

THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA SENATE

CORPORATE LAW REFORM BILL (NO. 2) 1992

EXPLANATORY MEMORANDUM

(Circulated by Authority of the Attorney-General, the Honourable Michael Duffy, MP)

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CORPORATE LAW REFORM BILL (NO. 2) 1992

OUTLINE

1. The Corporate Law Reform Bill (No. 2) 1992 (the Bill) contains amendments to the Corporations Law which provide for:
 - the introduction of a new concept of a disclosing entity whose securities are of interest to investors;
 - on-going disclosure by disclosing entities of material information concerning their position;
 - a new system for half yearly reports by disclosing entities;
 - a new system for annual reporting for disclosing entities which are non-companies;
 - accounting standards to be made by the Australian Accounting Standards Board (AASB) and applied in respect of new reporting requirements and (existing) annual accounts for prescribed interests;
 - streamlining of the prospectus provisions for disclosing entities which satisfy certain criteria concerning their disclosure of information;
 - a relaxation of the present restrictions on companies indemnifying and insuring their officers and auditors; and
 - facilitation of the use of printouts from the Australian Securities Commission (ASC) national database as evidence in court proceedings.
2. The Bill primarily implements a scheme for enhanced corporate disclosure, broadly along the lines recommended by the Companies and Securities Advisory Committee (CASAC) in its September 1991 Report on an Enhanced Statutory Disclosure System. The basic aim of the scheme is to ensure that investors can make informed decisions about the allocation of their funds.
3. A number of significant modifications have been made to the scheme proposed by CASAC in the light of extensive consultation with business and professional groups, following the release of the CASAC report. In particular, the number of entities to be covered has been reduced and the obligations placed on these entities have been reformulated in order to ensure that the scheme operates in an effective, but commercially practical manner.
4. The major reform contained in the Bill is the requirement for 'disclosing entities' (i.e. listed companies, other corporate entities whose securities are traded or offered for sale and regulated prescribed interest schemes) to report on an on-going basis to the ASC all material matters which have a significant effect on their financial position and prospects.
5. The ASC will have a significant role in the enforcement of disclosure obligations, while new civil remedies will be provided for investors who suffer a loss as a result of a breach of ongoing disclosure requirements.
6. The introduction of the enhanced disclosure regime enables the current prospectus requirements to be relaxed, subject to appropriate safeguards, to ensure that investor protection is not materially affected. In essence, the prospectus reforms will involve a substantial lessening of the requirements for primary and secondary prospectuses for securities of disclosing entities which meet certain criteria related to the level of disclosure of material information.
7. A detailed summary of the enhanced disclosure scheme implemented by the Bill is provided at page 7.

FINANCIAL IMPACT STATEMENT

8. Implementation of the new disclosure scheme will require additional expenditure of \$3.2m over the next 4 years. This will enable an upgrading of the ASC's computer system so that material disclosed under the new scheme can be made available to the public in less than 24 hours of being lodged with the ASC. It is estimated that the start up costs of the new system will be \$1.84m and that annual running costs will range from \$510,000 to \$550,000.

9. The ASC has estimated that there will be offsetting revenue in the order of \$500,000 per annum from increased access to its DOCIMAGE database and the availability of on line subscription systems to interested parties. This will represent a substantial saving to the cost of running the disclosure system.

10. The enhanced corporate disclosure scheme has been designed in such a way as to minimise compliance costs to disclosing entities, while at the same time ensuring the objectives of disclosure are achieved. In this regard, a large number of disclosing entities will already be complying with the substantive obligations under the scheme because they are similar to requirements under the Listing Rules of the Australian Stock Exchange (ASX). In addition, a number of unlisted entities which will be required to comply with the enhanced disclosure regime are already subject to the supplementary prospectus provisions in the Corporations Law and would not incur additional costs in complying with the continuous disclosure requirements.

11. Some additional costs can be expected for entities in complying with the new statutory half year reporting requirement and for those entities which do not presently have reporting systems in place to identify in a timely manner, ongoing material information about the entities' position.

12. The proposed reforms to the prospectus provisions will result in savings for entities subject to the disclosure regime which engage in fundraising, especially for those frequent or continuous fundraisers.

ABBREVIATIONS

The following abbreviations are used in this explanatory memorandum:

AASB	Australian Accounting Standards Board
ACLR	Australian Company Law Reports
AGM	Annual General Meeting
ASC	Australian Securities Commission
ASX	Australian Stock Exchange
CASAC	Companies and Securities Advisory Committee
Ch	Chancery Division Reports (UK)
CSLRC	Companies and Securities Law Review Committee
DOCIIMAGE	Document Image Network
the Bill	Corporate Law Reform Bill (No. 2)1992
the Law	Corporations Law

SUMMARY OF MAIN FEATURES OF ENHANCED DISCLOSURE SCHEME IMPLEMENTED BY BILL

Continuous Disclosure Requirements

13. New Part 7.12A of the Corporations Law (inserted by Part 2 of the Bill) implements the continuous disclosure obligations which form a central part of the enhanced corporate disclosure scheme contained in the Bill. Disclosing entities (which will include listed entities and other entities whose securities are offered or traded in the market) will be required to lodge with the ASC, as soon as practicable, but in any event within 3 business days, information about any event or change in circumstances, which investors and their professional advisers would reasonably require, and reasonably expect to be disclosed, for the purpose of making an informed assessment of:

- the assets and liabilities, financial position, profits and losses, and prospects of the disclosing entity;
- the rights attaching to the relevant securities of the disclosing entity; and
- in the case of a disclosing entity which is an undertaking in relation to prescribed interests - the merits of participating in that undertaking and the extent of the risk involved in the participation.

14. Disclosure of information will not be required where the disclosing entity can establish that disclosure would be likely to result in unreasonable prejudice to the disclosing entity. In addition, disclosure of information will not be required if a supplementary prospectus has been, or is required to be, lodged containing the same information.

15. Breach of the continuous disclosure obligations will be a criminal offence where the disclosing entity acted knowingly or recklessly as to the breach. Criminal liability of persons involved in a breach by a disclosing entity will be determined in accordance with the Crimes Act 1914.

16. An investor who suffers loss as a result of a failure to comply with the obligations imposed under the continuous disclosure regime will have a right of action to recover that loss against the responsible entity. A person who is knowingly involved in a contravention of the continuous disclosure provisions will be liable to compensate an investor who thereby suffers loss as a result of a dealing in securities.

17. A disclosing entity will have a defence if it can establish that it was not aware of the information and the existence of a disclosure system that the disclosing entity could reasonably be expected to have had in place could not reasonably be expected to have resulted in the information being disclosed as required. The nature of the disclosure obligations and the scope of liability, including the defences available for civil liability, make it clear that the continuous disclosure regime is not imposing 'due diligence' obligations as is the case with the issue of a prospectus.

18. The role of the ASX (and any other relevant exchange) will be expressly preserved (under the provisions inserted by Part 2 of the Bill) to make it clear that the role played by the ASX in the case of ongoing and periodic disclosure is not adversely affected. In addition, the protection of qualified privilege will be expressly conferred on securities exchanges, including the ASX, where they publish information provided to them under a disclosure regime (whether legislative or pursuant to their rules) or as part of their general functions of supervising listed entities. This will remove any doubts about whether such protection exists at common law.

Periodic Reporting

19. Under Part 2 of the Bill, disclosing entities will be required to prepare half yearly financial statements (consolidated if a company or non-company disclosing entity is a chief entity) as well as:

- in the case of a company or non-company - a statement as to whether the accounts provide a true and fair view of the entity's state of affairs at the end of the half yearly financial period;
- in the case of a company or non-company - a report which specifies the names of the directors of the entity and contains a review of operations and particulars of any significant changes in the entity's affairs during the half yearly financial period; and
- in the case of a prescribed interest scheme - a report which contains a review of operations and particulars of any significant changes in the scheme's affairs during the half yearly financial period.

20. Except in the case of a borrowing corporation, the disclosing entity will have the option to determine in respect of half yearly financial statements whether the auditor provides:

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

21. In the case of a borrowing corporation (which already has half yearly reporting and audit requirements) the auditor will be required to provide a half yearly audit report, unless authorised by the trustee for debenture holders to provide a review report.

22. Non-companies which are disclosing entities will, in addition to the half yearly financial reporting obligations outlined above, be required to prepare and to have audited annual financial statements, in accordance with similar requirements which apply to the preparation and audit of a company's annual financial statements.

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

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

24. Disclosing entities will be required:

- to lodge half-yearly financial statements (including the directors' statement and report and the audit or review report) with the ASC within 75 days of the end of the half yearly financial period; and to lodge annual financial statements with the ASC within 90 days of the end of the financial year.

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

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

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

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

Revised Prospectus Regime

28. Under Part 2 of the Bill (clauses 38 to 48), relief will be granted from the primary and secondary prospectus provisions in relation to securities of an entity which has been a disclosing entity for 12 months prior to an offer of securities and which has not had the benefit of exemptions from the enhanced disclosure requirements (a 'qualifying disclosing entity').

29. A disclosing entity which has the benefit of such exemptions will not be entitled to relief from the prospectus provisions unless the ASC has certified by notice published in the Gazette that, having regard to all the circumstances, including any conditions relating to the exemption, the exemption does not have a material adverse effect on the level of information available to the market about the disclosing entity.

30. The prospectus provisions will have primacy over the continuous disclosure requirements when a qualifying disclosing entity is fundraising. In particular, a qualifying disclosing entity will not be able to rely on the 'confidentiality' exemption under the continuous disclosure regime when preparing a prospectus for the purposes of fundraising or during any period in which the prospectus is current.

31. With respect to primary offers of quoted securities by a qualifying disclosing entity (principally rights issues and offers under employee share plans) the requirement to lodge a full prospectus will be replaced by a requirement to lodge a more limited prospectus containing only transaction specific information, rather than information about the entity itself which should already be known to the market through the enhanced disclosure requirements.

32. This more limited prospectus is to include such information as investors and their prospectus advisers would reasonably require and reasonably expect to find in the document for the purpose of making an informed assessment of the offer, the effect of the offer on the entity and the rights attaching to the securities.

33. Qualifying disclosing entities will be able to incorporate a document by reference into a prospectus provided the document was previously lodged with the ASC, a summary of the document is included in the prospectus and the prospectus states that the document is available free of charge from the issuer of the prospectus.

34. Relief from much of the secondary prospectus provisions will apply to secondary offers of securities of an entity which has been a qualifying disclosing entity for the preceding 12 months, provided that the seller gives the offeree a document setting out the terms and conditions of the offer. The document must include a statement that the entity which issued the securities is subject to statutory periodic and continuous disclosure obligations and that matters disclosed by it may be inspected at or obtained from an office of the ASC.

35. A seller who, together with associates, proposes to sell more than 20% of the voting shares of an eligible disclosing entity during the 12 month period following the issue of the prospectus will not be entitled to any relief from the usual secondary prospectus provisions.

36. The life of a prospectus, which is presently restricted to 6 months under the Corporations Law, is to be extended to 12 months for a disclosing entity which:

- has been a disclosing entity for 12 months; or
- has on two occasions in the previous 15 months lodged primary prospectuses with the ASC.

37. The ASC will have the power to remove the relief for primary offers of quoted securities and require an entity to prepare a full prospectus if the ASC is satisfied that the entity has not complied with its periodic and continuous disclosure obligations during the preceding 12 months.

Disclosing Entities

38. The enhanced disclosure obligations under the Bill will effectively apply to the following entities (referred to as 'disclosing entities') which are defined in clause 4 (Dictionary) of the Bill:

- listed entities and listed prescribed interest schemes;
- entities and prescribed interest schemes which raise funds in circumstances where a prospectus is required to be lodged with the ASC;
- entities and prescribed interest schemes which offer securities other than debentures as consideration for an acquisition under a takeover scheme;
- entities involved in an amalgamation or reconstruction under a compromise or scheme of arrangement;
- entities and prescribed interest schemes whose securities are traded on the stock market of a stock exchange, an approved securities organisation or an exempt stock market prescribed by regulation;
- borrowing corporations which issue debentures; and
- other prescribed interest schemes constituted by approved deeds which are designated by regulation.

39. A body or prescribed interest scheme will cease to be a disclosing entity if, at the end of an offer period under a prospectus or offer document under a takeover, compromise or scheme of arrangement, the number of shareholders or prescribed interest holders is less than 50.

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

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

41. Provision will be made for entities to be exempted from any or all of the disclosure obligations both by regulation and by ASC administrative action. Such exemptions may be made subject to conditions.

CLAUSE-BY-CLAUSE COMMENTARY

PART 1 -PRELIMINARY

Clause 1 - Short title

42. This clause provides for the Bill, upon enactment, to be known as the *Corporate Law Reform Act (No. 2) 1992*.

Clause 2 - Commencement

43. Proposed subclause 2(1) provides that Part 1 of the Bill, entitled 'Preliminary' (comprising clauses 1 to 3) and Part 5, entitled 'Application of Changes to the Corporations Law resulting from this Act' (clause 62 inserting Division 6 of Part 9.11 of the Corporations Law) will commence on the day the Bill receives the Royal Assent.

44. Subclause 2(2) provides that, with the exception of clause 37 which deals with qualified privilege for a securities exchange, Part 2 of the Bill, entitled 'Implementing Enhanced Disclosure', will commence on 31 December 1993. This commencement date will give disclosing entities affected by these provisions time to prepare for the commencement of Part 2. It will also enable the ASC to update its computer system to provide timely public access to information about disclosing entities on its DOCIMAGE database.

45. Subclause 2(3) provides that the remaining provisions in the Bill will commence upon Proclamation. This will enable regulations to be made where necessary so that the relevant provisions can be brought into operation. Subclause 2(4) ensures, however, that all the remaining provisions will commence within 6 months of Royal Assent.

Clause 3 - Meaning of "Corporations Law"

46. This clause is self-explanatory.

PART 2 - IMPLEMENTING ENHANCED DISCLOSURE

Clause 4 - Dictionary

47. This clause amends existing definitions and inserts a number of new definitions. An explanation of the new and amended definitions is set out below.

'accounting enterprise'

48. To facilitate drafting of the amendments relating to accounts, the expression 'accounting enterprise' has been used and defined (in paragraph 4(i) of the Bill) to mean:

- a company (of any kind);
- a body that is not a company ('non-company') - the term 'body' is separately defined in paragraph 4(h) of the Bill; and
- the undertaking to which prescribed interests relate ('undertaking') - the term 'undertaking' is separately defined in paragraph 4(i) of the Bill.

'accounting period'

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

50. 'Accounting period' in relation to an accounting enterprise will be defined (in paragraph 4(i) of the Bill) to mean:

- the financial year of a company (including a company that is a disclosing entity);
- the financial year of all non-companies and undertakings that are disclosing entities at both the end of that year and 90 days after the end of that year; and

- the first 6 months of the financial year of all companies, non-companies and undertakings that are disclosing entities at both the end of that period and 75 days after the end of that period.

51. Consequential amendments are proposed to the definitions of 'consolidated accounts' and 'financial statements' in section 9 of the Corporations Law (see Part 1 of the Schedule to the Bill).

'accounts'

52. This expression will, in addition to its existing meaning, be defined to mean, for the purposes of Division 1 of Part 1.2 and Division 11 of Part 3.6, the profit and loss account and the balance sheet of the undertaking to which prescribed interests relate (see paragraph 4(h) of the Bill).

'applicable accounting standard'

53. This expression will, in addition to its existing meaning, be defined to mean, in relation to the accounts of an accounting period of the undertaking to which prescribed interests relate, an accounting standard that applies to the accounting period and is relevant to the accounts (see paragraph 4(h) of the Bill).

'audited or reviewed in accordance with this Law'

54. This expression will have the meaning set out in proposed section 53AAA of the Corporations Law .

'body'

55. The word 'body' is presently defined in section 9 of the Corporations Law to include a society or association. The scope of this definition is to be clarified by providing that 'body' will mean a body corporate or an unincorporated association and include, for example, a society or association (see paragraph 4(h) of the Bill).

56. A key example of the use of the word 'body' is the definition of 'disclosing entity'. If securities in relation to a body are enhanced disclosure securities ('ED securities') then the body will be a disclosing entity.

57. Consequential amendments to the existing definitions which use the term 'body corporate' rather than 'body' will also be made (see paragraph 4(a) of the Bill, amending the definition of 'consolidated accounts', paragraph 4(b) of the Bill, amending the definition of 'debenture', paragraph 4(c) of the Bill, amending the definition of 'financial statements' and paragraph 4(g) of the Bill, amending the definition of 'share').

'deadline'

58. This expression will have the meaning set out in proposed section 58C of Corporations Law.

'disclosing entity'

59. If securities in relation to a body or an undertaking are enhanced disclosure securities ('ED securities') then the body or undertaking will be a disclosing entity (see paragraph 4(i) of the Bill, definition of 'disclosing entity'). The term 'body' has been separately defined in paragraph 4(h) of the Bill. The term 'undertaking' has been separately defined in paragraph 4(i) of the Bill, in relation to a prescribed interest.

60. Proposed sections 22A, 22B, 22C, 22D, 22E, 22F and 22G of the Corporations Law set out the circumstances in which securities of a body, or securities which are made available in relation to an undertaking in the case of prescribed interests, will be taken to be ED securities. If any of these

circumstances are satisfied, the body or undertaking will be a disclosing entity for the purposes of the Bill.

61. Under proposed section 22H, there will be a capacity to declare specified securities of bodies not to be ED securities with the result that those bodies will not be disclosing entities in respect of those securities.

'disclosure provisions'

62. The term 'disclosure provisions', in relation to a disclosing entity, will be defined in paragraph 4(i) of the Bill to mean the following provisions, so far as they are applicable to the disclosing entity:

- the provisions of Part 3.6 of the Corporations Law dealing with accounts;
- the provisions of Part 3.7 of the Law dealing with audit;
- proposed subsection 1017B(4) dealing with conditions imposed by the ASC on a disclosing entity to ensure that any material adverse effect which an exemption from disclosure requirements may have on the level of information available to the market about the entity will be adequately redressed;
- the provisions of proposed new Part 7.12A of the Corporations Law (inserted by Part 2 of the Bill) dealing with continuous disclosure obligations; and
- the supplementary prospectus provisions under section 1024 of the Corporations Law.

'ED securities'

63. The term 'ED securities' (see paragraph 4(i) of the Bill) is short for 'enhanced disclosure securities' and will have the meaning given by proposed Division 3A of Part 1.2 of the Corporations Law (see proposed definition of 'disclosing entity' in paragraph 4(i) of the Bill and proposed sections 22A, 22B, 22C, 22D, 22E, 22F and 22G of the Corporations Law). If securities are ED securities, the body or undertaking in relation to which they are issued or made available will be a disclosing entity for the purposes of the Bill.

'half-year'

64. This expression will be defined to mean the first 6 months of the financial year of all companies, non-companies and undertakings that are disclosing entities at the end of that period (see paragraph 4(i) of the Bill).

'life period'

65. This definition (see paragraph 4(i) of the Bill) relates to amendments which are proposed to be made to section 1040 of the Corporations Law and consequential amendments which are proposed to be made to subsection 1021(5) and to sections 1029, 1029A and 1041 of the Law.

66. It is proposed that the life of a prospectus, which is presently restricted to 6 months by section 1040, will be extended to 12 months for a prospectus relating to securities of a disclosing entity which:

- has been a disclosing entity for 12 months; or
- has on two occasions in the previous 15 months lodged primary prospectuses with the ASC under section 1018 of the Corporations Law.

67. If any of the circumstances set out in the preceding paragraph are satisfied, it is proposed that the life of a prospectus will be 12 months. Otherwise, it is proposed that the life of a prospectus will remain at 6 months.

'lodge'

68. The effect of the definition of the word 'lodge' in section 9 of the Corporations Law is to permit annual returns and other documents to be lodged at any ASC office, including at an office of a legal or accounting firm which has been appointed to act as a Local ASC Representative in a regional community.

69. However, to enable the ASC to make information lodged by disclosing entities available on its DOCIMAGE database as soon as possible, the information needs to be lodged direct with the ASC and not via a Local ASC Representative. Accordingly, it is proposed to amend the definition of 'lodge' in section 9 to make provision for lodgment at offices specified by the Minister in a notice published in the Gazette at which offices annual and half yearly financial statements, continuous disclosure notices, reports by borrowing corporations, supplementary prospectuses and returns relating to prescribed interests must be lodged (see paragraph 4(h) of the Bill, definition of 'lodge'). It is envisaged that the offices specified would be ASC Business Centres, but no limits will be placed on the categories of ASC offices that may be specified in such a notice.

'qualifying disclosing entity'

70. Proposed section 1017B of the Corporations Law defines what is meant by a 'qualifying disclosing entity'. A disclosing entity (see paragraph 4(i) of the Bill) which satisfies the terms of this definition will be entitled to certain relief from the primary and secondary prospectus provisions (see proposed sections 1022AA and 1022AB of the Law).

71. A disclosing entity will be a qualifying disclosing entity under proposed section 1017B if at a particular time before the issue of a prospectus:

- it was not exempted by regulation or ASC order from any of the obligations imposed on disclosing entities; or
- it was not afforded any relief from requirements as to accounts and reports under section 313 or by reason of section 314 of the Law; or
- it was not afforded any relief, as an Australian bank or life insurance corporation, from requirements as to accounts and reports under sections 409 and 409A of the Law; or
- it was so exempted or afforded such relief, but the ASC is satisfied that the exemption or relief did not have a material adverse effect on the level of information available to the market about the entity; or
- it was so exempted or afforded such relief, but the ASC is satisfied that any material adverse effect which the exemption or relief has will be adequately redressed if conditions specified by the ASC are complied with; or
- in relation to a past period, it was so exempted or was afforded such relief, but the ASC is satisfied that the exemption or relief did not have a material adverse effect on the level of information available to the market about the disclosing entity, or about disclosing entities in a class.

'quotation'

72. It is proposed to amend the definition of 'quotation' in section 9 of the Corporations Law to extend its application to exempt stock markets (see paragraph 4(f) of the Bill).

73. An example of the use of the word 'quotation' is in proposed clause 22B.

`undertaking'

74. The word *`undertaking'* is to be defined, in relation to a prescribed interest, to mean the undertaking, scheme, enterprise, contract or arrangement to which the prescribed interest relates (see paragraph 4(i) of the Bill).

75. A key example of the use of the word *`undertaking'* is the definition of *`disclosing entity'*. If prescribed interests or units of prescribed interests are enhanced disclosure securities (*'ED securities'*) in relation to an undertaking then the undertaking will be a disclosing entity.

unless:

76. Consequential amendments are proposed to the definition of *`profit and loss account'* (see paragraphs 4(d) and (e) of the Bill).

Clause 5 - (Insertion of new Division

Proposed Division 3A of Part 1.2 - ED securities

77. Proposed Division 3A of Part 1.2 of the Corporations Law, comprising sections 22A to 22H, deals with various categories of ED securities which, if issued or made available by a body or undertaking, will result in that body or undertaking being a disclosing entity for the purposes of the Bill.

Proposed section 22A - Effect of Division

78. Securities of a body may be ED securities because of one or more provisions of proposed Division 3A. For example, prescribed interests may be caught by both proposed section 22B and proposed section 22C.

79. For the purposes of Division 3A (except for proposed section 22E which results in securities other than debentures of a borrowing corporations ceasing to be ED securities in certain circumstances when the number of holders of the securities falls below 50) units of shares, debentures or prescribed interests will be taken to be included in a class of shares, debentures or prescribed interests as the case may be.

Proposed section 22B - Securities quoted on a stock market

80. Securities in a class of securities of a body will be ED securities, and the body or undertaking in relation to which they are issued or made available will be a disclosing entity, if securities in that class are listed for quotation, or are quoted or traded, on:

- a stock market of a stock exchange; or
- a stock market of an approved securities organisation prescribed by the Corporations Regulations; or
- an exempt stock market that is prescribed by the Corporations Regulations;

unless:

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

81. Securities will not be taken to cease to be quoted on a stock market or exempt stock market only because:

- in the case of a stock market of a prescribed approved securities organisation - trading in those securities is prohibited by a notice given to that organisation by the ASC under subsection 775(2) of the Corporations Law; or
- in any case - the securities are temporarily suspended from quotation.

82. If, while quotation of securities of a body on a stock market of a securities exchange is suspended, the body ceases to be included in an official list of the securities exchange, the securities will be taken, for the purposes of proposed section 22B of the Law, to have stopped being listed for quotation on a stock market of the exchange when the body ceased to be so included (proposed subsection 22B(5)). Proposed subsection 22B(5) will not limit the circumstances in which securities may be taken to stop being listed for quotation (proposed subsection 22B(6)).

Proposed section 22C - Securities to which a lodged or deemed prospectus relates

83. Under proposed subsection 22C(1) of the Corporations Law, shares in a class of shares in a body, or prescribed interests in a class of prescribed interests of an undertaking, will be ED securities, and the body or undertaking in relation to which they are issued or made available will be a disclosing entity, if a primary prospectus in relation to shares or prescribed interests in that class has been lodged, or was required to be lodged, with the ASC under Part 7.12 of the Corporations Law or with the former National Companies and Securities Commission under the previous Companies Codes.

84. Under section 1030 of the Corporations Law, which is based on section 104 of the previous Companies Codes, where a corporation allots or issues securities to a person for the purpose of all or any of them being offered for sale, any document by which the offer for sale is made is deemed to be a primary prospectus issued by the corporation. Under proposed subsection 22C(2), securities to which section 1030 applies, or the former section 104 applied, will be ED securities and the corporation which allots or issues them will be a disclosing entity.

85. Debentures to which a lodged or deemed prospectus relates are dealt with in proposed section 22F.

86. Proposed section 22C will be subject to proposed section 22E. The effect of proposed section 22E is that a body or undertaking will cease to be a disclosing entity if:

- at the end of an offer period under a prospectus or offer document under a takeover, compromise or scheme of arrangement, the number of shareholders or prescribed interest holders is less than 50; or
- at the end of that offer period, the number of shareholders or prescribed interest holders is 50 or more and later falls below 50.

87. If either of the above situations results in a body or undertaking ceasing to be a disclosing entity, it will not become a disclosing entity again merely because at some later time there were 50 or more shareholders or prescribed interest holders. However, if such a body or undertaking subsequently meets any of the criteria of the sections in proposed Division 3A, for example by issuing a prospectus, it will again be treated as a disclosing entity.

Proposed section 22D - Securities offered as consideration for an acquisition under a takeover scheme or Part 5.1 compromise or arrangement

88. Securities, other than debentures (which are covered by proposed section 22F of the Corporations Law) in a class of securities of a body will be ED securities, and the body or undertaking which issues them or makes them available will be a disclosing entity, if securities in that class have

been offered as consideration for the acquisition of shares under a takeover scheme as defined in section 603 of the Corporations Law or under previous corresponding takeover legislation.

89. In addition, securities in a class of securities of a body will be ED securities, and the body or undertaking in relation to which they are issued or made available will be a disclosing entity, if:

- securities in that class have been offered as consideration for the acquisition of securities of another body under a compromise or arrangement under Part 5.1 of the Corporations Law or under previous corresponding companies legislation e.g. because of an amalgamation or reconstruction of two or more bodies; and
- the body in respect of which the securities have been offered or the body whose securities are being acquired was a disclosing entity immediately prior to the offer.

90. Proposed section 22D of the Corporations Law is subject, however, to proposed section 22E. The effect of proposed section 22E is that a body or undertaking will cease to be a disclosing entity if:

- at the end of an offer period under a prospectus or offer document under a takeover, compromise or scheme of arrangement, the number of shareholders or prescribed interest holders is less than 50; or
- at the end of that offer period, the number of shareholders or prescribed interest holders is 50 or more and later falls below 50.

91. If either of the above situations results in a body or undertaking ceasing to be a disclosing entity, it will not become a disclosing entity again merely because at some later time there were 50 or more shareholders or prescribed interest holders. However, if such a body or undertaking subsequently meets any of the criteria of the sections in proposed Division 3A, for example by issuing a prospectus, it will again be treated as a disclosing entity.

Proposed section 22E - Securities ceasing to be ED securities when number of holders falls below 50

92. Proposed section 22E of the Corporations Law applies for the purposes of proposed sections 22C or 22D which deal with:

- securities (other than debentures) to which a prospectus relates; and
- securities (other than debentures) offered as consideration for an acquisition under a takeover scheme; and
- securities offered as consideration for an acquisition under a Part 5.1 compromise or scheme of arrangement.

93. The effect of proposed section 22E is that a body or undertaking will cease to be a disclosing entity for the purposes of proposed sections 22C or 22D if:

- at the end of an offer period (defined in proposed subsection 22E(5)) under a prospectus or offer document under a takeover, compromise or scheme of arrangement, the number of shareholders or prescribed interest holders is less than 50; or
- at the end of that offer period, the number of shareholders or prescribed interest holders is 50 or more and later falls below 50.

94. If either of the above situations results in a body or undertaking ceasing to be a disclosing entity, it will not become a disclosing entity again merely because at some later time there were 50 or more shareholders or prescribed interest holders. However, if such a body or undertaking subsequently meets any of the criteria of the sections in proposed Division 3A, for example by issuing a prospectus, it will again be treated as a disclosing entity.

95. A person who has subscribed for or bought securities and has not yet been issued with the securities or registered as the holder of them will be taken to hold the securities for the purposes of proposed section 22E until such time as the person sells or transfers them or ceases to have a legal or equitable interest in them (proposed subsections 22E(6) and (7)).

96. For the purposes of proposed section 22E, joint holders of securities will count as one person.

Proposed section 22F - Debentures in relation to which there is or should be a trustee

97. Debentures of a borrowing corporation will be ED securities and the borrowing corporation will be a disclosing entity if there is a trustee for debenture holders (as is required by section 1052 of the Corporations Law) or section 1052 requires the appointment of such a trustee (if, for example, the previous trustee has retired or been removed but a new trustee has not yet been appointed).

Proposed section 22G - Prescribed interests declared by the regulations

98. Prescribed interests will be ED securities, and the undertaking to which the prescribed interests relates will be a disclosing entity, if there is an approved deed governing the undertaking and the prescribed interests are declared by the Corporations Regulations to be ED securities. This provision will allow the flexibility to prescribe by regulation other prescribed interests in relation to an undertaking which may not be covered by any other provision in proposed Division 3A.

Proposed section 22H - Regulations may declare securities not to be ED securities

99. Under proposed section 22H, there will be a capacity for certain securities of a body to be declared not to be ED securities with the result that the body will not be a disclosing entity with respect to the declared securities. Any regulations which are made will have effect accordingly, despite anything else in proposed Division 3A.

Clause 6 - (Insertion of new section)

Proposed section 53AAA - Audited or reviewed in accordance with this Law

100. Clause 6 will insert a new provision, proposed section 53AAA, which will provide that accounts or financial statements are taken to be audited or reviewed when the requirements of Division 2 of Part 3.7 have been complied with.

Clause 7 - Classes of shares or prescribed interests

101. Section 57 of the Corporations Law provides that the shares in a body corporate, if not divided into 2 or more classes, constitute a class.

102. It is proposed to amend section 57 to provide that if the prescribed interests to which a deed relates are not divided into 2 or more classes, they constitute a class.

Clause .8 - (Insertion of new section)

Proposed section 58C - Deadline

103. Clause 8 will insert a new provision, proposed section 58C, which explains the meaning of 'deadline' in respect of an 'accounting period' of an 'accounting enterprise'. For all companies that are not disclosing entities, 'deadline' will have the same meaning as the existing definition (which is contained in section 9 of the Corporations Law). For disclosing entities, the expression will mean the time when financial statements have to be lodged with the ASC.

104. Where a company is not a disclosing entity, the expression 'deadline' will indicate the length of time prior to the date of a company's annual general meeting (AGM) that the company's financial

statements and directors' report must be completed. The periods of time, which will be the same as under the existing definition, are:

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

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

Clause 9 – (Insertion of new section)

Proposed section 80AA - Lodge - specification of offices for the purposes of paragraph (b) of the definition

106. Paragraph (b) of the proposed definition of 'lodge' (see paragraph 4(h) of the Bill), in conjunction with proposed section 80AA of the Corporations Law, will allow the Minister, in a notice published in the Gazette, to specify particular ASC offices at which annual and half yearly financial statements, continuous disclosure notices, reports by borrowing corporations, supplementary prospectuses and returns relating to prescribed interests must be lodged.

Clause 10 - Officers. and other persons, in default

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

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

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

Clause 11 -Securities

109. The proposed amendments to the definition of 'securities' in section 92 of the Corporations Law which are effected by this clause are consequential upon the amendment to the definition of 'body' proposed by paragraph 4(h) of the Bill.

Clause 12 - Application of accounting standards: general

110. This clause will amend section 284 of the Corporations Law by omitting the existing subsections (1) and (3) and inserting a new subsection (3).

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

Clause 13 - Application of accounting: accounting periods

112. Clause 13 will amend section 285 of the Corporations Law by changing:

- 'financial year of a body corporate' to 'accounting period of an accounting enterprise';
- 'later financial years of the body corporate' to 'later accounting periods of the accounting enterprise';
- 'a company's directors' to 'an accounting enterprise'; and
- 'financial year of the company shall apply to that financial year' to 'accounting period of the accounting enterprise is to apply to that accounting period'.

113. In addition, clause 13 will insert a new provision, proposed subsection 285(3A), which indicates who may make an election (about the use of certain accounting standards) under subsection 285(3) - the directors of a company or noncompany and the trustee of an undertaking.

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

Clause 14 - (Insertion of new section)

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

115. Clause 14 will insert a new provision, proposed section 285A, which will make it clear that, notwithstanding that the proposed definition of 'accounting enterprise' will extend to entities that are neither companies nor disclosing entities, the AASB only has power under the Corporations Law to make standards for the purposes of Parts 3.6 and 3.7. That is, the power does not apply in respect of entities not subject to the requirements of Parts 3.6 and 3.7 of the Law.

Clause 15 - Accounting records

116. Clause 15 will amend subparagraph 289(1)(b)(ii) by inserting the words 'or reviewed' after 'audited'. The effect of the amendment will be to require companies to keep such accounting records as will enable the preparation of true and fair accounts that can be either audited or reviewed.

Clause 16 - Profit and loss account

117. This clause will amend section 292 of the Corporations Law to make it subject to proposed section 293A. The way in which proposed section 293A will affect this section is explained at clause 18.

Clause 17 - Balance sheet

118. This clause will amend section 293 of the Corporations Law to make it subject to proposed section 293A. The way in which proposed section 293A will affect this section is explained at clause 18.

Clause 18 - (Insertion of new section)

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

119. Clause 18 will insert a new provision, proposed section 293A, which sets out the circumstances in which a company that is a disclosing entity does not have to comply with the requirements of sections 292 and 293 of the Corporations Law.

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

121. Subsections 294(2) to (4) of the Corporations Law require the directors of a company to make appropriate inquiries about bad and doubtful debts, the value of current assets and the value of non-current assets before preparing a profit and loss account and balance sheet in accordance with sections 292 and 293 respectively. As a disclosing entity that is a chief entity will not be required to prepare separate half-year financial statements of its own (proposed subsection 293A(1)) it will be required by proposed subsection 293A(2) to apply the requirements of subsections 294(2) to (4) to the consolidated profit and loss account and consolidated balance sheet prepared under sections 295A and 295B respectively.

Clause 19 - Audit of financial statements

122. This clause will amend section 296 of the Corporations Law by changing 'as required by this Part' to 'or reviewed in accordance with this Law'. The effect of this amendment will be to require the directors of a company that is a disclosing entity to have the company's half-year financial statements audited in accordance with Part 3.7 of the Corporations Law.

123. In addition, clause 19 will amend subsection 296(2) to require a review report by an auditor to be attached to the half-year financial statements to which the review relates.

Clause 20 - Inclusion of comparative amounts for items required by accounting standards

124. Clause 20 will amend section 300 of the Corporations Law by changing 'current year amount' and 'year' to 'current period amount' and 'period' respectively. It will also substitute a new provision for the existing paragraph 300(1)(b).

125. These amendments will require comparative amounts to be provided in financial statements as follows:

- for an accounting period that is a financial year - the preceding financial year; and
- for an accounting period that is a half-year - the equivalent period of the preceding financial year.

Clause 21 - Statement to be attached to accounts

126. The clause will amend paragraph 301(9)(c) by inserting 'or reviewed' after 'audited'. The effect of this amendment will be to alter the requirement for the section 301 statement by the directors of an exempt proprietary company (to indicate whether the company kept accounting records that

could be audited) to take account of the new concept of statements being reviewed in accordance with the Corporations Law.

Clause 22 - Report on company that is not a chief entity

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

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

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

129. It should be noted that the amendments will not affect the requirements for a directors' report in respect of a financial year. Those requirements (and the exemptions given to certain companies) will be unchanged by virtue of proposed subsection (3C) which provides that, in addition to the requirements in subsections (3), (3A) and (3B) (which apply to half-year reports) those in subsections (4), (5), (6), (7), (10) and (11) apply to annual reports.

Clause 23 - Report on company that is a chief entity

130. This clause will make a series of amendments to section 305 of the Corporations Law, which sets out the matters to be dealt with in the directors' report of a company that is a chief entity. The proposed amendments will be along similar lines to those proposed for section 304.

131. In addition, clause 23 will add a proposed subsection 305(12) which provides that, where a company did not control a particular entity throughout an accounting period, the report will not have to deal with the entity in respect of that part of the period when it was not controlled.

Clause 24 - Report may omit prejudicial information

132. This clause will amend section 306 of the Corporations Law by changing the test under which information required to be included in a directors' report under subsections 304(11) or 305(11) may be omitted. The existing test, which permits information to be omitted if, in the directors' opinion, it would prejudice the company's interests in unreasonable

133. The amendment will require directors to give more careful consideration to whether they can omit information from the directors' report. It will bring the test in section 306 substantially into line with proposed section 1084C, which enables information to be withheld under the continuous disclosure system where disclosure would be likely to result in unreasonable prejudice to the disclosing entity.

Clause 25 - Additional requirements for financial year reports - public companies

134. Clause 25 will amend section 307 to provide that the information about directors only has to be included in the directors' report where the report is in respect of an accounting period that is a financial year.

Clause 26 - Additional requirements for financial year reports - Options

135. Clause 26 will amend subsections 308(1) and (2) to provide that the information about options only has to be included in the directors' report where the report is in respect of an accounting period that is a financial year.

Clause 27 - Additional requirements for financial year reports - benefits under contracts with directors

136. Clause 27 will amend section 309 to provide that the information about directors receiving benefits under contracts only has to be included in the directors' report where the report is in respect of an accounting period that is a financial year.

Clause 28 - Commission may require certain companies that are not disclosing entities to lodge accounts etc.

137. Clause 28 will amend the definition of 'financial year' in subsection 317(1) by changing 'audited under this Part' to 'audited or reviewed in accordance with this Law'. The amendment will not affect the operation of the section, which will continue to apply only to exempt proprietary companies that have not appointed an auditor.

Clause 29 - (Insertion of new section)

Proposed section 317A - Lodgment of accounts etc by companies that are disclosing entities

138. Clause 29 will insert a new provision, proposed section 317A, containing the requirements for the lodgment of accounts and reports by companies that are disclosing entities.

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

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

Clause 30 - (Insertion of New Divisions 10 and 11)

141. Clause 30 will insert two new Divisions in Part 3.6 of the Corporations Law. Proposed Division 10 will set out the requirements for disclosing entities that are neither companies nor undertakings ('non-companies') while proposed Division 11 will set out the requirements for prescribed interests that are ED securities.

Proposed Division 10 - Accounts of certain non-companies

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

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

143. The proposed Division will not provide any automatic relief from the provisions referred to in proposed section 323A of the Corporations Law for any class of disclosing entity (except to the extent that the provisions of Part 4.5 apply). It is believed that the number of bodies falling into this

category will be relatively small. Section 313 will enable them to seek relief from the ASC, in respect of the accounts and audit provisions of Parts 3.6 and 3.7. In addition, there is scope under proposed section 22H and proposed Division 5 of new Part 7.12A of the Corporations Law (inserted by Part 2 of the Bill) for complete or partial exemption.

Proposed section 323A - Divisions 3 to 7 of Part 3.6 and Part 3.7 apply to disclosing entities that are not companies or undertakings

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

- Part 3.6 - Accounts
- Division 3 - Financial years of a company and the entities it controls;
- Division 4 - Accounts of a company;
- Division 4A - Consolidated accounts of a company and the entities it controls;
- Division 4B - Requirements for financial statements;
- Division 5 - Directors' statements
- Division 6 - Directors' reports
- Division 7 - Financial statements and directors' reports
- Part 3.7 - Audit
- the definitions of 'applicable accounting period', 'consolidated accounts' and 'financial statements' contained in section 9;
- Corporations Regulations provisions made for matters dealt with in Divisions 3-7 of Part 3.6 and in Part 3.7 (e.g. Schedule 5).

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

Proposed Division 11 - Accounts in relation to prescribed interests that are ED securities

146. This proposed Division will contain the requirements for the preparation of accounts and reports and the audit of the accounts by prescribed interests that are ED securities. The proposed provisions are based on the existing requirements for companies, but have been drafted so that they do not conflict with the covenants currently required to be included in trust deeds.

Proposed section 323B - Introduction

147. Proposed section 323B will provide that Division 11 of Part 3.6 imposes obligations on the trustee or representative in relation to a deed relating to prescribed interests and the management company for that deed, in relation to an accounting period of the undertaking, if the deed is or was an approved deed for the purposes of Division 5 of Part 7.12 of the Corporations Law.

148. This Division maintains consistency with the present allocation of responsibilities of trustees and management companies in relation to prescribed interests. It is noted that these responsibilities are presently under review by the Australian Law Reform Commission and the CASAC.

Proposed section 323C - Profit and loss account

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

Proposed section 323D - Balance-sheet

150. Proposed section 323D will require the preparation of a balance sheet for the undertaking before the deadline after an accounting period. This provision, which is based on section 293 of the Corporations Law, is consistent with the covenant to be included in a trust deed in accordance with subparagraph 1069(1)(f)(ii) of the Law.

Proposed section 323E - Accounts to comply with regulations

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

152. A decision on what, if any, requirements should be prescribed has still to be made. If requirements are prescribed, they will not go beyond the requirements of the ASX in respect of trust deeds for unit trusts.

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

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

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

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

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

Proposed section 323H - Audit or review of accounts

156. Under proposed section 323H, the accounts for the undertaking will have to be audited by a registered company auditor. The auditor's report will be required to state whether the accounts give a true and fair view of the matters with which they have to deal and whether they are drawn up in accordance with the Corporations Law and applicable accounting standards (proposed subsection 323H(1)). The requirements in proposed subsection 323H(1) are, in general terms, based on the requirements of subsection 331B(1) of the Corporations Law and are in keeping with the covenant to be included in a trust deed in accordance with subparagraph 1069(1)(e)(iv) of the Law.

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

Corporations Law and applicable accounting standards. Where any matters have come to the auditor's attention, the auditor is required to give details of the matters.

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

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

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

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

Proposed section 323K - Lodging accounts etc.

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

161. In the case of a financial year, the documents referred to in proposed subsection 323K(1) must be lodged with the management company return that has to be lodged in accordance with section 1071 of the Corporations Law (proposed subsection 323K(2)). Where the accounting period is a half-year, the documents must be lodged no later than 75 days after the end of the half-year. (This is the same period that applies in respect of other disclosing entities.)

Proposed section 323L - Regulations may make additional provision based on Divisions 2 to 8

162. Proposed section 323L provides that the regulations may make provision for matters of a kind dealt with in Divisions 2 to 8 of Part 3.6. The proposed section also provides that the regulations may make provision for the lodging of documents and the sending of documents to holders of prescribed interests.

Clause 31- Auditor must report

163. This clause will amend section 331A of the Corporations Law to reflect the changes in terminology used elsewhere in the amendments and to take account of the requirement for companies that are disclosing entities to have half-year financial statements.

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

- subsection (1) will be amended to omit the requirement that the auditor's report is to be addressed to the company's members (paragraph 31(a));
- a new provision, proposed subsection 331A(1A), will provide that where an accounting period is a financial year, the auditor's report is a report to the company's members (paragraph 31(c)); and
- a new provision, proposed subsection 331A(3), will provide that where the company is a disclosing entity the auditor must give his report to the directors of the company in time for them to comply with the lodgment requirements in proposed section 317A (paragraph 31(e)).

165. The omission of the express requirement that the auditor's report is to be addressed to a company's members is intended to reflect the fact that the auditor's report on half-year financial statements will not have to be circulated to the company's members. By providing that the auditor's

report on full-year financial statements is a report to members, proposed subsection 331A(IA) will maintain the present position whereby the auditor's report on full-year financial statements is made to members.

Clause 32 - (Insertion of new section)

Proposed section 331 AA - Requirements for auditor's report

166. Clause 32 will insert a new provision, proposed section 331AA, dealing with the audit requirements for financial statements.

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

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

169. Proposed subsection 331AA(3) will provide that the half-year financial statements of a borrowing corporation must be the subject of an audit unless the trustee has given his consent to the auditor carrying out a review. Where the trustee has given such consent, a copy of that consent must be lodged with the half-year financial statements (proposed subsection 331 AA(4)).

Clause 33 - Auditor may obtain information and attend company meetings, and must report certain breaches to Commission

170. The clause will amend subsection 332(9), which requires the auditor of a company to report to the ASC any default by the company or its directors in complying with sections 245 (holding of AGM) or 316 (laying of documents before AGM). Consistent with the existing requirement of reporting matters detected during an audit, the auditor will, in future, have to report any matters detected during a review of financial statements.

Clause 34 - (Insertion of new section)

Proposed section 323A - Application of provisions by section 323A - certain disclosing entities that are prescribed corporations

171. This clause will insert a new provision, proposed section 408C, so that proposed section 323A will apply to prescribed corporations which are also disclosing entities.

Clause 35 - Accounts. and directors reports, of a prescribed corporation

172. This clause will amend section 409 of the Corporations Law to reflect the amendments to Chapter 3 of the Law. The Chapter 3 amendments will expand the application of financial reporting requirements to half-yearly as well as annual accounts.

173. The clause also proposes to include new provisions (proposed subsections 409(3A) and (SA)) which will extend the exceptions in respect of prescribed corporations' annual accounts to any half-yearly accounts which the banking and life insurance legislation may require.

Clause 36 - Consolidated accounts where the chief entity or a controlled entity is a prescribed corporation

174. Clause 36 will amend the terminology of section 409A in line with other proposed changes. The clause will extend the present provisions of section 409A to provide the same exceptions that currently apply in respect of prescribed corporations' annual accounts to any half-yearly accounts which the banking and life insurance legislation may require.

Clause 37 - Qualified Privilege

175. Clause 37 inserts additional definitions in subsection 37(1) of the Corporations Law and adds six new subsections to section 779 to extend the situations under the Corporations Law in which securities exchanges have the protection of qualified privilege. Securities exchanges have qualified privilege expressly conferred upon them under the Corporations Law only in limited circumstances. In particular, qualified privilege is provided in respect of disciplinary proceedings (section 779), publication of notices for claims against a fidelity fund (section 910), publication of a statement that a contract of insurance or indemnity applies in relation to a member of a securities exchange (section 917) and publication of documents prepared by an auditor (section 1289).

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

177. It seems likely that securities exchanges would have the protection of qualified privilege under the common law in relation to publication of material pursuant to any of their functions. However, the proposed amendments will put the position beyond doubt. The issue may be of particular importance in the context of the new statutory continuous disclosure regime in that the continuous disclosure provisions to be inserted in proposed Part 7.12A of the Corporations Law may well result in the same, or similar, information being lodged with a securities exchange (in particular the ASX) as is lodged with the ASC. In these circumstances, it will be important for the exchange to be able to make public, in a timely fashion, the same information as will be available through the ASC's DOCIMAGE database.

178. Paragraph 37(a) of the Bill inserts new definitions in subsection 779(1) which are relevant for the purposes of the new subsections to be inserted.

179. In particular, a definition of 'delisting or suspension decision', which is relevant for the purposes of proposed subsection 779(8), will be inserted. It will be defined to mean a decision by a securities exchange whether to delist a listed entity or to suspend or stop quotation of securities.

180. 'Information' will be defined to mean oral or written information.

181. 'Listed entity' will be defined to mean an entity included in an official list of a securities exchange.

182. 'Rules' will be defined to mean the business or listing rules of a securities exchange.

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

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

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

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

187. Proposed subsection 779(9) will make it clear that an officer of a securities exchange has qualified privilege in respect of an act that is done in the course of performing functions or exercising powers as an officer of the exchange and in respect of which the exchange would have qualified privilege under proposed subsections 779(5), (7) or (8) if the exchange had done the act.

188. Proposed subsection 779(10) makes it clear that none of the proposed subsections should be construed as limiting the other.

Clause 38 - Interpretation - Statement in a prospectus

189. Section 994 of the Corporations Law is an interpretative provision dealing with the circumstances in which a statement is taken to be in a prospectus. Paragraph 994(b) of the Law provides that a statement is taken to be in a prospectus if it is incorporated by reference in the prospectus, whether the reference occurs in the prospectus or in any other document. The Corporations Law does not presently deal with the circumstances in which incorporation by reference is permissible. The ASC has, however, recognised (in Policy Statement 6) that it may be appropriate for it, by exercising its discretionary powers under section 1084 of the Law, to allow the incorporation of certain materials by reference into a prospectus, subject to certain conditions (including the provision of a summary of the incorporated document) to ensure that the interests of prospective investors are adequately protected.

190. Proposed section 1024A of the Corporations Law deals with certain circumstances in which incorporation by reference will be permissible. It is proposed to amend section 994 in the light of proposed section 1024A. The effect of proposed subsection 994(2) is that where a document has been lodged with the ASC, the statements included in this document will be taken to be included in the prospectus if a summary of the document is included in the prospectus, if the prospectus includes a statement to the effect that the issuer will provide a copy of the document free of charge on request, and if the details required under section 1021 are stated in the prospectus.

191. The effect of proposed subsection 994(3) is to ensure that proposed section 1024A will not limit the circumstances in which a statement may be taken to be incorporated by reference in a prospectus.

Clause 39 - (Insertion of proposed section 1017B)

Proposed section 1017B - Qualifying disclosing entity

192. Proposed section 1017B of the Corporations Law defines what is meant by a 'qualifying disclosing entity'. A disclosing entity which satisfies the terms of this definition will be entitled to

certain relief from the primary and secondary prospectus provisions (see proposed sections 1022AA and 1022AB of the Law).

193. A disclosing entity will be a qualifying disclosing entity at a particular time before the issue of a prospectus if:

- it was not exempted by regulation or ASC order from any of the enhanced disclosure obligations imposed on it as a disclosing entity; or
- it was not afforded any relief from requirements as to accounts, audit and directors' reports under section 313 of the Corporations Law or by reason of section 314 of the Law; or
- it was not afforded any relief, as an Australian bank or life insurance corporation, from requirements as to accounts and reports under sections 409 and 409A of the Law; or
- it was so exempted or afforded such relief, but the ASC is satisfied that the exemption or relief did not have a material adverse effect on the level of information available to the market about the entity or about disclosing entities in a class; or
- it was so exempted or afforded such relief, but the ASC is satisfied that any material adverse effect which the exemption or relief has will be adequately redressed if conditions specified by the ASC are complied with - failure to comply with these conditions will attract a maximum penalty of \$20,000, or 5 years' imprisonment, or both, in the case of a natural person and a maximum penalty of \$100,000 in the case of a body corporate (see section 1312 of the Corporations Law and paragraph 54(a) of the Bill, amending Schedule 3 of the Corporations Law); or
- in relation to a past period, it was so exempted or was afforded such relief, but the ASC is satisfied that the exemption or relief did not have a material adverse effect on the level of information available to the market about the disclosing entity, or about disclosing entities in a class.

Clause 40 - Specific provisions applicable to all prospectuses

194. Subsection 1021(5) of the Corporations Law provides that a prospectus must contain a statement that no securities will be allotted or issued, or sold, on the basis of the prospectus later than 6 months after the date of issue of the prospectus.

195. It is proposed that the life of a prospectus, which is presently restricted to 6 months by section 1040, will be extended to 12 months for a prospectus relating to securities of a disclosing entity which:

- has been a disclosing entity for 12 months; or
- has on two occasions in the previous 15 months lodged primary prospectuses with the ASC under section 1018 of the Law.

196. The proposed amendment to subsection 1021(5) is consequential upon the proposed amendment to section 1040. If any of the circumstances set out in the preceding paragraph are satisfied, it is proposed that the period for the purposes of subsection 1021(5) will be 12 months. Otherwise, it is proposed that the period will remain at 6 months. (See the proposed definition of the term 'life period' in paragraph 4(i) of the Bill.)

Clause 41 - Central provisions applicable to all prospectuses other than prospectuses to which section 1022AA or 1022AB applies

197. Section 1022 of the Corporations Law sets out general content requirements applicable to all prospectuses. It is proposed that a prospectus relating to securities of a qualifying disclosing entity (defined in proposed section 101713) will not have to comply with the requirements of section 1022.

198. In particular, it is proposed that:

- with respect to primary offers of quoted securities by a qualifying disclosing entity (principally rights issues and offers under employee share plans) the requirement to lodge a prospectus will be satisfied by lodgment of a more limited prospectus containing transaction specific information, rather than information about the entity itself which should already be known to the market through the enhanced disclosure requirements - see proposed section 1022AA;
- unless a seller, together with associates, proposes to sell more than 20% of the voting shares of a qualifying disclosing entity in the 12 months after the issue of the prospectus, secondary offers of securities of a qualifying disclosing entity will satisfy the secondary prospectus requirements if the seller gives the offeree a document setting out the terms and conditions of the offer, stating that the entity which issued the securities is subject to statutory periodic and continuous disclosure obligations and that documents disclosed by it may be inspected at, or obtained from, an ASC office - see proposed section 1022AB.

Clause 42 - (Insertion of proposed sections 1022AA and 1022AB)

Proposed section 1022AA - General provisions applicable to certain primary prospectuses for securities of disclosing entities

199. In general terms, the relief intended to be provided by proposed section 1022AA of the Corporations Law is to have the effect of limiting the content requirement for prospectuses relating to primary offers of quoted securities of a qualifying disclosing entity to transaction specific information. Information about the entity itself should already be known to the market through the enhanced disclosure requirements. The rationale for this approach is that there is an externally determined market price for the securities and the issuing entity is subject to ongoing scrutiny by market analysts and professional investors. The approach is along the lines of a recommendation made in the March 1992 report of the Prospectus Law Reform SubCommittee of CASAC, although it is cast in terms based on the existing prospectus criteria.

200. The requirement to lodge a full prospectus under subsection 1018(1) of the Law is to be replaced with a requirement to lodge a more limited prospectus in relation to primary issues or offers of, or invitations to subscribe for, securities of an entity which was a qualifying disclosing entity at all times during the 12 month period before the issue of the prospectus provided that:

- the securities have, during that period, been listed for quotation, or quoted or traded on a stock market of a stock exchange, a stock market of a prescribed approved securities organisation or a prescribed exempt stock market; and
- at the time of issue of the prospectus, no ASC notice is in force specifying a disclosing entity as one which has not complied with some or all of the disclosure provisions.

201. The ASC will have the power, under section 1084 of the Corporations Law, to modify these proposed provisions in appropriate circumstances.

202. By reason of proposed section 22B of the Law, a temporary suspension of quotation of securities will be disregarded for the purposes of determining whether the securities have been quoted during the entire 12 month period before the issue of the prospectus. In addition, any ASC prohibition of trading in securities quoted on a prescribed approved securities organisation under subsection 775(2) of the Law will be disregarded.

203. The general prospectus contents rule in section 1022 of the Corporations Law is not to apply to proposed section 1022AA prospectuses. Instead, it is to include, in addition to the matters required by section 1021 of the Law:

- such information as investors and their professional advisers would reasonably require and reasonably expect to find in the document for the purpose of making an informed assessment of:

- the offer or invitation contained in the prospectus; and
- the effect of that offer or invitation on the disclosing entity; and
- the rights attaching to the securities;
- either:
 - a statement to the effect that, during the preceding 12 months, all information required to be included by the entity in enhanced disclosure documents was so included;
- or:
 - a statement to the effect that, except for certain omitted information, all information required to be included in enhanced disclosure documents was so included, and that sets out the omitted information;

204. The information required to be disclosed in the prospectus is to be that known to the disclosing entity, its directors, and the other persons referred to in subsection 1006(2) of the Corporations Law or such information as would be reasonable for such a person to obtain by making inquiries (proposed subsections 1022AA(3) and (4) of the Corporations Law - based on subsections 1022(2) and (3) of the Law).

205. Unless the most recent audited accounts and any subsequent half year accounts or continuous disclosure notices are in fact included in or with the prospectus, it will be required to include a statement to the effect that those accounts and statements will be provided on request without charge and the issuer of the prospectus must comply with that statement (proposed subsection 1022AA(5) and (6) of the Law).

206. Unlike the continuous disclosure test (see proposed subsection 1084(5) of the Law), there is no provision for 'confidentiality' as an exemption from disclosure contained in section 1022 of the Corporations Law. It is proposed that the current position be preserved when an eligible disclosing entity is fundraising. Accordingly, a disclosing entity will be required to include in any prospectus details of any matter or change the disclosure of which is required under the continuous disclosure provisions, but which has not been disclosed as a result of reliance on the confidentiality provision (proposed subsection 1022AA(7) of the Law).

207. The ASC will have the power to remove the relief proposed by section 1022AA of the Corporations Law in a particular case and require the entity to prepare a full prospectus in accordance with section 1022 of the Law if the ASC is satisfied that the entity has not complied with all its periodic and continuous disclosure obligations during the preceding 12 months.

208. The information requirements referred to in proposed section 1022AA are intended to be minimum disclosure requirements. The provision will not preclude the issuer of the prospectus from including such additional information as the issuer may wish (subject to the prohibitions in Part.7.11 of the Corporations Law).

209. A section 1022AA document will be a 'prospectus' for the purpose of the Part.7.11 and 7.12 of the Corporations Law.

210. For the purposes of proposed section 1022AA, shares will not be in different classes merely because of a temporary difference in the dividend rights attaching to the shares (proposed subsection 1022AA(9)). It is not unusual for shares issued pursuant to a rights issue not to participate in the next dividend payment, but for them otherwise to be treated in the same way as the ordinary shares on issue. If all that was different was the temporary ranking of the shares for dividend purposes, it would not be desirable to preclude such shares from having the benefit of relief from the full prospectus provisions. Generally speaking, securities will be in a different class if there are any significant differences between the rights attaching to the securities. It is not clear from the case law, however, whether a temporary difference in dividend ranking will be enough to constitute different

classes: see *Cumbrian Newspapers Group Ltd v Cumberland & Westmorland Herald Newspaper & Printing Co. Ltd* [1987] Ch 1 at 15, 22 per Scott J; *Clements Marshall Consolidated Ltd v ENT Ltd* (1988) 13 ACLR 90 at 93 per Neasey J and *TNT Australia Pty Ltd v Normandy Resources NL* (1989) 15 ACLR 99.

211. The amendment to be made by proposed subsection 1022AA(9) for the purposes of section 1022A is not intended to affect in any way the meaning of other references in the Corporations Law to a 'class of securities' or a 'class of shares'.

Proposed section 1022AB - General provisions applicable to certain secondary prospectuses for securities of disclosing entities

212. A secondary prospectus is required for secondary offers of securities which are not quoted on the stock market of a stock exchange other than when the offer is an excluded offer. The prospectus must include all the subsection 1022(1) information which is known to the seller and other persons involved in the preparation of the prospectus and such information as would be reasonable for those persons to obtain by making reasonable inquiries (subsection 1022(2) of the Corporations Law).

213. The introduction of the continuous disclosure regime enables a relaxation of the secondary prospectus requirements in relation to secondary offers of securities of disclosing entities because the continuous disclosure requirements effectively shift the burden of disclosure from the seller to the entity which issued the securities.

214. It is proposed that secondary offers of securities of an entity which has been a qualifying disclosing entity for the preceding 12 months will be exempt from the secondary prospectus requirements, provided that the seller gives the offeree a document setting out:

- the terms and conditions of the offer or invitation contained in the prospectus; and
- a statement to the effect that the disclosing entity is subject to the enhanced disclosure provisions and that copies of documents lodged in relation to the entity under those provisions may be obtained from, or inspected at, an office of the ASC.

215. The information requirements referred to in proposed section 1022AB of the Law are intended to be minimum disclosure requirements. The provision will not therefore preclude the issuer of the document from including such additional information as the issuer may wish (subject to the prohibitions in Part 7.11 of the Law).

216. A section 1022AB offer document will be a prospectus for the purposes of the Corporations Law and will need to be lodged with the ASC under section 1018 of the Corporations Law.

217. It is proposed, however, that a seller who is in a position to control a significant block of the voting shares of a body corporate should not be entitled to take advantage of the relief provided by proposed section 1022AB. Accordingly, it is proposed that a seller who, together with any associates, proposes to sell more than 20% of the voting shares of the body during the 12 month period following the issue of the prospectus will be required to prepare a full secondary prospectus in accordance with section 1022 of the Corporations Law. The rationale for this approach is that the magnitude of such a proposed sale warrants the preparation of a full secondary prospectus.

218. Proposed subsection 1022AB(1) ensures that a seller of securities who has reasonable grounds to believe that the entity which issued the securities is a qualifying disclosing entity will not be put in a position of inadvertently breaching various provisions of Parts 7.11 and 7.12 of the Corporations Law (and potentially being subject to civil liability) merely because the entity is subsequently found not to be an eligible disclosing entity.

Clause 43 - Supplementary prospectuses

219. A supplementary prospectus is required under section 1024 of the Corporations Law where there is a significant change affecting any of the matters included in the prospectus or a significant new matter arises the inclusion of which would have been required in the prospectus under Part 7.12 of the Law. For the purposes of this requirement 'significant' means significant for the purposes of making an informed assessment of the matters mentioned in subsection 1022(1) of the Law (subsection 1024(2)).

220. In view of the similarity of the supplementary prospectus test and the continuous disclosure test it is desirable, as far as practicable, to integrate their operation.

221. It is proposed that section 1024 be amended to provide in relation to a proposed section 1022AA prospectus (which may be prepared in respect of primary offers of, quoted securities of a qualifying disclosing entity) that for the purposes of the section 1024 requirement to report significant changes or significant new matters 'significant' means significant for the purpose of making an informed assessment of the offer, the effect of that offer on the entity and the rights attaching to the securities.

222. It is also proposed that section 1024 be amended to provide that where a section 1022AB offer document (which may be used by certain sellers who are selling securities of a qualifying disclosing entity) has been lodged, there is an obligation to lodge a supplementary prospectus containing particulars of any significant change in the terms and conditions of the offer or invitation contained in the section 1022AB document.

223. So far as confidential matters arising after the issue of the prospectus are concerned, the desired result is for there to be an obligation to disclose the matter in a supplementary prospectus where this would be required by section 1024.

224. It is proposed that while a disclosing entity is engaging in fundraising and is subject to the prospectus provisions, the entity should not be subject to the continuous disclosure obligations and should not be entitled to take advantage of the 'confidentiality' exemption (see proposed subsection 1022AA(7)).

Clause 44 - (Insertion of proposed section 1024A)

Proposed section 1024A - Inclusion of documents in prospectuses by reference

225. Scope exists for relaxing the existing prospectus content requirements having regard to the operation of the enhanced disclosure provisions. In addition, the ASC has recognised (in Policy Statement 6) that it may be appropriate for it to provide relief from the prospectus provisions by exercising its discretionary powers under section 1084 of the Corporations Law to allow the incorporation of certain material by reference into a prospectus, subject to certain conditions (including the provision of a summary of the incorporated document) to ensure that the interests of prospective investors are adequately protected.

226. In the absence of an ASC declaration under section 1084 of the Corporations Law, the information required by sections 1021 and 1022 of the Law must be included in the prospectus itself and cannot simply be incorporated by reference (cf. section 1022A of the Law). However, any information so incorporated is taken into account for liability purposes (section 994).

227. In the light of the enhanced disclosure regime, it is proposed to permit the incorporation by reference in a prospectus of certain documents in certain circumstances. It is expected that the bulk of the documentation which will be so incorporated will be periodic accounts or continuous disclosure notices, but the provisions of proposed section 1024A will also permit the incorporation of other documents.

228. It is proposed that a document will be taken to be in a prospectus if it is incorporated by reference in the prospectus, provided that:

- the reference occurs in the prospectus;
- the document was lodged with the ASC under a statutory provision or regulation prior to the issue of the prospectus (including any document annexed to a document required to be so lodged e.g. a report attached to a continuous disclosure notice);
- a summary of the document is included in the prospectus; and
- the prospectus states that the documents incorporated by reference will be available from the issuer of the prospectus without charge on request.

229. Proposed section 1024A will operate so that the provisions of Parts 7.11 and 7.12 of the Corporations Law (other than section 1021) will apply to the prospectus as if the incorporated documents were actually included in it. In this regard, the following matters should be noted:

- section 1032 of the Corporations Law, when read with proposed section 1024A, will prohibit the incorporation by reference in a prospectus of a statement made by an expert or based on a statement made by an expert without the expert having given his or her consent under that provision;
- the details required under section 1021 of the Corporations Law must actually be stated in the prospectus;
- whether section 996 of the Corporations Law has been breached will be determined having regard to the information actually contained in the prospectus, taken together with any information which is incorporated by reference; and
- an expert will only have civil liability under section 1005 of the Corporations Law in relation to a statement which is incorporated by reference where he or she has consented to its inclusion in the prospectus under section 1032 of the Law.

Clause 45 – Primary prospectuses - documents to be kept

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

231. It is proposed that the life of a prospectus, which is presently restricted to 6 months by section 1040 of the Law, will be extended to 12 months for a prospectus relating to securities of a disclosing entity which:

- has been a disclosing entity for 12 months; or
- has on two occasions in the previous 15 months lodged primary prospectuses with the ASC under section 1018 of the Corporations Law.

232. The proposed amendment to section 1029 is consequential upon the proposed amendment to section 1040. If the circumstances set out in the preceding paragraph are satisfied, it is proposed that the period for the purposes of section 1029 will be 12 months. Otherwise, it is proposed that the period will remain as 6 months. (See the proposed definition of the term 'life period' in paragraph 4(i) of the Bill.)

Clause 46 - Second prospectuses - documents to be kept

233. Section 1029A of the Corporations Law requires a seller in relation to a secondary prospectus in relation to securities of a corporation to deposit at the registered office of the corporation or at some other address specified in the prospectus for a period of at least 6 months after the lodgement of

the prospectus, a copy of any consent required to the issue of the prospectus and of every material contract referred to in the prospectus.

234. It is proposed that the life of a prospectus, which is presently restricted to 6 months by section 1040 of the Corporations Law, will be extended to 12 months for a prospectus relating to securities of a disclosing entity which:

- has been a disclosing entity for 12 months; or
- has on two occasions in the previous 15 months lodged primary prospectuses with the ASC under section 1018.

235. The proposed amendment to section 1029A is consequential upon the proposed amendment to section 1040. If the seller referred to in section 1029A is selling securities of a disclosing entity and any of the criteria set out in the preceding paragraph are satisfied, it is proposed that the period for the purposes of section 1029A will be 12 months. Otherwise, it is proposed that the period will remain as 6 months. (See the proposed definition of the term 'life period' in paragraph 4(i) of the Bill.)

Clause 47 - Time limit on allotment, issue or sale of securities on the basis of a prospectus

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

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

238. It is therefore proposed that the life of a prospectus will be extended to 12 months for a prospectus relating to securities of a disclosing entity which:

- has been a disclosing entity for 12 months; or
- has on two occasions in the previous 15 months lodged primary prospectuses with the ASC under section 1018 of the Corporations Law.

239. In other cases, the life of a prospectus would remain at 6 months.

Clause 48 - Validity of allotment, issue or sale of securities

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

241. The proposed amendment to section 1041 of the Corporations Law is consequential upon the proposed amendment to section 1040 of the Law. If the prospectus relates to securities of a disclosing entity and any of the criteria set out in section 1040, as it will be amended, are satisfied it is proposed that the period for the purposes of section 1041 will be 12 months. Otherwise, it is proposed that the period will remain as 6 months.

Clause 49 - Obligations of borrowing corporations

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

243. The principal amendments that will be made to section 1058 by clause 49 are as follows:

- Subsection 1058(5), dealing with the annual and half-yearly accounting requirements for borrowing and guarantor corporations, will be replaced by a similarly worded provision dealing only with guarantor corporations (paragraph 49(a)).
- Subsection 1058(6), dealing with the consolidated annual and half yearly accounting requirements for a borrowing corporation and those guarantor corporations that are subsidiaries of the borrowing corporation, will be replaced by a similarly worded provision containing new time limits for lodging documents and supplying them to the trustee for the debenture holders. The time limits will be the same as those applicable to disclosing entities under Part 3.6 - 90 days in the case of a financial year and 75 days for a half-year (paragraph 49(a)).
- Under proposed subsection 1058(15A), a reference to borrowing corporation in proposed subsection 331AA(3) is to be interpreted as a reference to relevant guarantor corporation for the purposes of subsection 1058(15). The effect of this provision will be to require a relevant guarantor corporation to obtain the consent of the trustee for the debenture holders if it wants its auditor to undertake a review of its half-year financial statements (paragraph 49(d)).
- Subsections 1058(12), (13), (18) and (19) will be omitted because the matters with which they deal will be dealt with in Parts 3.6 and 3.7 (paragraphs 49(b) and (f)).

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

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

245. It is noted that where an economic entity comprising a chief entity and the entities it controls is identical to the group made up by a borrowing corporation and the guarantor corporations that are its subsidiaries, consolidated financial statements prepared for the purposes of Part 3.6 would also satisfy the requirements of subsection 1058(6).

Clause 50 - Covenants to be included in deeds

246. This clause will amend section 1069 of the Corporations Law by inserting a new covenant about the preparation of accounts and reports in deeds, by amending the period within which certain matters must be done and by inserting new requirements for sending documents to holders of prescribed units.

247. Proposed paragraph 1069(1)(ea) will require deeds to contain a covenant requiring compliance with Division 11 of Part 3.6 and any regulations made for the purposes of proposed section 323L (paragraph 50(a)). Deeds in force when proposed subsection 1069(8A) commences will be taken to contain the covenant required by proposed paragraph 1069(1)(ea) (paragraph 50(d)).

248. Paragraph 50(b) will amend paragraph 1069(1)(f) by changing the covenant requiring the trustee to circulate documents to holders of prescribed interests from within '2 months' after the end of the financial year to within 'the prescribed period'. It is envisaged that, consistent with the position for other disclosing entities, where the prescribed interests to which the deed relates are ED securities, the period prescribed will be 90 days.

249. Paragraph 50(c) will replace paragraph 1069(1)(f) with a new requirement under which holders of prescribed interests that are ED securities at the end of the financial year will receive a copy of the profit and loss account, balance sheet and the trustee's report on the undertaking. Where prescribed interests are not ED securities, the holders of those interests will continue to receive the same documents as at present.

Clause 51 - Returns and information about prescribed interests

250. Clause 51 will amend section 1071 of the Corporations Law by changing the requirement that the management company return must be lodged within 2 months after the end of the financial year applicable to the deed to one where it must be lodged within the prescribed period. A similar amendment will be made in respect of the period in which a return has to be lodged where the deed ceases to be in force.

251. It is envisaged that, consistent with the position for other disclosing entities, where the prescribed interests to which the deed relates are ED securities, the period prescribed will be 90 days.

NEW PART 7.12A - CONTINUOUS DISCLOSURE

Clause 52 - Insertion of New Part

252. Clause 52 inserts into the Corporations Law a new Part 7.12A entitled 'Continuous Disclosure' and comprising 5 Divisions.

253. Proposed Part 7.12A implements a scheme broadly along the lines recommended in the CASAC Report on an Enhanced Statutory Disclosure System of September 1991.

Proposed Division 1 - Preliminary

Proposed Section 1084A - Interpretation

254. This proposed section provides a number of definitions which are relevant for the purposes of proposed Part 7.12A.

255. A 'disclosure notice' in relation to a 'notifiable event' (also defined in Part 7.12A - see below) will be defined to mean a notice that is in accordance with the form prescribed by the Regulations and which contains all the information about the notifiable event as set out in the form. It is intended that the form referred to will be able to be used for the purposes of both proposed subsections 1084C(1) and (5).

256. The expression 'notifiable event' is central to the continuous disclosure requirements set out in proposed Part 7.12A and is defined to mean an event, or change of circumstances, in relation to a disclosing entity about which investors and their professional advisers would reasonably require information for the purpose of making an informed assessment of the general state of the company (i.e. its assets and liabilities, financial position, profits and losses, and prospects) and the rights attaching to the relevant securities of the disclosing entity. In considering whether an event is one about which investors would reasonably require disclosure it would be relevant to look at the impact of the event on the disclosing entity together with any subsidiaries.

257. The criteria in the definition of 'notifiable event' are based on the criteria for information which must be included in a prospectus under section 1022 of the Corporations Law. They also reflect

a major element of ASX Listing Rule 3A(1) which requires ongoing disclosure of material information by listed entities to the ASX. The statutory formula contains an additional criterion for prescribed interests. If the disclosing entity is a prescribed interest scheme, the relevant information must deal also with the merits of participating in the scheme and the extent of the risk involved in participation. This additional requirement is similar to that in regulation 7.12.12(1) of the Corporations Regulations applicable to prospectuses for prescribed interests.

Proposed Section 1084B - How this Part applies to an undertaking that is a disclosing entity

258. This proposed section makes it clear that responsibility for compliance with the continuous disclosure requirements in the case of prescribed interests will rest with the management company. This is consistent with the role which the management company has in managing the operation of a prescribed interest scheme on a day-to-day basis.

Proposed Division 2 - Disclosure of information

Proposed Section 1084C - Disclosure of information about notifiable events

259. This proposed section imposes the central disclosure obligation on disclosing entities to notify the ASC (by lodging a disclosure notice) about the occurrence of a notifiable event.

260. Proposed subsection 1084C(1) provides that, if a notifiable event in relation to a disclosing entity occurs, the disclosing entity is under an obligation to disclose information about the event. This disclosure is effected by lodging a disclosure notice as defined in proposed section 1084A.

261. Proposed subsection 1084C(2) provides that information need not be disclosed under subsection 1084C(1) where a supplementary prospectus containing the information has been, or is required to be, lodged under section 1024, because of the happening of a notifiable event. This provision is designed to avoid duplication of disclosure requirements under the Corporations Law.

262. A disclosure notice is required to be lodged under subsection 1084C(3) as soon as practicable, and in any event within three business days (see section 9 Dictionary) after the happening of the notifiable event. Under this provision, disclosing entities will have to lodge notices as soon as they practically can. This overriding obligation will ensure that disclosing entities will not be entitled to delay lodgement until shortly before the three day period has lapsed.

263. An exception to the requirement to disclose information is provided in proposed subsection 1084C(4) in circumstances where disclosing the information would be likely to result in unreasonable prejudice to the disclosing entity. This is an objective test which would require the disclosing entity effectively to balance the desirability and benefits from disclosure against the detrimental effect disclosure would have on the disclosing entity. The Ontario Securities Act has a similar provision which has been interpreted by Canadian courts to require the possible harm to shareholders through disclosure to be weighed against the public interest in the availability of information upon which an intelligent judgment may be made as to the desirability of acquiring and disposing of investments. Furthermore, any expectation of detriment must be plausibly based and not the result of supposition or conjecture.

264. It would not necessarily be sufficient under this test that information otherwise required to be disclosed is subject to a contractual confidentiality obligation. Nor would the test allow the withholding of information merely because it could be expected to have an adverse effect on the share price of the disclosing entity. The provision contemplates the situation where the prejudice from disclosure is suffered by the entity itself, and not merely a change in the value of the entities' securities. For example, in the case of new figures showing a downward revaluation of assets of a company, it would not be the disclosure of the figures which would have a prejudicial effect on the entity, but rather the change in the underlying value of the assets themselves. Any change in share price would merely reflect this underlying value.

265. Proposed subsection 1084C(5) requires a disclosing entity to lodge a disclosure notice in relation to a notifiable event when information originally withheld pursuant to proposed subsection 1084C(4) ceases to be likely to result in unreasonable prejudice to the disclosing entity. As with an initial notice, such a notice must be lodged as soon as practicable and in any event not later than three business days after the information ceased to be likely to result in unreasonable prejudice. The purpose of this provision is to ensure that disclosing entities have an obligation to disclose once this would no longer be likely to result in unreasonable prejudice. Where disclosure would still be reasonably required by investors and their professional advisers for the purposes of making an informed assessment of the matters set out in the definition of 'notifiable event', the disclosure obligation is, in effect, reinstated.

Proposed section 1084D - Division does not affect operation of business rules or listing rules

266. This proposed section provides that nothing in section 1084C can be taken to affect the operation of provisions in the business or listing rules of a securities exchange that require information to be provided to the exchange. The effect of this provision is to make it clear, for the avoidance of doubt, that the fact that disclosing entities are complying with the statutory requirements for disclosure does not affect the need also to comply with applicable disclosure requirements of business or listing rules of a securities exchange. In particular, a disclosing entity could not rely on the exception to disclosure provided under proposed subsection 1084C(4) to claim that information need not be disclosed to the securities exchange - assuming that disclosure of the information (which would be likely to result in unreasonable prejudice to the disclosing entity) would be sought by the exchange. Similarly, proposed subsection 1084C(4) could not be used as an excuse by a disclosing entity not to seek suspension of trading in the entity's securities on a securities exchange if the information being withheld from disclosure by virtue of subsection 1084C(4) was relevant to the question of the need for suspension to occur.

Proposed Division 3 - Criminal liability

Proposed Section 1084E – Offence for contravention of disclosure requirements

267. This proposed section provides for a criminal offence in relation to a failure by a disclosing entity to disclose and lodge information required to be disclosed and lodged under proposed subsections 1084C(3) and (5). A disclosing entity will only commit an offence if it has knowingly or recklessly contravened the disclosure requirements. In view of this requirement for 'knowledge', the existence or operation of a reporting system will not be relevant for an offence under this provision.

268. The maximum penalty for this offence will be specified in Schedule 3 to the Corporations Law to be \$20,000 for a natural person or 5 years' imprisonment (see proposed paragraph 54(b) of the Bill). (The penalty for a body corporate would be five times that amount i.e. \$100,000 (see section 1312 of the Corporations Law).)

269. The primary obligation to disclose will effectively be placed on the relevant body corporate. However, officers of disclosing entities (and other persons involved, such as expert advisers) would be criminally liable in relation to a contravention of the disclosure requirements in proposed section 1084C if, as contemplated by section 5 of the Crimes Act 1914, such a person aids or abets, or is in any way knowingly concerned in, the commission of any offence. In these circumstances, the person would be deemed to have committed the offence in section 1084E.

270. A disclosing entity which continues to contravene the requirements of proposed section 1084C by failing to lodge a notice containing the necessary information within the required time period could also breach section 1314 of the Corporations Law which deals with continuing offences.

271. A disclosing entity would not be guilty of an offence where it is shown that facts or circumstances existed at the relevant time which, because of subsection 1084C(2) (which obviates the need for lodgment of a disclosure notice where a supplementary prospectus containing the same

information is required to be lodged) or subsection 1084C(4) (which allows information to be withheld if it is likely to result in unreasonable prejudice to the disclosing entity) would preclude a contravention of subsections 1084C(3) and (5) from occurring.

Division 4 - Civil Liability

Proposed Section 1084F - Civil liability for contravention of disclosure requirements

272. Proposed subsection 1084F(1) provides that a disclosing entity which contravenes the disclosure requirements set out in subsections 1084C(3) or (5) will be liable to a person who, in connection with a dealing in securities, suffers loss or damage because of the contravention. The disclosing entity, or anyone involved in the contravention, will be liable to such a person for the amount of the loss or damage suffered. It is not a necessary pre-condition for liability under the subsection that the disclosing entity or person involved in the contravention has been convicted of an offence in respect of the contravention. It should be noted that section 50 of the *Australian Securities Commission Act 1989* enables the ASC to institute proceedings on behalf of a person if that is in the public interest.

273. The inclusion of the requirement that the loss be suffered in connection with a dealing in securities is consistent with the underlying 'investor protection' rationale for the continuous disclosure provisions. A person will be taken to have been 'involved in' a contravention under proposed section 1084F in the circumstances set out in section 79 of the Corporations Law. That section, in effect, defines the concept of 'being involved' in a contravention for the purposes of the Corporations Law.

274. Proposed subsection 1084F(2) requires an action under subsection 1084F(1) to be commenced within 6 years after the day on which the cause of action arose.

275. Proposed subsection 1084F(3) clarifies that Division 4 does not affect any liability that a person may have under any other law.

Proposed Section 1084G - Defences

276. This proposed section provides two defences to an action under proposed section 1084F (civil liability) which must be proved by a defendant. The first defence applies in the case where the information about a notifiable event was not required to be disclosed because of subsection 1084C(2) (where a supplementary prospectus containing the same information was required to be issued) or subsection 1084C(4) (where information may be withheld if it is likely to result in an unreasonable prejudice to the disclosing entity).

277. The second defence applies where a disclosing entity proves that it was not aware of the information and that no 'disclosure system' that the disclosing entity could reasonably be expected to have had in place could reasonably be expected to have resulted in the information being disclosed.

278. The 'disclosure system' defence will be important in ensuring that the continuous disclosure obligations can be discharged in a manner which has regard to reasonable commercial practices. It is designed to deal with two situations. First, where a disclosing entity has a reasonable system in place which could reasonably be expected to identify events required to be disclosed, it would be a defence to show that it was not aware of the event and, notwithstanding the operation of the disclosure system, the event was not disclosed. Secondly, where no such system is in place, a disclosing entity will nevertheless have a defence if it can show that no reasonable reporting system that it could have had in place could reasonably have been expected to have resulted in the information being disclosed.

279. The effect of this defence, together with the definition of 'notifiable event', is that disclosing entities are effectively not required on an ongoing basis to engage in the same level of enquiry and consultation with experts, in relation to the determination of whether a notifiable event has occurred,

as may be required under Part 7.12 of the Corporations Law in connection with the issue of prospectuses.

280. Whether a disclosure system is set up and how it operates will be a matter for the disclosing entity and its directors in respect of companies and non-companies and for the management of a prescribed interest. However, the existence of the defence can be expected to provide a major incentive for the establishment of a proper system.

281. The term 'disclosure system' is defined in proposed subsection 1084G(2) to mean a system for the disclosure of information under section 1084C, whether or not the system is used, or can be used, for other purposes.

Proposed Division 5 - Exemptions from enhanced disclosure provisions

Proposed section 1084H - Enhanced disclosure provisions

282. Proposed section 1084H specifies certain provisions as 'the enhanced disclosure provisions' for the purposes of proposed sections 1084J and 1084K which allow the making of exemptions from the enhanced disclosure provisions by the ASC or under the Corporations Regulations.

283. The enhanced disclosure provisions are as follows:

- the accounts and audit provisions of Parts 3.6 and 3.7 of the Corporations Law as applying in relation to companies in relation to accounting periods at the end of which the companies are disclosing entities;
- those Parts as applying to disclosing entities that are not companies because of proposed section 323A;
- proposed Division 11 of Part 3.6 relating to accounts in relation to prescribed interests that are ED securities;
- covenants required under proposed paragraph 1069(1)(ea) of the Corporations Law binding the management company and the trustee or representative, respectively, to comply with Division 11 of Part 3.6 and with regulations in force for the purposes of proposed section 323L;
- covenants required under paragraph 1069(1)(f), as proposed to be amended, requiring the trustee or representative to send prescribed interest holders certain accounts and reports as those covenants apply in relation to financial years at the end of which some or all relevant prescribed interests are ED securities; and
- the continuous disclosure obligations imposed by Division 2 of proposed Part 7.12A.

284. The above references to various provisions of the Corporations Law will include references to regulations in force for the purposes of any of those provisions.

Proposed section 1084J - Exemption by regulations

285. Regulations will be able to be made to exempt specified persons from all or any of the specified enhanced disclosure provisions referred to in proposed section 1084H. The exemptions which are made by regulations will be able to be of general or specific application and either conditional or unconditional.

286. An exemption under proposed section 1084J may relate to specified securities. Under proposed section 22H there will also be a capacity for certain securities of a body to be declared not to be ED securities, with the result that the body will not be a disclosing entity with respect to the declared securities.

Proposed section 1084K - Exemption by the Commission

287. In addition to the power to exempt by regulation under proposed section 1084J, the ASC will be able, under proposed section 1084K, to exempt specified persons from all or any of the enhanced disclosure provisions referred to in proposed section 1084H. The exemptions which the ASC will be able to make may be of general or specific application and either conditional or unconditional.

288. An exemption under proposed section 1084K may relate to specified securities. Under proposed section 22H there will also be a capacity for certain securities of a body to be declared not to be ED securities, with the result that the body will not be a disclosing entity with respect to the declared securities.

289. Without limiting the generality of the power of exemption conferred on the ASC under proposed section 1084K, the ASC may have regard to any of the following factors in exercising a power under the section:

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

290. Any exemption which the ASC publishes under proposed section 1084K must be published in the Gazette.

Proposed section 1084L - Enforcing conditions of exemptions

291. It will be an offence for a person to contravene a condition to which an exemption under proposed sections 1084J or 1084K is subject. In the case of a natural person, the maximum penalty for such a contravention will be \$20,000 or imprisonment for 5 years, or both. In the case of a body corporate, the maximum penalty will be \$100,000 (see paragraph 54(b) and section 1312 of the Corporations Law). If a person does contravene such a condition, the Court will be able, on the application of the ASC, to order the person to comply.

Proposed section 1084M - Effect of Division

292. Nothing in proposed Division 5 limits, or is limited by, any other exemption power such as:

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

Clause 53 - Other orders

293. This clause will insert references to proposed Part 7.12A (Continuous Disclosure) into section 1325. Section 1325 enables the Court to make a range of orders to compensate persons who have suffered loss because of conduct engaged in contravention of Parts 7.11 (conduct in relation to securities) and 7.12 (offering securities for subscription or purchase). These orders may be made on the application of persons who suffer loss or by the ASC, with their consent, on their behalf. With the insertion of a reference to proposed Part 7.12A, the Court will be able to make similar orders on the

application of such persons in relation to loss or damage occasioned by a contravention of the continuous disclosure obligations in that Part.

Clause 54-Schedule Schedule 3

294. It will be an offence under proposed subsection 1017B(4) for a disclosing entity to contravene any conditions which the ASC has imposed to ensure that exemptions applying to the entity do not have a material adverse effect on the level of information available to the market. Failure to comply with these conditions will attract a maximum penalty of \$20,000 or 5 years' imprisonment, or both, in the case of a natural person and a maximum penalty of \$100,000 in the case of a body corporate (see paragraph 54(a) of the Bill, amending Schedule 3 of the Corporations Law, and section 1312 of the Corporations Law).

295. Under proposed section 1084E it will be an offence for a disclosing entity to knowingly or recklessly contravene subsections 1084C(3) or (5) dealing with disclosure of information about notifiable events. In the case of a natural person, the maximum penalty for such a contravention will be \$20,000 or imprisonment for 5 years, or both. In the case of a body corporate, the maximum penalty will be \$100,000 (see paragraph 54(b) of the Bill and section 1312 of the Law).

296. Under proposed subsection 1084L(1), it will be an offence for a person to contravene a condition to which an exemption under proposed sections 1084J or 1084K is subject. In the case of a natural person, the maximum penalty for such a contravention will be \$20,000 or imprisonment for 5 years, or both. In the case of a body corporate, the maximum penalty will \$100,000 (see paragraph 54(b) of the Bill and section 1312 of the Law).

Clause 55 - Consequential amendments changing references to financial years to references to accounting periods

297. This clause will include a schedule at the end of the Bill which will amend expressions containing the words 'financial year' or by changing those words to 'accounting period'.

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

299. Where individual provisions are modified so that the half-year requirements are different to full-year requirements, these changes are explained in the explanatory material for the clauses that make the modifications (see, for example, clauses 18, 22, 23, 25, 26, 27, 31 and 32).

PART 3 - INDEMNIFYING OR INSURING AN OFFICER OR AUDITOR OF THE COMPANY

Introduction

300. This Part contains amendments to be made to the Corporations Law to provide a new scheme dealing with insurance and indemnification of company officers and auditors in place of existing section 241.

301. Section 241 prohibits, in effect, a company from exempting its officers from, or providing insurance or indemnities in respect of, liabilities which they may incur in relation to their company. The provision has attracted extensive criticism, both because of doubts as to the scope of the prohibition and because its operation is inconsistent with appropriate commercial practices.

302. The former Companies and Securities Law Review Committee (CSLRC), which examined the operation of section 241, recommended in 1990 that the section be revised, essentially to enable a

company to pay the premium for insurance held by its officers against liability arising out of conduct that did not involve dishonesty or a breach of their duty of good faith to the company. The Committee also recommended that the provision be clarified so that it only applied to payments made by or on behalf of the company and in respect of liability of officers to the company itself.

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

304. The reform of section 241 contained in this Part addresses the issues raised in the CSLRC and CASAC reports and, in summary, will enable companies to provide insurance for their officers, except in cases where they have wilfully breached their duty to the company or gained an improper advantage. Companies will also be able to indemnify their officers in respect of liability to persons other than the company (or a related company), provided the liability does not arise out of conduct involving a lack of good faith.

305. The present scheme in section 241 is effectively to be replaced by two provisions. These are revised section 241, which will deal with indemnification and exemption, and new section 241A, which will deal with insurance. In addition, safeguards will be included to ensure disclosure of payments or agreements and, in limited circumstances, shareholder approval.

Clause 56 - Voting by interested director of public company

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

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

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

Clause 57 -(Repeal and substitution of subsections 241(1).(2) and (3))

309. Clause 57 amends section 241 of the Law by removing existing subsections 241(1), (2) and (3) and substituting them with new subsections dealing with indemnification of officers and auditors of a company.

Proposed subsections 241(1) (IA) (2) and (3) -company not to indemnify officer or auditor

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

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

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

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

314. Proposed subsection 241(3) re-enacts in substance existing subsection 241(3). That subsection provides an exception to the prohibition in subsection 241(1) to enable an officer or auditor to be indemnified against a liability for costs and expenses incurred in defending civil or criminal proceedings in which judgment is given in favour of the officer or auditor or in which the officer or auditor is acquitted. The exception also applies in connection with an application, in relation to proceedings in which the Court grants relief to an officer or auditor under the Law (see section 1318 of the Corporations Law). However, the exception does not apply to any substantive liability which may be incurred as a result of the proceedings.

315. Paragraph 57(b) of the Bill will amend the definition of 'officer' in existing subsection 241(4) so that it does not include employees of a company. The effect of this amendment will be that companies will have no prohibition on indemnification in relation to their employees. This implements recommendations made in both the CSLRC and CASAC reports.

316. Paragraph 57(c) of the Bill will provide a definition of 'indemnify' to be inserted in subsection 241(4) for the purposes of proposed section 241, which will ensure that 'indemnify' includes doing so through one or more interposed entities. This provision is to ensure that the prohibition on indemnification in proposed subsection 241(1) cannot be circumvented by a company arranging payment of an indemnity via a third party.

Clause 58 -(Insertion of new section)

317. Clause 58 will insert a new section 241A into the Corporations Law dealing with the payment of insurance premiums in respect of liabilities of officers or auditors.

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

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

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

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

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

322. Proposed subsection 241A(4) provides that 'officer' has the same meaning as in revised section 241. This means that this provision, as well as section 241, will not apply to employees. The subsection also provides a definition of 'pay' for the purposes of proposed section 241A which will ensure that 'pay' includes payments made indirectly through one or more interposed entities. The definition is to ensure that the prohibition on paying or agreeing to pay an insurance premium under proposed subsection 241A(1) cannot be circumvented by a company arranging payment of a premium through an intermediary.

323. Payments made for the purposes of revised section 241 and proposed section 241A also remain subject to the usual requirement under section 232 that the decision be made in good faith and in the best interests of the company.

Clause 59 - Remunerating officers

324. Paragraph 59(a) of the Bill will amend section 243K of the Law dealing with officers' remuneration by inserting new subsections 243K(7A) and (7B). The effect of these proposed subsections is to ensure that an indemnity provided, or an insurance premium paid, to an officer of a public company against liability incurred in that capacity is taken to be remuneration for the purposes of Part 3.2A of the Law. Accordingly, if the indemnity or insurance premium paid does not constitute reasonable remuneration, the requirements of Division 5 of Part 3.2A must be complied with. In particular, a resolution of the members of the company may be required under section 243Q before such a payment could be made.

325. Paragraphs 59(b) and (c) of the Bill make consequential amendments to section 243K of the Law.

Clause 60 - (Insertion of new section 309A)

326. Clause 60 will insert a new section 309A into Division 6 of the Law dealing with directors' reports.

Proposed section 309A - Indemnifying officer or auditor

327. Proposed subsection 309A(1) will require a report for a financial year under Division 6 to set out the officer's or auditor's name, the nature of the liability and the amount of indemnity paid where, during or since the financial year, a company has paid an indemnity pursuant to an exception to the prohibition on payment set out in subsection 241(2) or (3).

328. Proposed subsection 309A(2) will require the report to set out details of a relevant agreement (as defined in section 9) to indemnify made pursuant to proposed subsections 241(2) or (3) (i.e. the exceptions), including particulars of the director's or auditor's name, the nature of the liability and how much the relevant agreement provides for the company to pay. In addition, the report must specify details about what else the company is required to do under the relevant agreement by way of indemnifying the officer or auditor.

329. Proposed subsection 309A(3) mirrors the above provisions in respect of insurance premiums so that similar details must be provided in the report where a company or a related company has paid or agrees to pay a premium permitted by virtue of proposed subsection 241A(3). However, the

requirement to set out the nature of the liability and the amount of the premium does not apply where this is not permitted by the contract of insurance. The purpose of this exception is to reflect common commercial practice whereby details of the amount and nature of liability covered remain confidential from third parties who may benefit from knowledge about these matters in instituting or settling proceedings.

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

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

PART 4 - MISCELLANEOUS

Clause 61- (insertion of new section)

332. This clause inserts a new provision in the Law dealing with the use in court proceedings of information from the ASC's database.

Proposed section 1274B - Use in court proceedings. of information from Commission's national database

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

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

335. Proposed subsection 1274B(1) includes definitions of 'data processor' and 'national database', terms which are used in subsection 1274B(2). Proposed subsection 1274B(3) will provide that the writing referred to in subsection 1274B(2) does not need to bear a certificate or signature in order to be taken to purport to have been prepared by the ASC. Proposed subsection 1274B(4) will provide that nothing in the proposed section limits, or is limited by, section 1274 or 1274A. Section 1274 contains a number of provisions relating to registers and includes subsection 1274(4C) which empowers the ASC to certify a document or certificate.

PART 5 - APPLICATION OF CHANGES TO THE CORPORATIONS LAW RESULTING FROM THIS ACT

Clause 62 - (insertion of new Division-6 of Part 9-11)

336. Clause 62 will add a new Division 6 to Part 9.11 of the Law. The new Division will include the application and transitional provisions relating to the Bill.

Division 6 - Changes resulting from the Corporate Law Reform Act (No. 2) 1992

Proposed section 1390 - Application of changes to section 241

337. Proposed subsection 1390(1) provides that amended section 241 'company not to indemnify officer or auditor' will apply in relation to a liability incurred at or after commencement of clause 57. This means that the prohibition on indemnification in section 241 will only apply in respect of liabilities incurred at or after commencement of clause 57.

338. Proposed subsection 1390(2) provides that section 241, as in force before commencement of clause 57, will continue to apply in relation to a liability incurred before that commencement, but not in relation to a contract of insurance made at or after that commencement (in which case proposed section 241A will be applicable).

Proposed section 1391-Application of section 241A

339. Proposed section 1391 will ensure that proposed section 241A ('company not to pay insurance premiums in respect of certain liabilities of officer or auditor') applies to a contract of insurance made at, or after, the commencement of clause 57 and in relation to a liability, whether incurred before, at or after that commencement.

Proposed section 1392 - Application of changes to Parts 3.6 and 3.7

340. Proposed subsection 1392(1) will ensure that the accounts and audit provisions of Parts 3.6 and 3.7 of the Corporations Law, as proposed to be amended by the Bill, will apply in relation to an accounting enterprise in relation to:

- the first half-year (if any) of the enterprise that begins on or after 31 December 1993;
- the first accounting period of the enterprise that is a financial year and begins on or after 31 December 1993; and
- each later accounting period of the enterprise.

341. Proposed subsection 1392(2) provides that proposed section 317A ('lodgment of accounts etc. by companies that are disclosing entities') will also apply in relation to a company in relation to the first financial year of the company that ends on or after 31 December 1993.

342. Proposed subsection 1392(3) provides that Parts 3.6 and 3.7 of the Corporations Law as in force before 31 December 1993 will continue to apply in relation to a company in relation to a financial year of the company that began before that day.

Proposed section 1393 - Application of changes to section 779

343. Proposed subsection 1393(1) will ensure that proposed subsections 779(5) to (9) (dealing with 'qualified privilege') apply to a publication by a securities exchange, after the commencement of clause 37, of information given, a document prepared, given or produced, or a statement made, whether before, at or after that commencement. This means that securities exchanges will have the benefit of qualified privilege under proposed subsections 779(5) to (9) in respect of any material published after commencement of clause 37, regardless of when the material was given to the exchange.

344. Proposed subsection 1393(2) will provide for the definition of 'delisting or suspension decision' in proposed subsection 739(1) to apply to a decision made before, at or after that commencement.

Schedule - Consequential amendments changing references to financial years to references to accounting periods

345. The Schedule will amend expressions containing the words 'financial year' by changing those words to 'accounting period'. Details of the expressions being amended and the provisions affected are contained in Annexure A.

346. The effect of these amendments is explained at clause 55.

Annexure A

AMENDMENTS CHANGING REFERENCES TO FINANCIAL YEARS TO REFERENCES TO ACCOUNTING PERIODS

<i>Part of Schedule</i>	<i>Existing expression</i>	<i>Proposed expression</i>	<i>Provisions of Corporations Law to be amended</i>
1	a financial year	an accounting period	s.9 (definitions of `consolidated accounts' and `financial statements'; ss.287, 292 and 293; s-secs. 294(1), 294A(3), 294B(3) and 295(1); ss.296, 297 and 298; s-secs 299(1), 300(1), 300(2), 301(1) and 302(1); s.303; s-secs.304(2) and 305(2); s.310; s-secs.313(4) and 332(6); s.332A; and s-secs.408B(2),409A(1), 409A(3) and 409A(4)
2	that financial year	that accounting period	s.9. (definitions of `consolidated accounts' and `financial statements'; ss.292 and 293; s-secs.294A(3), 294B(3), 295(1) and 295(2); ss.295A and 295B and s secs.296(1), 302(3), 332(6), 409A(3) and 409A(4)
3	the financial year	the accounting period	s-secs.294(4), 300(2), 301(2), 301(3), 301(7), 301(9), 301(11), 302(6) and 302(9); s.303, s-secs.304(2) and 305(2), s.310 and s secs.312(1), 331C(1), 331 Q3) and 331 E(2)
4	financial years	accounting periods	s-secs.294A 1 ; 29413(l)
4	year's	period's	s.295b
4	particular financial year	particular accounting period	s-secs.312(1) and (2)
4	corresponding financial year	corresponding accounting period	s-sec.409a(1)