the ASC of changes to the name or residential address of a director, principal executive officer or secretary.

Proposed section 242A – Retiring directors to notify Commission

183. Proposed section 242A inserts a requirement that a retiring director notify the ASC of the fact of his or her retirement from the position of director of a company where at least half the directors of the company cease to be directors on the same day. The purpose of the amendments is to remedy the common problem where a company is in effect 'sold', and there is a changeover of the directors and officers, and the incoming directors fail to lodge the notice of change in directors as required by CL section 242(7). The requirement can be satisfied by any one of the directors lodging the

notification.

Proposed section 276A – Charges of recognized companies and certain foreign companies

184. It is to be made clear that charges registered under the CL of one jurisdiction are to be given the same status as charges registered under the CL of any other jurisdiction. The purpose is to give national effect to the registration of a charge under the Corporations Law in any one jurisdiction.

185. Proposed section 276A is inserted to apply Part 3.5 (which deals with the registration of charges) of the CL of one jurisdiction in every other jurisdiction. The provision is similar to section 213 of the previous Companies Code. This provision is expressed to come into operation as of 1 January 1991 to avoid any inconvenience to the business community.

Section 28 - Accounting Records

186. A drafting correction is to be made to apply subsection 289(2) to accounting records kept under a 'previous' law corresponding to s.289(2) of the Law.

Section 304 – Report on company other than group holding company

187. A drafting correction is to be made to include a reference to amounts shown in a report under a 'previous' law corresponding to subsection 304(7).

Section 30 – Report on Group Holding Company

188. A drafting correction is to be made to include a reference to amounts shown in a report under a 'previous' law corresponding to subsection 305(7).

Section 362 – Publication of name etc

189. Amendments are to be made to section 362 of the CL in relation to the Australian Registered Body Number to correspond to the amendments proposed to be made to section 219 in relation to the Australian Company Number.

190. Subsection 362(4) is to be amended so that a Registered Australian Body will not be required to include its Australian Registered Body Number or, any public document or negotiable instrument that is signed or issued before 1 January 1992. A retrospective statutory moratorium has been provided from the present requirements.

191. However, Registered Australian Bodies will still be required to include their Australian Registered Body Number or any public document that is intended to be lodged, or required to be lodged with the ASC under the CL or the ASC Law. Proposed new subsection 362(3A) sets out the requirement. Consequential amendments are proposed to be made to subsections 352(5) and (6) to take account of proposed new subsections 362(3A).

Section 83 - Omission of 'Limited' in names of charitable and other companies

192. A drafting correction is to be made to include a reference to provisions of a licence or a provision inserted in the memorandum or articles by virtue of a provision of a 'previous' law corresponding to subsection 383(3).

Section 414 – acquisition of shares of shareholders dissenting from scheme or contract

193. A drafting correction is to be made to subsection 414(15) to include a reference to property received and held in trust by a company under a 'previous' law corresponding to section 414.

Section 530 – Division 2 Company

194. A drafting correction is to be made to paragraphs 530(a) and (b) to refer to the provisions of the 'previous' law corresponding to para 167(1)(a) or (e).

Section 750 – Part A, B, C and D Statements
Section 911 – Power of Board to settle claims
Section 988(7) – Claims under corresponding previous law
Section 1015 – Amount Recoverable
Section 1065 – No issue without approved deed

195. The above-mentioned sections are to be amended to refer to the corresponding 'previous' laws in relation to the matters to which those provisions relate.

Section 107 - Consequences of contravention

196. New provisions are to be inserted to provide that a contravention of covenants included, or taken to be included in approved deeds will be treated as a contravention of the Law (s-s.1073(1A)). However, such a contravention is not to be an offence (s-s.1073(1B)).

Section 1224(1) – Power of Courts to restrain dealings with futures broker's bank accounts
Section 1243 - Power of Board to settle claims
Section 1265 - Compensation for loss etc
Section 1305 - Admissibility of books in Evidence

197. The above-mentioned provisions are to be amended to refer to the corresponding 'previous' laws in relation to matters to which those provisions relate.

Proposed section 1313C - Offences committed partly before and partly after the commencement of this Law

198. The purpose of proposed s.1313C is to clarify the liability of a person in relation to a offence committed partly before and partly after the commencement of the Law.

Section 17 - Excluded decisions

199. A drafting correction is to be made to include an 'or' between paragraphs 1317C(a) and 1317(b).

200. Paragraph 1317C(c) relating to a decision by the Minister to make or refuse to make a declaration of an outsize partnership under s.112(3) is to be omitted.

201. Proposed paragraph 1317(f) provides that a decision by the ASC to make an application for an order of the Court in relation to the examination of a person connected with a corporation under section 597 is not to be a matter which will be able to be reviewed by the AAT. It is not appropriate that the decision of a 'regulator to commence court proceedings in relation to a matter be the subject of review.

Section – 1335 Costs

202. Two amendments are to be made to section 1335 to bring the provision back into line with section 533 of the Co-operative Scheme Companies Codes. The references to 'body corporate' in subsection 1335(1) are to be replaced with the expression 'corporation'. The limitation of the provision to proceedings against corporations 'under this Law' is also to be removed as the corresponding previous provision was not limited in this respect.

SCHEDULE 3 - AMENDMENTS OF THE CORPORATIONS LAW: CONSOLIDATED ACCOUNTS OF A COMPANY AND THE ENTITIES IT CONTROLS

203. There have been widespread abuses of the existing company accounting and reporting requirements under which the true financial position of a group of companies has been able to be disguised by "off-balance sheet" reporting. This has enabled the financial statements of the company to be manipulated in such a way as to mislead investors and the market generally regarding the real level of liabilities or performance of a company or the group.

204. Currently, the CL requires a company to produce group accounts in respect only of the company and its "subsidiaries" (a term which encompasses only bodies corporate and not unincorporated entities). Further, group accounts need not be consolidated.

205. One of the consequences of these practices has been a significant loss of investor confidence in the reliability of corporate financial information, both amongst Australian and overseas investors.

206. To remedy these problems clause 7 of the Bill provides for amendments (set out in Schedule 3) to be made to the Corporations Law to alter the definitions in Chapter 1, and the provisions of Parts 3.6 and 3.7, to require the consolidation of group accounts. The key provisions are proposed sections 295A and 295B, which provide that a company's directors must produce a single profit and loss account and balance sheet. These financial statements must show, in an aggregated form, the profit and loss and the state of affairs of the company and every corporate or unincorporated entity which it controls. The notions of "entity" and "control" are defined partly by reference to proposed Approved Accounting Standard 1024 which was released by the then Accounting Standards Review Board in December 1990. The amendments to the Corporations Law will enable that Standard to operate effectively.

207. However, there is one other change of significance to section 298. Currently, section 298(2) provides that the directors need not ensure that financial statements are made out in accordance with an accounting standard if to do so would fail to give a true and fair view. This has been used by certain companies to avoid complying with accounting standards and to rely on the more general, and more vague, test of 'true and fair' to adopt favourable (and dubious) accounting treatments.

208. Under the amendments, primacy will be given to compliance with the accounting standards. If the directors consider compliance with the standards will not lead to a true and fair

view, they will be required to add notes of such additional information as will give a true and fair view, rather than to depart from the standards in compiling the balance sheet and profit and loss account. This will bring the obligations under the Law in relation to accounting standards into line with the obligations under the Law applicable to the requirements of Schedule 5 of the Corporations Regulations.

209. The other amendments in this Schedule are consequential upon the different approach taken to group accounts in proposed sections 295A and 295B, and the adoption of terminology used in the proposed standard.

Section - Dictionary

210. Significant amendments which alter, delete, or add definitions are set out below, together with a brief explanation of each change.

"company"

211. The reference to section 74 in paragraph (a) of the definition of "company" is to be omitted to reflect the omission of that section.

"financial year"

212. This definition will be expanded to define the financial years of non-corporate entities which are to be required to be consolidated into the financial statements of a company. In respect of such entities, "financial year" will mean a period in respect of which a profit and loss account either was made out or was required by law to be made out.

"profit or loss"

213. A new paragraph (b) is to be inserted into this definition to define an entity's "profit or loss" to be the profit or loss resulting from the operations of the entity. The new paragraph (b) is based on the definition of a company's "profit or loss" currently contained in paragraph

(a). The current paragraph (b), which deals with the definition of the "profit or loss" of a group of 'bodies corporate", is to replaced by an expanded definition (to be located in a new paragraph (c)) which will reflect the adoption of the "entity" concept.

"accounts"

214. This definition will be omitted and substituted to reflect the adoption of the "entity" concept in the preparation of accounts. This involves changes of terminology. There is no change of substance to the definition.

"executive officer"

215. This definition will be altered to give effect to the adoption of the "entity" concept in proposed section 82A (definition of "officer"). The adoption of that concept means, for example, that references to a "body corporate" in the current definition of "executive officer" need to be replaced with references to an "entity".

"financial statements"

216. This definition will be substituted with one which takes account of the requirement to prepare consolidated accounts after the commencement of the amendments to be effected by the Schedule. The term "financial statements" is used in the amendments in a number of places where expressions such as "accounts or group accounts" are currently used, and proposed paragraph (b) in the definition of "financial statements" facilitates those changes.

"officer"

217. This amendment will move the substantive provisions of the definition of the expression "officer" to proposed section 82A.

"group", "group accounts" and "group holding company"

218. The following definitions are to be omitted without substitution:

* "group" (to be replaced by the concept of "economic entity")

* "group accounts" (to be replaced by the expression "consolidated accounts" - currently group accounts can take a number of forms, with a consolidated set of accounts being one of the available options: under the amendments, a set of consolidated accounts is the only option to be permitted, so there is no need for a separate concept of "group accounts")

* "group holding company" (proposed to be replaced by the expression "chief entity").

"chief entity"

219. This term is defined at proposed section 295. The consolidation obligations will be imposed on all companies which are "chief entities". A company will be a chief entity for the purposes of the CL if it:

(a) controlled another entity during all or part of its financial year; or

(b) controls another entity at the end of its financial year;

and the company is a "parent entity" in an "economic entity" that is a "reporting entity" (see proposed section 294A for the definitions of "parent entity", "economic entity" and "reporting entity").

"consolidated accounts"

220. This new definition identifies the reports that comprise a company's consolidated accounts. These are a consolidated

profit and loss statement, a consolidated balance-sheet and statements, reports and notes to be read in conjunction with those two documents.

"control"

221. This new definition adopts, for the purposes of Parts 3.6 and 3.7 only, the definition of "control" at proposed section 294B. Companies which are "chief entities" will be required to deal in consolidated accounts with all the entities which they "control". It is not intended that this definition will apply to or affect any use of the expression "control" in Parts of the CL other than Parts 3.6 and 3.7.

"economic entity", "entity" "parent entity", "reporting entity"

222. These expressions are defined at proposed section 294A.

223. The expressions "economic entity", "entity", "parent entity" and "reporting entity" will, for the purposes of Parts 3.6 and 3.7, include any definition of those expressions which appears in an accounting standard that deals with the making out of consolidated accounts of companies. In the case of the key definition of "entity", the CL itself (section 294A) provides more detail, including a partial definition of the term.

Section 62 - Dormant Bodies Corporate

224. If a company and all the entities it controls are "dormant", the directors of the company are not required to report on the company and the entities it controls (ss.302(9), 305(2)). These several amendments alters the definition of "dormant" to embrace the adoption of the "entity" concept in Parts 3.6 and 3.7. No change of substance is made to the definition.

Section 74 - Group Holding Companies

225. This definition is to be omitted. With the adoption of the "control" test in proposed section 294B and the "economic

entity" concept in Parts 3.6 and 3.7, the term "group holding company" is no longer used in the CL.

Proposed section 82A – Officers of bodies corporate and other entities

226. The substantive provisions of the definition of the expression "officer" are to be moved from section 9 and amended to define the term in relation to entities as well as bodies corporate. No change of substance is made to the definition.

Section 287 – Board may require copy of company's financial statements

227. This provision is to be amended to reflect:

(a) the substitution of subsection 332(11) by proposed section 332A; and

(b) the adoption of the expression "financial statements" in lieu of the expression "accounts or group accounts".

Heading to Division 3 of Part 3.6

228. The heading to Division 3 will be altered to reflect the implementation of reporting on an entity basis.

Section 290 - Synchronisation

229. Section 290 deals with the question of the alignment between the financial years of a holding company and those of its subsidiaries. A number of minor amendments will be made to this section to reflect the implementation of reporting on an entity basis. The recasting of subsections (1), (2) and (3) also reflects drafting changes. No change of substance is made to the provision.

Heading to Division 4 of Part 3.6

230. Current Division 4 is to be divided into 3 Divisions, numbered 4, 4A and 4B. The new Division 4 will deal only with the obligation of each company to prepare financial statements relating to the company itself, and the heading to the Division is to be amended accordingly.

Section 295 – Group accounts

231. This amendment deletes section 295 and substitutes a new Division.

Division 4A – Consolidated accounts of a company and the entities it controls

232. Section 295 will be replaced by proposed sections 294A, 294B, 295, 295A and 295B. These proposed sections will form a new Division of Part 3.6, namely "Division 4A - Consolidated accounts of a company and the entities it controls".

233. Proposed Division 4A will implement financial reporting on an "entity" basis. It will oblige a company that is the "chief entity" to make out consolidated accounts for the chief entity and each entity it controls.

234. The concept of reporting on an entity basis has involved the development of definitions for each of the expressions "entity", "parent entity", "economic entity", and "reporting entity". Division 4A will draw on an accounting standard dealing with the consolidation of accounts to define these terms as well as the term "control". The relevant definitions in proposed ASRB 1024 (which will be able to be made after the amendments are in place) are as follows:

*	"entity"	any legal, administrative, or fiduciary arrangement, organisational structure or other party (including a person) having the capacity to deploy scarce resources in order to achieve objectives

*	"parent entity"	an entity which controls another entity
*	"economic entity"	a group of entities comprising the parent entity and each of its subsidiaries (a "subsidiary" being defined to be an entity which is controlled by a parent entity)
*	"reporting entity"	an entity (including an economic entity) in respect of which it is reasonable to expect the existence of users dependent on general purpose financial reports for information which will be useful to them for making and evaluating decisions about the allocation of scarce resources
*	"control"	the capacity of an entity to dominate decision-making, directly or indirectly, in relation to the financial and operating policies of another entity so as to enable that other entity to operate with it in achieving the objectives of the controlling entity.

Proposed section 294A – Entities, parent entities, economic entities and reporting entities

235. The expressions "entity", "parent entity", "economic entity" and "reporting entity" will, for the purposes of Parts 3.6 and 3.7 in relation to a financial year of a company, include any definition of those expressions which appears in an accounting standard that deals with the making out of consolidated accounts of companies and applies to that financial year of the company (proposed subsection 294A(3)).

236. The expressions "entity", "parent entity", "economic entity' and "reporting entity" may also be defined in the Regulations (proposed subsection 294A(1)).

237. Proposed subsection 294A(4) lists as "entities" a number of key types of entities which have been identified as appropriate for consolidation. The list does not purport to be exclusive, but should prove a useful guide. The entities listed are:

(a) a company

(b) a recognised company

(c) any other corporation

(d) a partnership

(e) an unincorporated body

(f) the trustee of a trust that has only one trustee.

238. Proposed subsection 294(5) provides that where a trust has more than one trustee, those trustees collectively in their capacity as trustee will constitute a single entity.

Proposed section 294B – When one entity controls another

239. An entity will be taken to control another entity for the purposes of Parts 3.6 and 3.7 if the first entity is taken to control the second entity for the purposes of an accounting standard that deals with the making out of consolidated accounts (proposed subsection (3)). The Regulations may also prescribe circumstances in which one entity will be taken to control another (proposed subsection (1)).

Proposed section 295 - Application of Division

240. Proposed section 295 identifies the company that is to be the "chief entity" for reporting purposes. It thereby sets out the criteria for the application of proposed sections 295A and 295B.

241. A company will be a chief entity for the purposes of the CL if it:

(a) controlled another entity during all or part of its financial year; or

(b) controls another entity at the end of its financial year;

and the company is a parent entity in an economic entity that is a reporting entity.

Proposed section 295A – Consolidated profit and loss account

242. The directors of a chief entity will be required to have made out a consolidated profit and loss account before the deadline after each financial year (the expression "deadline" is defined at section 9). The account must give a true and fair view of the economic entity's profit and loss for that financial year. The economic entity will comprise the chief entity and any other entity that it controlled at any time during the year.

243. Where the chief entity controls an entity for only part of the year, the profit and loss account will relate only to any profit or loss made by the controlled entity during each part of the financial year when it was controlled by the chief entity (proposed subsection (2)).

Proposed section 295B – Consolidated balance sheet

244. The directors of a chief entity will also be required to have made out a consolidated balance sheet before the deadline after each financial year. The balance sheet must give a true and fair view of the affairs of the economic entity constituted by the chief entity and the entities that it controls at the end of the financial year.

Division 4B – Requirements for financial statements

245. Proposed Division 4B, entitled "Requirements for financial statements", will comprise sections 296, 297, 298, 299 and 300.

Section 296 – Audit of financial statements

246. The reference in subsection 296(2) to subsection 332(2) will be altered to subsection 331A(2). This is consequential upon a recasting of section 332 (see below).

Section 297 - Financial statements to comply with regulations

247. Subsection 297(2) is to be omitted and the obligation currently provided for by that subsection is to be relocated at proposed section 299.

Section 298 - Financial statements to comply with applicable accounting standards

248. Subsection 298(2) is to be omitted. The subsection currently allows the directors to prepare financial statements that do not comply with the applicable accounting standards if financial statements prepared in accordance with the accounting standards would not give a true and fair view of the matters required to be dealt with by the statements. Under the amendments to this section and section 299, financial statements will have to both comply with the accounting standards and also give a true and fair view.

Proposed section 299 - Additional information to give a true and fair view

249. Proposed section 299 will oblige directors to add to financial statements prepared in accordance with the regulations (in accordance with section 297) and the applicable accounting standards (in accordance with section 298) such additional information and explanations (if any) as are required to ensure that the financial statements give a true and fair view of the matters with which they are required to deal.

Subsection 301(6) - Applicable accounting standards

250. This subsection will be omitted to remove the obligation to state in the accounts whether or not they have been

prepared in accordance with applicable accounting standards, since the CL will, after the amendments, require compliance with those standards in all cases.

Subsection 301(7) – Use of non-mandatory accounting standards

251. Subsection 301(7) will be amended to effect a drafting change. There will be no change of substance to the subsection.

Subsection 301(8) – Departures from applicable accounting standards

252. Subsection 301(8) requires an explanation of departures from applicable accounting standards; departures which are currently allowed by section 298. The subsection is to be omitted to reflect the proposed amendment of section 298. There will be no need in the future for the directors' statement to explain departures from accounting standards as financial statements will be required to comply with those standards.

Section 302 – Statement to be attached to group accounts

253. Subsections 302(1), (2) and (3) have been restructured, partly to reflect the change to entity-based reporting and partly to reflect drafting changes. There are no changes of substance. Where the directors of a company make out consolidated statements in accordance with Division 4A, they will be obliged to attach to the statements a further statement that:

(a) complies with subsection 303(2) (a provision which deals with the timeliness and formalities relating to the making of the statement) (proposed subsection (1)); and

(b) states whether or not:

i) the statements have been made out in accordance with proposed Divisions 4A and 4B, and

ii) they give a true and fair view of the matters with which they deal (proposed subsection (2)).

254. In making that statement the directors will be obliged by proposed subsection 302(3) to have regard to material post balance day events.

255. Minor amendments will be made to each of subsections 302(4), (6), (8) and (9) to reflect the adoption of reporting on an entity basis. No changes of substance are to be made to those subsections.

256. Subsection 302(5) will be omitted to remove the obligation to state in the accounts whether or not they have been prepared in accordance with applicable accounting standards, since in the future the CL will require compliance with those standards.

257. Subsection 302(7) requires an explanation of departures from accounting standards applicable to group accounts; departures which are currently allowed by section 298. The subsection is to be omitted to reflect the proposed amendment of section 298. There will be no need in the future for the directors' statement to explain departures from accounting standards as financial statements will be required to comply with those standards.

Section 304 - Report on company other than group holding company

258. Subsection 304(1) will be amended to reflect the adoption of reporting on an entity basis. No change of substance will be effected.

Section 305 – Report on Group Holding Company

259. Section 305 deals with the report which must be made about a group by the directors of a group holding company. A number of amendments have been made to the section, mainly to reflect the implementation of reporting on an entity basis. No substantive changes are to be made. Proposed subsection

305(9A), the only new provision, makes it clear which activities need to be reported where an entity is controlled for only part of the relevant financial year.

Subsection 308(2) - Options

260. Section 308 requires disclosure of share options granted by bodies corporate in a group Subsection 308(2) will be amended as the adoption of reporting on an entity basis necessitates the adoption of a control test in substitution of the "group" test currently used.

Section 309 – Benefits under contracts with directors

261. Section 309 has been revised to take account of non-corporate entities. Subsection 309(1) has been omitted and substituted by subsections (1) and (3). The directors' report is to disclose relevant benefits that a director has received or has become entitled to receive. These are benefits which flow from a contract between the company (or an entity connected with the company) and the director or an entity in which the director has a substantial interest.

Section 311 - Rounding off amounts

262. Section 311 will be amended to reflect the use of the term "consolidated accounts". No change of substance will be effected.

Section 312 - Directors of holding company to obtain all necessary information

263. Section 312 requires directors of a subsidiary to supply to the subsidiary's group holding company all the information that is necessary to enable group accounts to be prepared. A number of minor amendments will be made to section 312 to reflect the implementation of reporting on an entity basis. The substance of the section will remain unchanged. After the amendments are made, the "reporting officers" of any entity controlled by a chief entity will be obliged to supply the directors of the chief entity with sufficient information to

enable them to discharge their obligations under Parts 3.6 and 3.7 to produce consolidated accounts. A new subsection 312(4) will define the expression "reporting officers" to mean the directors of a corporation and the officers of a non-corporate entity.

Section 313 - Relief from requirements as to accounts and reports

264. A number of minor amendments will be made to section 313 to reflect the change in terminology from "group accounts" to "consolidated accounts", and the adoption of reporting on an entity basis. No change of substance is to be effected.

Section 315 – Members entitled to financial statements and reports

265. The reference to "group accounts" will be altered to "consolidated accounts" to reflect the change in terminology brought about by the introduction of reporting on an economic entity basis. No change of substance will be effected to the section.

Section 316 - Financial statements and reports to be laid before annual general meeting

266. The reference in paragraph 316(d) .to section 332 will be altered to refer to its equivalent following the amendments (proposed section 331A).

267. A new subsection 316(2) will be inserted empowering a member to require the directors to cause the auditor's report to be read aloud to the annual general meeting of a company. This provision is currently at subsection 332(7), but is more logically located in section 316.

Section 318 - Contravention of Part

268. Two minor amendments to subsection 318(3) are to be made to reflect the use of the term "consolidated accounts" rather than "group accounts" and to alter a cross-reference.

269. Subsection 318(4) deals with the onus of proof, in a case where the applicable accounting standards have not been complied with, in relation to whether compliance would have resulted in the accounts not being true and fair. Because of the proposed amendments to sections 298 and 299, accounts will have to both comply with applicable accounting standards and be true and fair. Subsection (4) will therefore become unnecessary and is to be deleted.

270. Subsection 318(5) will be omitted and substituted by subsections 318(5), (6) and (7) to effect drafting changes and cross-reference amendments required by other amendments set out in this Schedule.

Before section 324

Proposed Division 1 – Appointment and removal of auditors

271. Sections 324 to 331, inclusive, will be placed in a new Division entitled "Appointment and removal of auditors". The rest of Part 3.7 (currently sections 332 to 334) will be subsumed within other new Divisions.

Section 324 – Qualifications of auditors

272. A number of minor amendments will be made to reflect the implementation of reporting on an entity basis. The effect of these amendments will be to extend the disqualification for appointment as an auditor to situations where the auditor has a relevant conflicting relationship with any entity within the economic entity (currently the disqualification focuses mainly on bodies corporate).

Subsection 327(15) – Where a company becomes a subsidiary

273. Subsection 327(15) provides for the auditor of a company to retire at the next annual general meeting of the company after it becomes a subsidiary of another company. This facilitates the holding company appointing the same auditor to different companies within the group, if the holding company so wishes. The subsection will be amended to reflect the

implementation of consolidated reporting on a "control" basis. Where a company becomes controlled by a corporation that is audited by a person other than its present auditor, that present auditor will be required to retire at the next annual general meeting of the company.

After section 331

274. This amendment inserts a new Division 2, comprising sections 331A to 331F, followed by a new Division heading ("Division 3 - Certain powers and duties of auditors"), which covers sections 332 to 334.

Proposed Division 2 – The auditor's report on the company's financial statements

275. The changes in terminology and approach to consolidated accounts referred to earlier require a large number of minor changes to section 332, which deals with the powers and duties of auditors as to reports and accounts. The opportunity has been taken to restructure section 332 into a number of sections, each dealing with a specific topic covered by the present section.

Proposed section 331A – Auditor must report

276. Proposed section 331A requires a company's auditor to report to the members on the company's financial statements and accounting and other records, in time for the directors to lay required documentation before the annual general meeting. The proposed section is based on existing subsections 332(1) and (2).

Proposed section 331B – Are the financial statements properly drawn up?

277. This section requires the auditor to state whether the financial statements give a true and fair view, and comply~ with the CL and applicable accounting standards. It is based on current paragraphs 332(3)(a), (b) and (e), though the amendments to sections 298 and 299, which result in the

imposition of an obligation to comply with applicable accounting standards, will make much of paragraph 332(3)(b) unnecessary, and these aspects are accordingly not included in the proposed section.

Proposed section 331C - Matters affecting consolidated accounts

278. Proposed section 331C is based on current subparagraphs 332(3)(c)(i), (ii) and (iii). It deals with the auditor's obligations where the auditor was not the auditor of an entity controlled by the reporting "chief entity".

Proposed section 331D – Defects, irregularities and omissions

279. Proposed section 331D is based on current paragraph 332(3)(d). It places an obligation on auditors to comment in their report on any defect in the financial statements and identify any further material to which regard must be had in order to obtain a true and fair view of the matters dealt with by the financial statements.

Proposed section 331E - Are the financial statements, and the auditor's report based on adequate information?

280. Proposed section 331E is based on current subsection 332(4). This section obliges the auditor to form an opinion about a number of matters. Those matters include whether the auditor has had access to all the information and been provided with explanations required to complete the audit; whether proper accounting records and registers required by the CL have been kept by the company; whether branch offices of the company have provided adequate returns; and whether (if the company is a chief entity) the other entities in the reporting entity have kept adequate records and given sufficient access and explanations to the auditor. Current paragraph 332(4)(e), which deals with the situation where group accounts are not fully consolidated, is omitted from the proposed new section, since other amendments in this Schedule will require all "group" accounts to be presented in a consolidated form.

Proposed section 331F – Members entitled to inspect auditor's report

281. Proposed section 331F confers a right on the members of a company to inspect the auditor's report at any reasonable time. It is based on the current subsection 332(7).

Proposed Division 3 0 Certain powers and duties of auditors

Subsection 332(1), (2), (3) and (4)

282. These subsections will be replaced by proposed sections 331A to 331E, inclusive, and accordingly are to be deleted.

Subsection 332(6) and (7)

283. Subsection 332(6), which deals with the auditor's access to the records of a subsidiary, has been recast to reflect the implementation of reporting on an entity basis, to effect drafting changes and to alter cross-references. No changes of substance are effected.

284. Subsection 332(7), which among other things requires the auditor's report to be attached to the accounts, has been omitted. The auditor's duty to attach or endorse a copy of the audit report to the company's accounts is imposed by subsection 296(2) and its repetition in. subsection 332(7) is unnecessary. The other aspects of current subsection 332(7) will be relocated to proposed section 331F and subsection 316(2).

Subsection 332(9) and (10)

285. References to "accounts or group accounts" in both subsections are to be changed to references to "financial statements". No change of substance is effected.

Paragraph 332(10)(b)

286. A minor amendment is made in this paragraph to reflect the change to reporting on a "control" basis rather than on a

"group" basis. The effect will be to require the auditor to report to the ASC wherever a contravention is not remedied by the directors of a corporation which controls a company included in the corporation's consolidated accounts or by the directors of the company itself.

Subsection 332(11)

287. This subsection is to be omitted and replaced by a new section 332A to follow section 332.

Proposed section 332A – Board to be informed of non-compliance with accounting standard

288. Proposed section 332A will replace the current subsection 332(11). It places an obligation on an auditor to report a failure to comply with a particular accounting standard to the AASB.

Section 333 – Obstruction of auditor

289. Section 333 prohibits obstruction of auditors. It will be omitted and substituted to reflect the adoption of reporting on an economic entity basis, and to effect drafting changes. There will be no change of substance to the section.

Before section 409

290. Parts of current section 409 are to be replaced by 3 new sections - 408A, 408B, and 409A.

291. Section 409 addresses the accounting obligations of companies which are "prescribed corporations", being Australian banks and life insurance companies. The amendments will not require a company controlling an economic entity which contains a prescribed corporation to include in its consolidated accounts matters relating to that corporation. The accounting principles which apply to banks under the Banking Act 1959 and life insurance companies under the Life Insurance Act 1945 differ from the principles which apply under the CL to the point where "consolidation" of the

accounts produced under the different sets of principles could be difficult.

292. The AASB is currently reviewing accounting standards for Australian banks and life insurance companies in conjunction with the Australian Accounting Research Foundation. The AASB is currently developing standards for banking operations and the life insurance industry. Upon the finalisation of those standards, the question of consolidation of the accounts of groups which contain such corporations will be able to be considered further.

Proposed section 408A - Interpretation

293. Proposed subsection 408A(1) is the same as current subsection 409(1). It defines a "prescribed corporation" to be an Australian bank or a body corporate registered under the Life Insurance Act 1945.

294. Proposed subsection 408A(2) adopts, for the purposes of proposed sections 408A-409A, the definitions contained in proposed sections 294A and 294B (which are otherwise limited in reach to Parts 3.6 and 3.7), including the key definitions of "control" and" entity".

Proposed section 408B – Application of Parts 3.6 and 3.7

295. Proposed section 408B is based on current subsection 409(2), which applies Parts 3.6 and 3.7 to prescribed corporations, subject to modifications made by the latter subsections of section 409. Some drafting and cross-reference changes are necessary to reflect the change to reporting on an entity basis.

Subsection 409(1) and (2)

296. Proposed sections 408A and 408B will render these subsections redundant and they are accordingly to be deleted.

Subsection 409(6)

297. A cross-reference in this subsection is to be altered. This will not effect the substance of the provision.

Subsection 409(7)

298. This subsection is to be replaced by proposed section 409A and is accordingly deleted.

Subsection 409(8)

299. Minor changes, consequential upon other amendments, are to be made to this subsection. The substance of the subsection will not be changed.

Proposed section 409A - Consolidated accounts where the chief entity or a controlled entity is a prescribed corporation

300. This proposed section replaces current subsection 409(7).

301. The effect of proposed subsection 409A(1) is that the consolidated accounts of a "reporting entity" which includes a prescribed corporation do not have to include material relating to that prescribed corporation, provided certain conditions are met. The conditions are that there must be attached to the consolidated accounts relating to other entities in the "reporting entity" a set of accounts relating to the prescribed corporation that

* comply with a law of the Commonwealth relating to the preparation of annual accounts of that prescribed corporation; or

* in the case of a prescribed corporation registered under the Life Insurance Act 1945 - comply with such conditions as are specified by the ASC.

302. Exemptions are also granted in respect of the director's report on the chief entity and the entities it controls (proposed subsection 409A(3)) and in respect of the related

audit report (proposed subsection 409A(4)). These latter two subsections are based on current paragraphs 409(7)(b) and (c).

Subsections 1058 (12), (13), (14), (15) and (23) – Obligations of borrowing corporation

303. Section 1058 deals with the reporting obligations of borrowing corporations in relation to debentures. The section applies certain provisions of Parts 3.6 and 3.7 to reports concerning such matters as if they were reports generated under those Parts. It is necessary to amend several of the subsections in the section to reflect the change to entity-based reporting and to alter cross-references to provisions which are to be amended by other provisions in this Schedule. No change of substance is effected to the operation of section 1058.

Paragraph 1289(1)(c) - Auditor's privilege

304. This amendment changes a reference to "group accounts" to "consolidated accounts". No change of substance is effected.

Paragraph 1309(1)(b) and (2)(c) - False information etc

305. Section 1309 deals with the offence of providing false information, including to auditors. Paragraphs 1309(1)(b) and (2)(c) are to be omitted and substituted with new formulations reflecting the change to entity-based reporting. No change of substance is effected.

SCHEDULE 4 - AMENDMENT OF THE CORPORATION LAW: INSIDER TRADING

Introduction

306. Insider trading has become a matter of increasing concern within the securities industry and among the wider community over the last few years, contributing to the deterioration of public confidence in the securities markets more generally.

307. Some commentators have suggested that regulation of insider trading is not necessary, as insider trading enhances the efficiency of the securities market through the faster dissemination of information. The Government's policy view is, however, that it is necessary to control insider trading to protect investors and make it attractive for them to provide funds to the issuers of securities, for the greater and more efficient development of Australia's resources. The effects of insider trading on investor confidence are regarded as outweighing any efficiencies arising from the faster dissemination of information which some commentators allege would accrue if insider trading were decriminalised.

308. On 8 February 1989, the then Attorney-General, the Hon Lionel Bowen, MP, requested that the House of Representatives Standing Committee on Legal and Constitutional Affairs conduct an inquiry into the adequacy of the existing legislative and administrative controls over insider trading. Submissions were sought from the public and the Committee took evidence at public hearings. The Committee's report, "Fair shares for all: Insider Trading in Australia", tabled in the House of Representatives on 28 November 1989, made recommendations for legislative reform and administrative action in relation to enforcement of the existing insider trading provisions.

309. The Government's formal response to the report, tabled in the House of Representatives on 11 October 1990 accepted, and proposed to act on, the vast bulk of the Committee's recommendations which required legislative action. Exposure draft legislation and explanatory material on proposed amendments to the insider trading provisions of the Corporations Law were released for public comment on 20 December 1990. In line with the Committee's recommendation that the insider trading provisions be redrafted and simplified, the whole text of sections 1002 and 1013 of the Corporations Law have been redrafted, with the former to be replaced by a proposed new Division 2A of Part 7.11.

310. The key elements of the new provisions are:

* the definition of an "insider":

* will encompass corporations as well as natural persons, and

* there will be no need for the prosecution to establish a connection between the person in possession of inside information and the company to which the information relates: instead the proposed provision will prohibit any person, including a tippee, who is in possession of inside information using it to trade in or subscribe for securities of the company.

* a statutory definition of inside information is to be included, based on a "reasonable person" test: A person will be prohibited from trading in securities whilst knowingly in possession of information that is not generally available and, if it were generally available, a reasonable person would expect it to have an effect on the price or value of securities;

* information will be defined as being generally available where it is disclosed in a manner which would, or would be likely to, bring it to the attention of persons who commonly invest in securities of a kind whose price or value might be affected by the information, and where a reasonable period of time for the dissemination of information has elapsed;

* The offence will be extended to trading in prescribed interests, such as units of unit trusts, and other relevant securities. The definition of securities will be clarified to ensure that it includes prescribed interests, options and convertible securities; and

* monetary penalties will be increased to:

* in the case of a natural person, an amount equal to double the amount of profit realised or loss avoided as a result of the insider trading, or $100,000, whichever is greater; or

* in the case of a body corporate, $1,000,000.

* In addition, a body corporate that issued securities will be able to recover any profit accruing to the insider through dealing in those securities. Further, the ASC may bring an action in the name of, and for the benefit of, the body corporate,

* The futures insider trading provisions are being reviewed with a view to adopting similar provisions to those proposed for securities in this Bill.

311. Schedule 4 contains the exposure draft provisions, as amended to take account of comments received from the public. The key changes to the exposure draft provisions are:

* limiting the knowledge attributed to a body corporate in section 1002E to the knowledge possessed by its officers which has come into their possession as officers of the body corporate;

* the inclusion of a new deeming provision for partners to the effect that partners are taken to possess any information that an employee or partner possesses by virtue of his/her employment or position as a partner and be presumed to know or ought reasonably know any matter or thing that an employee or other partner knows or ought reasonably to know;

* including as an element of the offence in subsection 1002G(1) the requirement that the insider knows, or ought reasonably to know, that the information is not generally available and, if it were, it might have a material effect on the price or value of securities. This places the onus of proof on the prosecution as compared with the exposure draft in which the matter was included as a defence. The recommendations of the Griffiths Committee have now been complied with in this regard. However, the operation of these provisions will be monitored to see whether they are effective in preventing insider trading

and restoring investor confidence in the securities markets;

* recasting of the elements of the offence in paragraph 1002G(1)(a) to possession of information that is not generally available but, if it were, a reasonable person would expect it to have a material effect on the price or value of securities of a body corporate. In the exposure draft could was used rather than would. Material effect has also been defined in section 1002C;

* modification of the provisions to ensure that they apply appropriately to unit trust and other prescribed interests by:

* providing an exemption from the primary prohibition in subsection 1002G(2) for management companies in relation to prescribed interests where trustees are required to redeem units in accordance with buy-back covenants which specify that the redemption price is to be calculated, as far as reasonably practicable, by reference to the underlying value of the assets of the undertaking or scheme to which the interest relates less any reasonable charge for purchasing the interest (section 1002H); and

* ensuring that any amount recovered in a civil action instituted by the management company in relation to a prescribed interest, or by the ASC in the name of and on behalf of the management company, under subsections 1013(2) and (5) is held by the management company on behalf of participants in the undertaking or scheme that gave rise to the prescribed interest, in proportion to their interest in the undertaking or scheme (subsection 1013(8));

* extension of the concept of general availability in section 1002B to readily observable matter and clarification that deductions, conclusions or inferences made or drawn from information that has been made known in a manner likely to bring it to the attention of

persons who commonly invest in the particular kind of securities and/or readily observable matter are also regarded as generally available information;

* provision of defences to the tipping offence in subsection 1002G(3) for an insider who communicates inside information to a second person who would or would be likely to trade in securities where:

* the information came into the insiders possession solely as a result of it having been made known in a manner likely to bring it to the attention of persons who commonly invest in the particular kind of securities; and

* where the person to whom the information was communicated by the insider knew or ought to have known of the information before it was communicated (subsection 1002T(3)); and

* provision of a defence to the civil liability provisions of section 1013 where the information came into the insiders possession as a result of it being made known in a manner likely to bring it to the attention of persons who commonly invest in the particular kind of securities (subsection 1013(7)).

312. A number of other minor or technical changes have also been made to the provisions in the exposure draft.

Section 1002 - Insider Trading

313. The proposed amendment repeals CL section 1002, which, in conjunction with section 1013, sets out the current insider trading provisions. The remainder of the schedule establishes a new insider trading regime in Division 2A of Part 7.11 and revised section 1013 of the CL.

Division 2A - Insider Trading

314. It is proposed to insert a new Division 2A before Division 3 of Part 7.11 to contain the revised insider trading provisions.

Section 1002 – Application of Division

315. Proposed section 1002 clarifies the jurisdictional nexus of the insider trading provisions, making it clear that before Division 2A and section 1013 operate one of the following connections must be established:

* an act or omission has occurred within the enacting jurisdiction in relation to the securities of any body corporate; or

* an act or omission has occurred outside the enacting jurisdiction in relation to the securities of a body corporate that is formed or carries on business in the jurisdiction.

Section 1002A -Securities

Background

316. The Griffiths Committee was concerned that the insider trading provisions might not apply to exchange traded options or unit trusts and other prescribed interests. It recommended that the provisions should so apply, and that any doubt as to the application of the provisions should be removed.

317. It is considered that unit trusts and other prescribed interests are clearly covered by paragraph (c) of the definition of 'securities' in relation to a body corporate in CL subsection 92(2), which currently applies for the purposes of the insider trading provisions. While paragraph (d) of that definition would include options or rights issued by a body corporate, it may not cover all exchange traded options.

318. It was noted in submissions from the public on the exposure draft that while non-exchange traded call options came within the definition of securities, non-exchange traded put options did not and there was no logical distinction between the two. Further, there is a separate insider dealing regime in relation to futures contracts in Division 1 of Part 8.7 thus futures contracts need to be expressly excluded from the definition of securities.

319. Doubt was also expressed as to whether the term 'information' would be interpreted as encompassing supposition, intentions and other matter not sufficiently certain to require its release to the public, notwithstanding the broad interpretation given to the term in Commissioner for Corporate Affairs v Green [1978] VR 505 at 511.

Proposed amendment

320. Proposed section 1002A(1) provides definitions of 'information' and 'securities', in relation to a body corporate, to apply for the purposes of the insider trading provisions. The definition of information is an inclusive one, with information being taken to include supposition and other matters insufficiently definite to warrant being made known to the public and matters relating to the intentions, or likely intentions, of a person.

321. The definition of securities adopts paragraphs (a) to (d) from CL subsection 92(2) and adds an additional category in paragraph (e), to extend the definition to specifically include option contracts under which a party acquires from another party an option or right, exercisable at or before a specified time to buy from, or sell to, that other party, securities at a price specified in, or to be determined in accordance with, the contract whether or not the options or rights are traded on the stock market of a securities exchange. Futures contracts and excluded securities are specifically excluded from the definition.

322. Definitions of 'purchase' and 'sell' in relation to options contracts are also provided. In some cases trading in

options may not involve the transfer of contractual rights, but will instead involve the 'seller' closing out an existing open or written position taken by 'buying' an equal and opposite position. This is permitted in the trading of Exchange-traded options in the Australian Options Market (see ASX Business Rules 7.1.4(1)(c) and 7.1.4(2)(c); OCH Rule 7.3.12). In such a case, if the words 'purchase' and 'sell' are interpreted strictly, transactions by which open options positions are closed out or new options positions are opened may not fall within the concepts of 'purchase', 'sell' or 'subscribe for'.

323. The definitions of purchase and sell will cover this situation. 'Purchase' is to be taken to include the acquisition or taking of an assignment of an option and 'sell' is to include granting or assigning an option or taking action to release an option.

324. Doubt had been expressed as to whether subsection 92(3) applied to the insider trading provisions as expressed in the exposure draft in consequence of the specific definition of securities. Proposed subsection 1002A(2) replicates subsection 92(3) for the purposes of the insider trading provisions to clarify that the provisions apply in relation to securities (as defined in subsection 92(1)) issued by a government, unincorporated body or any other person, and apply in the same way as if the issuer were a body corporate.

Section 1002B - Information generally available

Background

325. The Committee recommended that information be defined as 'generally available' where it is disclosed in a manner which would be likely to bring it to the attention of a 'reasonable investor', and where a reasonable period of time for the dissemination of the information has elapsed.

326. Concern was expressed that in consequence of the adoption of this definition in the exposure draft, information directly observable in the public arena would not be regarded as

generally available, as it has not been 'made known'. It was considered that a person could be liable for insider trading where he/she traded in securities on the basis of, for example, an observation that the body corporate had excess stocks in a yard. This was not the intention of the provisions.

327. Further, although it was not intended that the provisions would regard as inside information such things as deductions and conclusions which investors, brokers or other market participants may make based on independent research of generally available information, a number of submissions considered that this intention was not reflected in the provisions.

Proposed amendment

328. Proposed section 1002B is a reflection of the Committee's recommendation in relation to generally available information. For information to be generally available, subsection 1002B(2) requires either that it:

* consist of readily observable matter, i.e. facts directly observable in the public arena (subparagraph (a)); or

* be made known in a manner that would, or would be likely to, bring it to the attention of persons who commonly invest in securities of bodies corporate of a kind whose price or value might be affected by the information.
This provision is intended to define the term 'generally available' in terms appropriate to closely held and unlisted companies as well as listed companies with dispersed shareholdings. It would not be sufficient for information to be released to a small sector of the investors who commonly invest in the securities. The information must be made known to a cross section of the investors who commonly invest in the securities; and

* a reasonable period of time has elapsed for the information to be disseminated. This provision is designed to prevent an insider, who is aware of

information prior to its release, getting an unfair head start on other market participants, not to require and embargo on trading of such duration that it constitutes an impediment to the efficient operation of the market (subparagraph (b)).

329. Proposed subsection 1002B(3) makes it clear that information is also generally available if it consists of deductions, conclusions or inferences based on, separately or in combination, readily observable matter and information that has been made known within subparagraph (2)(b)(i).

Section 1002C – Material effect on price or value of securities

330. Proposed section 1002C defines 'material effect' for the purposes of the insider trading provisions. A reasonable investor is to be taken to expect information to have a material effect on the price or value of securities if the information would, or would be likely to, influence a person who commonly invests in securities deciding whether or not to subscribe for, buy or sell any such securities. This definition did not appear in the exposure draft provisions.

Section 1002D – Trading, and procuring trading, in securities

Background

331. It was intended that the tipping offence in proposed subsection 1002G(3) apply to listed securities only, whether or not trading in those securities was temporarily suspended. Literally, however, the provision applies only when trading in the securities is permitted on the stock market of a securities exchange, which may not cover a period of suspension in trading in relation to an otherwise listed security.

332. In addition, the existing insider trading provisions in CL section 1002 prohibit 'dealing' in securities, with 'deal' being defined broadly in section 9. The proposed prohibition in section 1002G prohibits subscribing for, purchasing or selling securities, or making an agreement or procuring a

second person to do so. This is much narrower than 'dealing' although some aspects of dealing would be covered by the general aiding and abetting provisions in section 5 and the attempt provisions in section 7 of the Crimes Act 1914.

Proposed amendments

333. Proposed subsection 1002D(1) makes it clear that where trading in securities is ordinarily permitted on the stock market of a securities exchange, for the purposes of the insider trading provisions, it will be taken to be permitted on that stock market even though trading in the securities is suspended by action taken by the securities exchange or is prohibited by a notice given to that securities exchange by the ASC under subsection 775(2). Thus, an insider is prohibited from communicating inside information in relation to listed securities within subsection 1002G(3) during a period of suspension in trading in those securities.

334. Proposed subsection 1002D(2) incorporates some aspects of the definition of 'deal' in CL section 9 by providing a definition of 'procure' for the purposes of the insider trading provisions, without limiting the meaning that the expression has apart from the subsection. If a person incites, induces, urges or encourages an act or omission by another then he/she is taken to procure the act or omission by that other person.

Section 1002E - Information in possession of officer of body corporate

335. This proposed new section:

* attributes to a body corporate information in possession of an officer of that body corporate which came into his/her possession in the course of the performance of duties as such an officer; and

* presumes that a body corporate knows or ought reasonably to know any matter or thing that an officer of the body

corporate knows or ought reasonably to know because he/she is an officer of the body corporate.

Section 1002F – Information in the possession of a partner or an employee of a partnership

Background

336. Doubt has been raised as to whether, at least for the purposes of criminal liability under the exposure draft provisions, a partner would be taken to possess inside information which another partner has that relates to partnership affairs. Section 20 of the Partnership Ordinance (ACT) (and equivalent provisions in other jurisdictions) provides that 'notice to a partner ..... of any matter relating to partnership affairs operates as notice to the firm'. There is no authority on how this provision, and similar principles under the general law of agency, apply for the purposes of criminal liability of partners.

337. Further, it is not clear whether as a matter of general law partners would be attributed with the knowledge in the possession of their employees as employees.

Proposed amendment

338. Proposed section 1002F clarifies that for the purposes of both Division 2A and section 1013:

* a partner is taken to possess any information that an employee or another partner possesses by virtue of his/her employment or position as partner; and

* if any employee or partner knows or ought reasonably to know any matter or thing by reason of his/her employment or position as partner, it be presumed that all partners know or ought reasonably to know that matter or thing.

Section 1002G – Prohibited conduct by person in possession of inside information

Background

339. The present prohibition in CL subsection 1002(1) includes, as an element of the offence, that the person who deals in securities while in the possession of materially price sensitive information that is not generally available must come into possession of that information by virtue of some connection with the body corporate that issued the securities. A similar element is present in the prohibitions contained in CL subsections 1002(2) and (3). The Committee considered that this element was an unnecessary complication and recommended that the provisions be amended to provide that a person who knows or ought reasonably to know that it is inside information shall not use that information to trade in or subscribe for the securities of the company which is the subject of the information. It also recommended that the offence in relation to tippees in CL subsection 1002(3) be included in this primary prohibition and that a statutory definition of inside information be specified based on a 'reasonable person' test.

340. Further, in Hooker Investments Pty. Ltd. v Baring Bros. Halkerston Partners Securities Ltd. and Ors (1986) 10 ACLR 524, the NSW Court of Appeal held that the word 'person' in Securities Industry Act 1980 subsection 128(1), (2) and (3) (the equivalent of CL subsection 1002(1), (2) and (3)) did not cover a body corporate, possibly preventing a body corporate from being covered by the tipping and procuring provisions (subsection 1002(4) and (5)) which depend on liability under subsection 1002(1)-(3). The Committee recommended that it should be put beyond doubt that the primary prohibition contained in the provisions apply to bodies corporate as well as natural persons.

Proposed Amendment

341. New section 1002G is to replace subsection 1002(1)-(6), as recommended by the Committee. The provision does not

require, however, that the prosecution prove the person in possession of inside information used it to trade in or subscribe for particular securities. In order to establish the offence, it is necessary to prove that:

* a person was in possession of information that was not generally available;

* if the information were generally available, a reasonable person would expect it to have a material effect on the price or value of securities of a body corporate;

* the person knows, or ought reasonably to know, that:

* the information is not generally available; and

* if it were generally available, it might have a material effect on the price or value of those securities (subsection (1));

and either

* the person traded in or agreed to trade in the relevant securities or procured another person to do so (subsection (2)); or

* where the securities are listed, the person communicated the information to a another person and knew or ought to have known that the other person would or would be likely to deal in the securities (subsection (3)).

342. As recommended by the Committee the connection between the person and the corporation has been removed. Contrary to the exposure draft provisions, however, it is necessary for the prosecution to establish that the person knew or ought to have known that the information was not generally available and likely to be price sensitive. Thus a person who, for example, overhears information in a lift or on the street and trades on the basis of that information would only be in breach of the provisions if he/she was aware that the information was inside information.

343. The degree of likelihood that the information would affect the price of securities in paragraph 1002G(1)(a) has been reduced from that of a possibility to a probability. The exposure draft provisions required that a reasonable person 'could' expect it to affect the price of securities, while proposed paragraph 1002G(1)(a) requires that a reasonable person 'would' expect it to have this effect. Material effect is defined in proposed section 1002C.

344. Subsection (2) makes it clear that the prohibition on trading applies to a person as either principal or agent, and both subsections (2) and (3) clarify that the prohibition applies not only to dealing in securities, but also agreements to do so.

345. For the purposes of this provision 'procure' has been defined in subsection 1002D(2).

346. The section does not explicitly provide that the term 'person' includes a body corporate. However, the general definition of 'person' in CL section 9 includes bodies corporate, and the reasoning of the Court in Hooker Investments in finding a contrary intention to this general definition is not applicable to the new insider trading regime in proposed Division 2A.

Section 1002H – Exception for redemption of prescribed interest under buy-back covenant

347. As recommended by the Griffiths Committee it has been clarified in section 1002A that the insider trading provisions apply to prescribed interests. However, concern has been expressed that there may be a conflict between the redemption requirements of a trust manager under a trust deed and the insider trading provisions. Trust deeds must provide redemption facilities under the Corporations Law and in doing so the trust deed may specify that the buy-back price is to be adjusted on a periodic basis to reflect the underlying value of the assets of the trust and that units are to be brought

back at the price quoted at the time of the application for redemption. In such circumstances, the buy-back price may not at any given time reflect all material information in the possession of the trust manager and to avoid contravening the insider trading provisions by waiting for the price to reflect all such information the manager may be in breach of the trust deed.

Proposed Amendment

348. Proposed section 1002H provides that the manager of a prescribed interest does not contravene the prohibition in subsection 1002G(2) where it redeems a prescribed interest in accordance with a buy-back covenant, at a price that is required to be calculated, so far as reasonably practicable, by reference to the underlying value of the assets to which the prescribed interest relates less any reasonable charge for purchasing the interest. The provision takes into account lags in adjusting the buy-back price for changes in the underlying value of the assets.

Section 1002J - Exception for underwriters

349. This proposed section adopts the Committee's recommendation that there be an exception to the general prohibition against insider trading in subsection 1002G(2) enabling underwriters to subscribe for and sell any securities which they are required to take up as a consequence of an underwriting agreement (subsection 1002J(1)). The section also provides an exception to the tipping offence in subsection 1002G(3) where information is communicated:

* solely for the purpose of procuring a person to enter into an underwriting agreement; or

* to a person who may be required under an underwriting agreement to subscribe for securities solely for the purpose of procuring a person to enter into a sub-underwriting agreement and/or subscribe for securities (subsection 1002J(2)).

350. The application of this latter subsection to communication for the purpose of procuring a person to subscribe for securities goes further than the Committee's recommendation.
However, it accords with current commercial practice of underwriters who largely provide information to potential investors to encourage subscription rather than sub-underwriting.

351. Views expressed in submissions on the exposure draft varied from the belief that the provision does not go far enough in that it does not provide an exemption for subscribers, other than sub-underwriters, when information has been communicated by an underwriter or sub-underwriter within the exemption in sub-paragraph 1002J(2)(b)(ii), to the view that it goes too far in even allowing the exemption in sub-paragraph 1002J(2)(b)(ii). A watching brief is to be maintained in relation to the exemption and if, once the provisions are operational, it is considered that they are too broad or not broad enough appropriate amendments will be made.

Section 1002K – Exception pursuant to legal requirement

352. Proposed section 1002K provides an exemption from the primary prohibition in subsection 1002G(2) in respect of the purchase of securities pursuant to a requirement imposed by the Corporations Law. For example, in relation to arrangements, reconstructions and takeovers, sections 414, 701 and 703, in certain circumstances, require a body corporate to purchase shares from dissenting shareholders, where those shareholders so request. Where the body corporate does so while in possession of inside information it will not be taken to breach the insider trading provisions.

Section 1002L - Exemption for information communicated pursuant to a legal requirement

353. Concern has been expressed that the communication of information under a legal requirement, for example, to the Australian Securities Commission or the Australian Stock Exchange, might come within the prohibition against

communication of inside information in subsection 1002G(3). Proposed section 1002L provides an exemption from that prohibition where information is communicated pursuant to a legal requirement.

Section 1002M – Chinese wall arrangements by bodies corporate

354. New section 1002M substantially re-enacts the defence provided for bodies corporate in CL subsection 1002(7) where the body corporate has in place an administrative arrangement to prevent information that is made available to one part of the organisation being passed to other parts of the organisation. A body corporate may deal in securities when an officer is in possession of inside information if:

* the decision to deal was taken on its behalf by a person or persons other than that officer;

* it had in operation arrangements that could reasonably be expected to ensure that the information was not communicated to that person or those persons and no advice was given to that person or any of those persons by the person in possession of the information; and

* the information was not so communicated and no such advice was given.

355. It has been clarified that the exemption applies where the decision to trade in securities was taken by a group of persons as well as by an individual. The standard required of the Chinese wall has also been reduced somewhat to an arrangement that 'could reasonably be expected to ensure', rather than 'reasonably designed to ensure' in the exposure draft provisions.

Section 1002N - Chinese wall arrangements by partnerships, etc

Background

356. The Committee recommended that the Chinese wall defence available to bodies corporate, as outlined above, be extended to unincorporated bodies.

357. As noted in relation to proposed section 1002F some doubt has been expressed as to what information possessed by partners and employees each partner would be taken to possess. Section 1002F clarifies this for the purposes of the insider trading provisions. In consequence a Chinese wall defence is necessary for partnerships.

358. The situation is different for other unincorporated bodies. Such bodies have no legal existence apart from that of their individual members and there is no general principle attributing notice of information in the possession of one member to all other members. Nor is it considered appropriate to provide one legislatively. By their very nature such bodies are unlikely to engage in dealing in securities, particularly as bodies which have as an object the acquisition of gain and more than 20 members are required to be incorporated by virtue of CL section 112. Further, it is unlikely that an action could be brought successfully against the members of an unincorporated association for a breach of the provisions on behalf of that association. The insider trading provisions would only seem to have practical application to the individual members of such associations. It is not considered necessary, therefore, to provide a Chinese wall defence for unincorporated bodies other than partnerships.

Proposed amendment

359. Proposed section 1002N provides that:

* the members of a partnership do not contravene the insider trading provisions at any time merely because one

or more (but not all) of the partners or employees are in actual possession of inside information if:

* the decision to deal was taken on behalf of the partnership by a partner and/or employee(or partners and/or employees) who is (or are) not in actual possession of the information;

* the partnership had in operation arrangements that could reasonably be expected to ensure that the information was not communicated to the partner(s) and/or employee(s) who made the decision and that no advice was given to the partner(s) and/or employee(s) by a person in possession of the information; and

* the information was not so communicated and no advice was so given (subsection 1002N(1)); and

* a member of a partnership does not contravene the provisions by dealing on his/her own behalf merely because he/she is taken to possess information in possession of an employee or another partner of the partnership (subsection 1002N(2)).

360. In either case, if the member who traded actually possessed the information, the defence in section 1002N does not apply.

Section 1002P - Exception for knowledge of person's own intentions or activities

361. Proposed section 1002A makes it clear that the term 'information' encompasses intentions. While in the exposure draft bodies corporate were protected from liability where they only possess inside information as to their own intentions to trade in securities, concern was expressed that individuals could be liable for insider trading where they trade in securities at a time when they intend to purchase further securities. For example where an individual sells a

small parcel of shares knowing that he/she intends to sell a large parcel of the same kind of shares.

Proposed Amendment

362. Proposed section 1002P provides that a natural person does not contravene the primary prohibition in subsection 1002G(2) by trading in securities of a body corporate merely because the person is aware that he/she has previously traded or proposes to trade in securities of that body corporate. It aligns the treatment of natural persons in this regard with that afforded to bodies corporate by proposed section 1002Q.

Section 1002Q - Exception for bodies corporate

363. Proposed section 1002Q substantially re-enacts CL subsection 1002(8), which allows a body corporate to deal in securities of another where the body corporate possesses information or one of its officers possesses information obtained in the course of his/her duties relating only to the body corporate proposed dealings in securities of that other body corporate. This exception protects a body corporate proposing to make a takeover of a target company or otherwise proposing to acquire or dispose of securities of another body corporate.

364. The proposed section has also been extended to knowledge that the body corporate or an officer of a body corporate have in relation to the past dealings of the body corporate in the securities of another body corporate. Further, it has been clarified that the section only applies to information concerning the mere fact that the body corporate intends to deal or has in the past dealt in securities of another body corporate. It had been suggested that the exposure draft provision could be read more broadly to encompass any information acquired in researching the proposed dealing in securities.

Section 1002R – Exception for officers or agents of body corporate

365. Proposed section 1002R provides an exemption from the primary prohibition in subsection 1002G(2) for officers and agents acting on behalf of a body corporate that is afforded an exemption within proposed section 1002Q.

Section 1002S – Transaction by holder of dealers licence or a representative of the holder of such a licence

366. This proposed section substantially re-enacts CL subsection 1002(10) and extends its operation to representatives of holders of dealers licences, as well as the holders of such licences. It enables such dealers and their representatives to enter into transactions as agent for, and on the specific instructions of, a person with whom he/she is not associated and to whom he/she has not given any advice based on inside information in relation to the securities in question.

367. Paragraph 1002S(c) modifies the requirement in relation to the giving of advice to the client in relation to securities. Under subsection 1002(10) and in the exposure draft provision neither the holder not any of its representatives was permitted to give any advice to the client. A number of submissions on the exposure draft expressed concern about this requirement. It has been modified to enable a dealer to establish a Chinese wall between the representative in possession of the inside information and the representative who gives advice to the client.

368. Nothing in the section is to be taken to affect the application of proposed subsection 1002G(2) in relation to other persons in respect of the transaction.

Section 1002T – Prosecutions and defences

Background

369. The definition of 'generally available' in proposed section 1002B, by requiring that a reasonable period of time elapse for the information to be disseminated could, in the absence of any defence, penalise a particularly diligent investor who seeks out and analyses information as soon as it is published.

370. Concern was expressed in a number of submissions that while defences where provided against the primary prohibition in subsection 1002G(2), no defences were provided against the tipping offence in proposed subsection 1002G(3).

Proposed amendment

371. Proposed subsection 1002T(1) makes it clear that the exemptions to subsection 1002G(2) and (3) in sections 1002H, 1002J, 1002K, 1002L, 1002M, 1002N, 1002P, 1002Q, 1002R and 1002S are defences and not elements of the offence. That is, the prosecution does not have to disprove the circumstances that might bring a person within an exemption, rather the defence must prove that they come within an exemption on the balance of probabilities.

372. Proposed subsection 1002T(2) provides two defences against a prosecution under subsection 1002G(2):

* the information came into the person's possession solely as a result of the information having been made known in a manner that would, or would be likely to, bring it to the attention of persons who commonly invest in securities of a kind whose price or value might be affected by the information (paragraph 1002T(2)(a) (this will provide protection to a diligent investor who relies on information that is publically available);

* the other party to the transaction knew, or ought reasonably to have known, of the information before entering into the transaction (paragraph 1002T(2)(b)) (this paragraph re-enacts the existing defence in subsection 1002(11)).

373. Proposed subsection 1002T(3) provides similar defences against the tipping offence in proposed subsection 1002G(3) that a person communicated information, or caused information to be communicated to a another person. It provides a defence where

* the information came into the person's possession solely as a result of the information having been made known as mentioned in subparagraph 1002B(2)(b)(i); and

* the other person knew, or ought reasonably to have known, of the information before it was communicated.

Section 1002U - Powers of Court

Background

374. CL section 1005 provides that a person who suffers loss or damage as a result of insider trading by another may recover the amount of the loss or damage from the insider or any other person involved in the contravention. In addition, the Court is empowered by CL subsection 1325(1) to make such orders as it considers appropriate against a person who contravenes CL Part 7.11 or 7.12. However, the Committee specifically recommended that the Courts be empowered to make a wider range of orders in relation to insider trading matters, generally along the lines of the orders available in cases of unacceptable conduct in the context of a takeover.

Proposed amendment

375. Proposed section 1002U empowers the Court, where it finds contravention of section 1002G has occurred, to make a variety of orders similar to those in relation to unacceptable conduct in the context of takeover in CL section 613. Without

limiting the generality of the orders the Court may make, it may make orders:

* restraining the exercise of voting or other rights attached to securities;

* restraining the issue or allotment of securities;

* restraining the acquisition or disposal or directing the disposal of securities;

* vesting securities in the Commission;

* cancelling an agreement for the acquisition or disposal of securities;

* cancelling a securities licence; and

* directing a person to do or refrain from doing a specified act, in order to secure compliance with any other order.

Section 1005(2) – Civil liability for contravention of this Part or Part 7.12

376. A consequential amendment is to be made to subsection 1005(2) to account for changes in section 1013.

Section 1013 – Liability for insider trading

377. Section 1013 is to be redrafted in line with the Committee's recommendation to redraft and simplify. A number of technical changes have been made to the provision.

378, It has been extended to enable a body corporate to recover, as a loss suffered, the difference between the price at which securities were subscribed for by an insider and the price at which they would have been sold in a sale at the time of subscription if the information had been generally available (subsection 1013(2)). This is necessary as the drafting of the existing provisions does not seem to apply to

subscription for securities, since in such a case the price is set by the issuer and is therefore not necessarily dependent on the inside information. The Commission may bring an action under subsection 1013(2), in the name of and for the benefit of the body corporate, if it considers that it is in the public interest to do so (subsection 1013(6)).

379. In consequence of the explicit extension of the general prohibition against insider trading in subsection 1002G(2) to agreements to deal in securities, section 1013 has also been extended to agreements to deal in securities. In addition, it has been made clear that the provisions apply where an insider has procured a another person to deal in securities. (subsection 1013(2)-(5)).

380. The action that a body corporate can bring under paragraph 1013(1)(d) to recover any profit accruing to the insider is to be re-enacted in proposed subsection 1013(5). The term 'financial benefit' which was used in the exposure draft in place of 'profit', has been replaced by a more specific formulation of the amount that a body corporate may recover:

* in relation to the purchase of securities, the difference between the price at which the securities were purchased and the price at which they would have been likely to have been purchased if the information had been generally available; and

* in relation to the sale of securities, the difference between the price at which the securities were sold and the price at which they would have been likely to have been sold if the information had been generally available.

381. A defence to a civil action has been provided in proposed subsection 1013(7) where the information came into the insiders possession solely as a result of it having been made known within subparagraph 1002B(2)(b)(i). This mirrors the defence to the criminal liability provisions in proposed paragraph 1002T(2)(a). A defence similar to that contained in proposed paragraph 1002T(2)(b) is provided in relation to the

civil liability provisions by only allowing a person who does not possess the information to bring an action (subsections 1013(2)(3) and (4)).

382. Proposed subsection 1013(8) ensures that the civil liability provisions apply appropriately to prescribed interests. It is generally the case that a management company is regarded as 'issuing' securities in relation to a prescribed interest. Subsections 1013(5) and (6) allow the body corporate that issues the securities to benefit from recovery action in accordance with those subsections. In the absence of anything in the contractual arrangement between the management company and the participants in the prescribed interest, the participants would not benefit from any recovery action. Proposed subsection 1013(8) provides that where a management company or the ASC, in the name of and for the benefit of such a company, brings civil recovery action any amount recovered is held by the management company on behalf of the participants in the prescribed interest.

383. The remainder of the section substantially re-enacts existing section 1013:

* paragraph 1013(1)(a), which outlines the offence of insider trading consequent on which the actions in section 1013 may be brought, is to be re-enacted in proposed subsection 1013(1) with consequential amendments as a result of changes to be made to the insider trading provisions. The paragraph has been amended from that appearing in the exposure draft to take account of the inclusion, as an element of the offence, of the requirement of knowledge that the information is inside information;

* paragraph 1013(1)(c), which provides an action to a party to a transaction involving insider trading who was not in possession of inside information to recover any loss, is to be re-enacted in proposed subsections 1013(3) and (4); and

* subsection 1013(3), providing that the ASC may bring an action in the name of and for the benefit of a body corporate, is to be re-enacted in proposed subsection 1013(6), with the action being extended to recovering any loss on subscription that a body corporate could recover under proposed subsection 1013(2).

* section 1013 does not apply to insider trading in option contracts (paragraph 1013(1)(a)), as recovery provisions are not apt to apply to all of the variety of transactions associated with such contracts. In consequence, civil recovery for insider trading in option contracts will be dealt with under the general civil liability provisions in section 1005, enabling the recovery of any loss or damage suffered by a person through such insider trading.

384. The proposed amendments make it clear that actions that a person has under section 1013 are in addition to any rights that any other person has under section 1005 (proposed subsection 1013(9)).

Schedule 3 - Penalties

Background

385. The Griffiths Committee considered that the existing pecuniary penalties for insider trading were inadequate. It recommended that they be amended so that, in the case of a natural person, the penalty would be double the amount of profit realised or loss avoided or $100,000 whichever is greater, or 5 years imprisonment, or both, and in the case of a body corporate, a penalty of double the profit realised or loss avoided or $500,000, whichever is greater. As noted in the Government response to the Committee's report, the Government considers that CL section 1013 and the Proceeds of Crime Act 1987 provide appropriate avenues for recovering any proceeds garnished by the insider from the illegal activity, but agreed that the primary monetary penalty needs to be increased.

Proposed amendment

386. The reference to section 1002 in Schedule 3 is to be replaced by reference to section 1002G, with a penalty of $200,000 or imprisonment for 5 years, or both. A penalty of $1,000,000 will then apply a body corporate by virtue of the operation of CL section 1312. This is double the penalty recommended by the Committee. The Government considers that it is necessary to send a very clear signal to the market and aberrant traders that insider trading will not be tolerated, and therefore wishes to increase the monetary penalty to this high level.

SCHEDULE 5 - TECHNICAL AMENDMENTS OF THE CORPORATIONS LAW

Section 9 – "accounting standard"

387. By replacing "and" at the end of the paragraph with "or", the definition will make it clear that references to an "accounting standard" are references either to an entire standard or to a particular provision within a standard, as the context requires.

Section 9 – "Board"

388. Paragraph (c) will be expanded to refer to the Board's establishment by the Australian Securities Commission Act 1989.

Section 9 – "Chapter 8 agreement"

389. The alphabetical order within CL section 9 of the definition of 'Chapter 8 agreement' is to be corrected.

Section 9 – "constitution"

390. The reference in subparagraph (b)(ii) of the definition of 'constitution' to "this Act or the company law of a State or Territory" is to be amended to "this Law", thus bringing the terminology in the subparagraph into line with that used elsewhere in the CL.

Section 9 – "eligible communications service"

391. This corrects a typographical error by inserting a comma after "telephonic".

Section 9 – "new company"

392. This definition is to be omitted since it is no longer necessary in view of the amendments made by the Corporations Legislation Amendment Act 1990.

Section 9 – "proprietary company"

393. Paragraph (c) of this definition is to be amended to include a reference to subsection 129(4) which reference was inadvertently omitted. This amendment will be deemed to have taken effect on 1 January 1991 (see proposed section 1363).

Section 9 – "sign"

394. References in this definition to subsections 153(1) and (7) are to be omitted as a result of the repeal of section 153 by the Corporations Legislation Amendment Act 1990.

Paragraph 103(2)(a) – Effect of certain contraventions of this Law

394. References in this section to section 113 are to be omitted as a result of the repeal of that section by the Corporations Legislation Amendment Act 1990.

Subsection 103(3)

396. The subsection is to be omitted. The provision was relevant for the purposes of ensuring compliance with the requirement to incorporate under the Corporations Act in its original form as a Commonwealth Act under s.51(20) of the Constitution. It is no longer necessary following the commencement of the new national arrangements.

Section 107

397. The section is to be repealed as it is redundant. Section 109D provides inter alia that headings to Chapters of the CL are taken to be part of the CL.

Section 206BM

398. The section is to be repealed as it is unnecessary. Its effect is duplicated by section 57 of the CL which treats the shares of a body corporate, if not divided into 2 classes, as a class.

Paragraph 242(7)(a)

399. The more precise and specific reference to the appropriate Division of the Law is to be inserted.

Subsection 242(11)

400. The subsection is to be omitted as it is unnecessary in the light of the definition of 'appoint' in section 9.

Subsection 301(10)

401. A drafting correction is to be made to make the appropriate reference to subsection 301(9).

Section 307

402. The substitution in subparagraph 307 (c)(ii) of "Division" for "subsection" will correct the terminology of the provision, since the reports referred to in the subparagraph are reports required under sections 304 and 305, not section 307.

Paragraph 324(1)(c)
Paragraph 324(2)(c)
Subsection 324(11), (12) and (13)
Paragraph 326(5)(a)(iii)
Subsection 326(9)

Subsection 327(13
Paragraph 332(10)(a)
Subsection 334(1) and (2)

403. The amendments will change the provisions to refer to the "Law" rather than to the "Act" because of the conversion of the substantive provisions of the Corporations Act into the Law.

Subsection 747(1) and (2)

404. The reference in sub-sections 747(1) and (2) to regulations made under section 748 is omitted because section 748 was repealed by the Amendment Act.

Subsection 1067(4)

405. The correct reference to subsection (3) is to be inserted.

Paragraph 1292(1)(d)

406. A superfluous word is to be omitted.

Paragraph 1292(7)(a)

407. The correct reference to section 230 is to replace the present reference.

Schedule 1 - Table A - Articles: Subregulation 95(4)

408. Subregulation 95(4) of the "Table A" Articles, contained in Schedule 1 to the Corporations Law, is to be amended to make it clear that an address for service of the notices to which regulation 95 refers may be anywhere Australia.

SCHEDULE 6 - COMMENCEMENT AND APPLICATION OF CERTAIN CHANGES TO THE CORPORATIONS LAW

409. This Schedule will insert a new Part 9.11 Division 1 into the Corporations Law.

Section 1363 – Commencement of certain changes

410. Proposed new section 1363 provides that specified amendments to the Corporations Law apply as of 1 January 1991. The proposed retrospective commencement of these provisions is for the purposes of commercial certainty, and is intended to preserve the position of companies and persons from the date of commencement, where the Law had an unintended effect or an error in a provision has become apparent since 1 January 1991, and where the failure to correct the error retrospectively, would impose on the companies or persons with some unfair or undesirable additional burdens.

Section 13645 – Application of Parts 3.6 and 3.7

411. The consolidation amendments apply to financial years ending on or after 31 December 1991. This means the amendments will apply to at least some financial years which are already in progress. The Government has chosen this unusually early application date in order to line up with the commencement date in the Standard. In so choosing, the Government is advised that, as the amendments only impact on the annual accounts, an early application will not place any significant burden on companies, since the annual accounts are not compiled until after the end of the financial year. The Chairman of the AASB has endorsed an early application date.

SCHEDULE 7 - AMENDMENTS OF THE AUSTRALIAN SECURITIES COMMISSION ACT 1989

Subsection 1(4)

412. The amendment to this provision corresponds to the amendment to subsection 3(3) of the Corporations Act in Schedule 1 which is explained in the notes to that provision.

Section 5 – Definition of "agency"

413, The definition will be omitted as it is unnecessary. The effect of the provision is duplicated by the definition of

'agency' in the CL which applies by virtue of subsection 5(3) of the ASC Act.

Section 5 – Definitions of "Director", "meeting" and "member"

414. The definitions will be amended to reflect the proper title of the Australian Accounting Standards Board.

Section 5 – Definition of "eligible person"

415. The definition is to be amended to appropriately refer to the 'previous' corresponding law to which the matter relates.

Subsection 5(1) – Definitions of "Corporations Law" and "Corporations Regulations"

416. Definitions of the Corporations Law and the Corporations Regulations are to be inserted for the purposes of the ASC Act. The meaning of these expressions will be the same as provided to those terms under the Corporations Act.

Para 6A – Acting Appointment

417. A new provision is to be included to limit acting appointments under the ASC Act to no more than 12 months where there is a vacancy in the relevant office.

Subsection 431
Paragraph 46(1)(a)
Subparagraph 46(1)(b)(i)

418. The reference in these provisions to the Corporations Law is to be limited to that Law as applied in a particular jurisdiction for the purposes of establishing an appropriate jurisdictional nexus.

Section 49(5) – Commission may cause prosecution to begin

419. This provision is to be amended to include a reference in appropriate cases to the Director of Public Prosecutions Act 1983 as it applies as Law of a particular jurisdiction.

Subsection 88(1A) – Application of Crimes Act

420. A new provision is to be substituted for subsection 88(1A). The new provision:

* widens the scope of the provision to include all national scheme laws of the particular jurisdiction rather than only the ASC Law; and

* recognises for the purposes of the national scheme law of one jurisdiction that an offence under the Crimes Act as it applies in relation to an examination or hearing under the ASC Law of another jurisdiction is taken to be an offence under the ASC Law of that other jurisdiction.

The purpose of the provision is to ensure that offences under Part III of the Crimes Act 1914 are 'cross-federalised' for the purposes of enforcement of the ASC Law.

Subsection 102(7)

421. This provision is to be amended to refer to the relevant CL interpretation provision, namely section 109ZF rather than the corresponding provisions of section 34A of the Acts Interpretation Act 1901 of the Commonwealth. This is consistent with the approach adopted elsewhere in the CL and the ASC Law.

Restrictions on dealing in Futures Contracts
Heading to Division 3 of Part 7
Section 128 – Certain persons not to deal on the basis of certain information
Subsection 129(1) - Compensation to other parties where section 128 contravened

422. Section 128 of the ASC Act is to be amended so that it will now only apply to dealings with inside information in relation to futures contracts and not to securities contracts. It presently applies to the use of information in respect of both types of contracts. It will not be necessary, when the CL amendments are in force, for the provision to

apply to securities contracts as the insider trading prohibitions on persons generally under proposed section 1002G of the CL will apply to members and staff of the ASC. The present provisions in section 128 need to specifically deal with insider trading in securities in relation to ASC staff because the current general CL provisions require a connection to be established between the insider trader and the corporation whose securities are being traded. This would, of course, normally exclude ASC members and staff who would not ordinarily have such a connection. As the futures insider trading provisions are not being amended at this time, it would also exclude those persons in relation to insider trading in relation to futures. Consequentially sections 128 and 129 have been retained. Corresponding amendments to the futures insider trading provisions are to be made in subsequent amending Bill.

423. The amendments to the Heading of the Division and to section 129(1) are consequent on that amendment.

Section 135

424. Subparagraph 135(1)(a)(iv) will be amended to reflect the proper title of the Australian Accounting Standards Board.

Section 174 - Functions and Powers of Panel

425. A new subsection 174(2) is to be added to confirm that the Corporations and Securities Panel has the power to do acts in the A.C.T. in relation to functions and powers conferred on it by the national scheme law of another jurisdiction.

Paragraph 203(1)(c)

426. The provision is to be amended to alter the present reference to the 'Australian Society of Accountants' consequent on the change of name of that body to the 'Australian Society of Certified Practising Accountants'.

Section 204 – Functions and Powers of Disciplinary Board

427. A new subsection 204(2) is to be inserted to confirm the powers of the Companies Auditors and Liquidators Board in relation to actions in the A.C.T. in pursuance of functions or powers conferred on the Board by a national scheme law of another jurisdiction. This proposed amendment corresponds to the above amendment to include a new section 174(2) in relation to the Panel.