

CO-OPERATIVE COMPANIES AND SECURITIES SCHEME

SHARE BUY-BACKS AND OTHER LEGISLATIVE PROPOSALS:  
DRAFT LEGISLATION AND EXPLANATORY PAPER

Prepared by the Business Affairs Division of the Commonwealth  
Attorney-General's Department for and on behalf of the  
Ministerial Council for Companies and Securities

September 1988

Attorney-General's Department

CO-OPERATIVE COMPANIES AND SECURITIES SCHEME

SHARE BUY-BACKS AND OTHER LEGISLATIVE PROPOSALS DRAFT  
LEGISLATION AND EXPLANATORY PAPER

Prepared by the Business Affairs Division of the Commonwealth  
Attorney-General's department for and on behalf of the  
Ministerial Council for Companies and Securities

September 1988

Australian Government Publishing Service  
Canberra

© Commonwealth of Australia 1988

ISBN 0 644 08627 0

This work is copyright. Apart from any use as permitted under the Copyright Act 1968, no part may be reproduced by any process without written permission from the Director Publishing and Marketing AGPS. Inquiries should be directed to the Manager, AGPS Press, Australian Government Publishing Service, GPO Box 84, Canberra, ACT 2601.

Printed in Australia by R. D. RUBLE, Commonwealth Government Printer, Canberra

## CONTENTS

### PREFACE

Purpose of Paper

Request for Comments

### PART A: INTRODUCTION

Future legislative program

Share buy-back proposals

Subordination of debt proposals

Annual return proposals

Key elements of buy-back proposals

Major departures from CSLRC approach

Queensland comment

### PART B: EXPOSURE DRAFT OF THE COMPANIES AMENDMENT BILL 1988

### PART C: CLAUSE BY CLAUSE COMMENTARY

The following abbreviations are used in this explanatory paper:

CA	- <u>Companies Act 1981</u> (Cth) as subsequently amended
CASA	- <u>Companies (Acquisition of Shares) Act 1980</u> (Cth) as subsequently amended
ED	- Exposure draft of Companies Amendment Bill 1988 (share buy-backs and other legislative proposals)
Commission	- National Companies and Securities Commission
The Bill	- Companies Amendment Bill 1988

## PREFACE

### Purpose of Paper

The purpose of this paper is to explain the contents of the exposure draft of the Companies Amendment Bill 1988 (hereafter referred to as 'the ED') which contains amendments to the Companies Act and Codes deriving from a decision of the Ministerial Council for Companies and Securities to introduce a "self-purchase" or 'buy-back' power for companies.

Two amendments to the Companies Act and Codes not related to buy-back are also made in this Bill. They relate to annual returns of companies (ED cl.13) and the effect of subordination of debts agreements in a winding up (ED cls.14 to 16). These amendments are also made following a decision of the Ministerial Council at its 1 July 1988 meeting.

### Request for Comments

Comments on the exposure draft of this Bill are requested from the public, and should be sent no later than Friday 9 December 1988 to the First Assistant Secretary, Business Affairs Division, Attorney-General's Department, Canberra, ACT 2600.

It will be assumed that submissions are not confidential and will be publicly available unless the contrary is indicated when the submission is made. However, if an application is made pursuant to freedom of information legislation for access to a submission in respect of which a claim of confidentiality has been made, the principles of that legislation will apply.

## PART A: INTRODUCTION

### Future legislative program

These proposals are currently being treated separately from the Commonwealth Government's proposals to replace the co-operative scheme with a regime based on Commonwealth laws i.e. comments are being sought on the basis that amendments would be introduced into co-operative scheme legislation, notwithstanding that legislation is currently before the Commonwealth Parliament which, upon enactment and proclamation, would generally supersede the co-operative scheme legislation. (For its part, the Commonwealth Government will consider comments received on this co-operative scheme exposure draft in order to assess the nature of amendments to be moved to the Corporations Bill 1988 to permit buy-backs).

2. The Bill to be introduced into the Commonwealth Parliament pursuant to the co-operative scheme, in the light of comments received on this exposure draft, will amend the Companies Act 1981 which applies only in the Australian Capital Territory. The amendments will also automatically amend the Companies Codes applying in each State and the Northern Territory by virtue of the Companies (Application of Laws) Acts of the respective States and Northern Territory.

### Background to proposed buy-back legislation

#### Share buy-back proposals

3. The issue of a company's capacity to purchase its own shares was fully analysed by the Companies and Securities Law Review Committee (CSLRC) in its Discussion Paper No. 5 (A Company's Purchase of its Own Shares) published in June 1986. After reviewing the submissions made in response to its

2.

Discussion Paper the CSLRC recommended to the Ministerial Council in September 1987 that the Companies Act 1981 be amended to enable companies to "directly" acquire their own shares in compliance with stipulated procedural and solvency requirements. The Committee also recommended that companies should also be entitled to purchase their options over unissued shares.

4. In March 1988 the Ministerial Council approved in principle companies being able to re-purchase shares subject to appropriate mechanisms being put in place to counter avoidance of proposed shareholder and creditor safeguards. Ministerial Council further resolved that re-purchase of public company shares should generally be on the basis of pari passu offers to all shareholders except in the case of odd lot holdings and pursuant to employee-share schemes.

5. Although the Ministerial Council agreed unanimously on the proposals, the Queensland vote was qualified in relation to two matters explained at paras. 10 to 12.

#### Subordination of debt proposals

6. The amendments proposed in ED Part IV, which relate to the subordination of certain debts, arose out of a recommendation by the CSLRC in a paper entitled 'Subordination of Debt' (April 1988). The amendments would overcome existing uncertainty as to whether CA s.440 allows a liquidator to recognize the subordination of a debt in a winding up. A subordinated loan is a loan under which the lending party contractually agrees with the borrower that repayment of the loan will be deferred until either creditors in the same class as the lender, or all of the creditors, have been repaid in full.

#### Annual return proposals

7. Cl.13 of the Bill will amend the annual return requirements contained in CA s.263 to provide that where the

Commission serves on a company a partly-completed annual return of the company, it will be necessary for the company to complete and lodge that return. (At present, the completion of the return provided by the Commission is optional and many companies find it more expedient to lodge a return generated on their own word processor.)

Key elements of the buy-back proposals

8. A brief outline of the principal features of the buy-back proposals is set out below:

\* Removal of financial assistance validation procedure (See Part C para. 15 ED para.8(c))

\* Choice between 2 solutions to regulate indirect buy-backs through interposed companies (See Option A ED cl.10, ss.130A-130D; Option BED cl.10, ss.130A-130G).

\* Self-purchase capacity will only be permitted in respect of fully-paid shares (See ED cl.11, s-sec.133BA (1)).

\* Subsidiary companies will continue to be prohibited from purchasing shares in their holding companies (CA s.36 not amended).

\* A company will be required to derive its self-purchase capacity from its constituent documents (See ED cl.11, s-sec.133CA (1)).

\* A company's self-purchase capacity will be subject to a 'sunset' provision so that the capacity will need to be renewed every 3 years by special resolution of shareholders (See ED cl.11 s-sec.133CB (2)).

\* The legislation will require certain matters to be set out in the notice of special resolution to



4.

introduce or renew the self-purchase power (See ED cl.11, s-sec.133CB (5)).

\* The legislation will not restrict the source of funds used by a company to purchase shares in itself (No specific provision necessary).

\* Self-purchased shares must be cancelled and all rights attaching to self-purchased shares will be extinguished (See ED cl.11, s-sec.133KL (1)).

\* The effect of the solvency declaration will be to make directors personally liable if the company becomes insolvent within 12 months of a self-purchase transaction (See ED cl.11, ss.133LC and 133LD).

\* Disclosure requirements in the form of advertisement of proposed pari passu self-purchases will be imposed. This requirement is intended to protect the rights of creditors (See ED cl.11, ss.133JA-133JG).

\* Pari passu offers to be on either a pro-rata or proportional basis (See ED cl.11, s-sec.133DA (11)).

\* Companies will be required to notify the Commission of the details of each completed self-purchase program (See ED cl.11, s.133NG).

\* Share re-purchases shall be prohibited during the currency of a rights issue or placement or within 3 months thereafter (See ED cl.11, s.133KG).

\* Company officers will be criminally liable for procedural breaches of the self-purchase power (See ED cls.11, ss.133NFD and 133NFE).

Major departures from CSLRC approach

9. In addition to a prohibition on selective re-purchases by public companies and on-market re-purchases (except for odd lot holdings and employee-share schemes) Ministerial Council decided to further safeguard the interest of shareholders and creditors by imposing the following requirements:

(a) public companies to be prohibited from re-purchasing more than 10% of their own shares in any 12 month period and such re-purchases to be approved by shareholders by ordinary resolution (cf. CSLRC recommendation that only purchases in excess of 10% in any 12 month period need be sanctioned by shareholders) (See ED cl.11, s.133EA).

(b) an auditor's report to be required for all re-purchases by public companies and for all re-purchases by proprietary companies beyond 10% (See ED cl.11, ss.133KA and 133KB)

(c) declarations of solvency to be signed by each director (but different requirements for public and proprietary companies); and

(d) companies no longer to be able to sanction the giving of financial assistance in connection with a re-purchase by passing a special resolution (CA s-sec.129(10)) (See ED para.8(c)).

Queensland comment

10. As the main thrust of these provisions is the regulation of buy-back of shares, Queensland considers excessively rigid requirements should not be imposed on the legitimate cross-holding of shares. Queensland therefore considers the cross-holding threshold figure should be set at 20% which is consistent with the takeover threshold (cf ED cl.10, s.130B).

11. Such a figure would still prevent abuses of the buy-back provisions by interposed companies but would not interfere with association between companies. These associations are commonly used to cement relationships between suppliers and users on a horizontal basis within industries. The prevention of these proper activities for what is a peripheral requirement for buy-backs is not supported by Queensland.

12. Further, Queensland considers all buy-backs should be on a pro-rata basis and not on a proportional basis. Again, this would be consistent with the Companies (Acquisition of Shares) Act and Codes.

PART B: EXPOSURE DRAFT OF THE  
COMPANIES AMENDMENT BILL 1988

**COMPANIES AMENDMENT BILL 1988**

TABLE OF PROVISIONS  
PART I - PRELIMINARY

Section

1. Short title etc.
2. Commencement

PART II - BUY-BACKS OF SHARES AND OPTIONS

3. Interpretation
4. Substitution of headings
5. Issue of shares at premium
6. Insertion of Subdivision heading
7. Insertion of Subdivision heading
8. Company financing dealings in its shares etc.
9. Consequences of company financing dealings in its shares etc.
10. Insertion of new Subdivision and heading:

OPTION A

Subdivision D - Company Acquiring Relevant Interests in its  
Voting Shares

- 130A. Relevant interests
- 130B. Company not to acquire relevant interests in mote than 10% of its voting shares
- 130C. Orders by Court where company contravenes section 130B
- 130D. Effect of Subdivision

Subdivision E - Other

[134] - 7/30.8.1988 - (134/88)

TABLE OF PROVISIONS - continued

Section

OPTION B

Subdivision D - Unacceptable Self-acquisition Schemes

- 130A. Interpretation
- 130B. Self-acquisition scheme
- 130BA. Relevant matters affecting self-acquisition scheme
- 130C. Declaration by Commission
- 130D. Commission may make interim orders
- 130E. Court may reverse Commission's declaration
- 130F. Court may act on Commission's declaration
- 130G. Effect of Subdivision

Subdivision E - Other

11. Insertion of new Division:

Division 3A - Buy-backs of Shares and Options

Subdivision AA - How this Division Works

- 133AAA. Outline of structure

Subdivision A - Interpretation

- 133AA. Interpretation
- 133AB. What constitutes buying back shares or an option
- 133AC. The 10% in 12 months limit
- 133AD. Takeover aspects of proposed resolution
- 133AE. When directors presumed to be aware of proposed or actual takeover bid
- 133AF. Solvency declaration
- 133AG. Auditor's report on solvency declaration
- 133AH. When buy-back agreement is completed
- 133AJ. When shares are transferred
- 133AK. Classes of shares

Subdivision B - Power to Buy Back Shares and Options

- 133BA. Power to buy back shares
- 133BBA. Power to buy back an option
- 133BB. Completion of buy-back
- 133BC. Effect of Division
- 133BD. Other obligations and liabilities not affected

Subdivision C - Buy-back Authorisation in Articles

- 133CA. Articles to contain buy-back authorisation
- 133CB. Inclusion, effect and renewal of buy-back authorisation

Subdivision D - Buy-back Schemes

- 133DAA. Shares and classes of shares
- 133DA. Buy-back scheme
- 133DB. Withdrawal or variation of buy-back offers
- 133DC. Acceptance of offers made under pro-rata buy-back scheme
- 133DD. Avoiding odd lots under proportional buy-back scheme
- 133DE. Odd lots to be disregarded for purposes of 10% in 12 months limit

Subdivision E - Approval of Buy-back Schemes by Ordinary Resolution

- 133EA. Public company

TABLE OF PROVISIONS - continued

Section

- 133EB. Proprietary company
- 133EC. Buy-back offers made under a resolution
- 133ED. Resolution to approve proposed buy-back scheme
- 133EE. Notice of resolution to approve proposed buy-back scheme

Subdivision F - Employee-shares Purchases

- 133FA. Approval by ordinary resolution
- 133FB. Resolution to approve proposed employee-shares purchase
- 133FC. Notice of resolution to approve proposed employee-shares purchase

Subdivision G - Other Share Buy-backs

- 133GA. Other buy-backs by public company
- 133GB. Selective buy-backs by proprietary company

Subdivision H - Notice of Resolution to Approve Selective Share Buy-back

- 133HA. Notice to comply with Subdivision
- 133HB. Contents of resolution and proposed agreement
- 133HC. Availability of agreement for inspection
- 133HD. Valuation of non-cash consideration
- 133HE. Reasons for buy-back
- 133HF. Solvency aspects
- 133HG. Directors' interests
- 133HH. Effect on control of company
- 133HJ. Other relevant information

Subdivision J - Creditors may Object to Proposed Share Buy-backs

- 133JA. Advertising proposed buy-backs
- 133JB. Content of advertisement
- 133JC. Newspapers in which advertisement to be published
- 133JD. Creditor may apply to Court
- 133JE. How application to be dealt with
- 133JF. Buy-backs not to proceed while application pending
- 133JG. Company to comply with order of Court

Subdivision K - Solvency Requirements

- 133KA. Solvency requirements for buy-back scheme



133KB. Solvency requirements for other buy-backs  
133KBA. Copy of solvency declarations and auditor's reports to be lodged with Commission  
133KC. Revocation of solvency declaration  
133KD. Solvency requirements for completion of buy-back under buy-back scheme  
133KE. Company not to register certain transfers during solvency period

Subdivision L - Share Buy-backs and other Securities Issues

133KF. Buy-back consideration not to consist of other securities in the company  
133KG. No buy-backs during rights issue or placement  
133KH. No rights issue or placement during offer period or within 3 months after buy-back

Subdivision M - Effect of Buy-back on Shares or Option

133KJ. Rights attaching to bought back shares or option  
133KK. Company not to sell bought back shares or option

TABLE OF PROVISIONS - continued

Section

- 133KL. Cancellation of shares or option after transfer to company
- 133KM. Accounting for money spent on buy-back where amount exceeds nominal value of shares

Subdivision N - Effect of Insolvency

- 133LA. Buy-back offer by externally-administered company void
- 133LB. Effect of supervening insolvency on buy-back scheme
- 133LC. Directors to indemnify insolvent company for consideration provided
- 133LD. Within last 12 months under buy-back agreements Relief from liability under section 133LC

Subdivision P - Rights of Unpaid Sellers

- 133MA. Specific performance of buy-back agreements
- 133MB. Buy-back agreement unenforceable while company insolvent
- 133MC. Unpaid seller may prove in winding up of company
- 133MD. Ranking of seller's claim in winding up

Subdivision Q - Certificates and Declarations of Compliance

- 133NFA. Certificate of compliance
- 133NFB. Presumptions about certain matters
- 133NFC. Who must sign compliance certificate
- 133NFD. Offences relating to compliance certificates: buy-back schemes
- 133NFE. Offences relating to compliance certificates: other buy-backs
- 133NFF. Declaration by Court of substantial compliance

Subdivision R - Notifying Commission and Securities Exchanges about Buy-backs

- 133NG. Company to notify Commission of buy-backs
- 133NH. Listed company to notify securities exchange of buy-backs

Subdivision S - Listed Company to Notify Members about Share Cancellations

- 133NK. Notifying member whose shares were cancelled
- 133NL. Notifying members generally

## Subdivision T - Register of Buy-backs

- 133PA. Company to keep register
  - 133PB. Particulars of buy-back schemes
  - 133PC. Particulars of other buy-backs
  - 133PD. Alteration of register where buy-back does not proceed
  - 133PE. Entries in register after cancellation of shares or option
  - 133PF. Inspection and copies of register
12. Proof of debts

## PART III - ANNUAL RETURNS

13. Annual return

## PART IV - SUBORDINATION OF CERTAIN DEBTS OWED BY A COMPANY

- 14. Distribution of company's property
- 15. Repeal of sections 440 and 444
- 16. Insertion of new sections:
  - 450A. Subordination agreements
  - 450B. Subordination of debts under Part VIII compromise or arrangement
  - 450C. Effect of sections 450A and 4.50B
  - 450D. Debts of a class to rank equally

1987-88

A BILL

FOR

An Act to amend the Companies Act 1981

BE IT ENACTED by the Queen, and the Senate and the House of Representatives of the Commonwealth of Australia, as follows:

**PART I - PRELIMINARY**

**Short title etc.**

1. (1) This Act may be cited as the Companies Amendment Act 1988.

(2) In this Act, "Principal Act" means the Companies Act 1981

**Commencement**

2. (1) Sections 1 and 2 commence on the day on which this Act receives the Royal Assent.

(2) The remaining provisions of this Act commence on a day or days to be fixed by Proclamation.

**PART II - BUY-BACKS OF SHARES AND OPTIONS**

**Interpretation**

3. Section 5 of the Principal Act is amended by inserting in subsection (1) the following definitions:

"'approving holding company', in relation to a body corporate, means:

(a) a listed corporation of which the body is a subsidiary; or

(b) if the body is a subsidiary of no listed corporation but the ultimate holding company (if any) of the body is incorporated in Australia or an external Territory - that ultimate holding company;

'make', in relation to a takeover bid, includes cause to be made;

'offer', in relation to a takeover bid, means one of the offers, or an offer made by virtue of the announcement, as the case requires, constituting the takeover bid;

'participating employee', in relation to a corporation, means:

(a) an employee of the corporation or of a related corporation; or

(b) without limiting the generality of paragraph (a), a director of the corporation or of a related corporation who holds a salaried employment or office in the corporation or in a 20 related corporation;

'takeover bid' means:

(a) offers made under a takeover scheme within the meaning of the Companies (Acquisition of Shares) Act 1980; or

(b) a takeover announcement within the meaning of that Act;".

**Substitution of headings**

4. The heading to Division 3 of Part IV of the Principal Act is repealed and the following headings are substituted:

**"Division 5 - Capital Structure of Companies  
"Subdivision A--Shares Generally".**

**Issue of shares at premium**

5. Section 119 of the Principal Act is amended:

(a) by omitting from subparagraph (2) (e) (ii) "or" (last occurring);

(b) by inserting after paragraph (2) (e) the following paragraph:

"(ca) as provided by subsection 133KM (2); or".

**Insertion of Subdivision heading**

6. After section 123 of the Principal Act the following heading is inserted:

"Subdivision B - lass Rights".

**Insertion of Subdivision heading**

7. After section 128 of the Principal Act the following heading is inserted:

**"Subdivision C - Company Financing Dealings in its Shares etc."**.

**Company financing dealings in its shares etc.**

8. Section 129 of the Principal Act is amended:

(a) by inserting in subparagraph (1)(b)(ii) "acquire or" before "purport";

(b) by omitting from paragraph (9) (b) all the words after "benefit of" and substituting the following:

"participating employees in relation to the company, where:

(i) if the company has an approving holding company or approving holding companies--the company, and that holding company or those holding companies, have each, at a general meeting; or

(ii) otherwise--the company has, at a general meeting; approved a scheme for providing money for such acquisitions and the financial assistance is given in accordance with the scheme.";

(c) by omitting subsections (10), (11), (12), (13) and (15).

**Consequences of company financing dealings in its shares etc.**

9. Section 130 of the Principal Act is amended:

(a) by inserting after paragraph (1) (a) the following paragraph:

"(aa) the validity of a contract or transaction is not affected by a contravention of paragraph 129 (1) (b) constituted by:

(i) a buy-back, within the meaning of Division 3A, of fully-paid ordinary shares or of an option; or

(ii) the transfer to a company, pursuant to such a buy-back by the company, of the shares or option;"

(b) by omitting from paragraph (1) (b) "a contravention" and substituting "any other contravention";

(c) by omitting subsections (6) to (12), inclusive.

10. After section 130 of the Principal Act the following Subdivision and heading are inserted:



**OPTION A**

**"Subdivision D - Company Acquiring Relevant Interests in its Voting Shares**

**Relevant interests**

"130A. Section 9 of the Companies (Acquisition of Shares) Act 1980 has effect for the purposes of this Subdivision as if:

- (a) subsection 9 (5) of that Act were omitted; and
- (b) the provisions of this Subdivision were provisions of that Act.

**Company not to acquire relevant interests in more than 10% of its voting shares**

"130B. (1) Where:

- (a) for any reason, a company acquires a relevant interest in voting shares in itself; and
- (b) immediately after the acquisition, the company has a relevant interest or relevant interests in more than 10% of the voting shares in itself;

the company contravenes this section.

"(2) The Commission may by writing approve, subject to such conditions (if any) as it specifies in the approval, specified acquisitions, by specified companies, of relevant interests in shares.

"(3) The Commission may exercise its powers under subsection (2) of its own motion or on application by a company to which the approval would relate.

"(4) A company does not contravene subsection (1) by acquiring a relevant interest in shares if an approval of the acquisition is in force under subsection (2) at the time of the acquisition.

"(5) A company shall not contravene a condition specified in an approval that relates to the company and is in force under subsection (2).

"(6) Where a company contravenes subsection (5), the Court may, on application by the Commission, order the company to comply with the condition.

"(7) A company that contravenes subsection (1) or (5) is not guilty of an offence by virtue of this section or section 571, but each officer of the company who is in default contravenes that subsection.

Penalty: \$2,500 or imprisonment for 6 months, or both.

**Orders by Court where company contravenes section 130B**

"130C. (1) This section applies where a company contravenes section 130B.

"(2) The Court may make any order it thinks necessary or expedient to bring about a situation where, or to ensure that, the company no longer has

a relevant interest or relevant interests in more than 10% of the voting shares in itself.

"(3) The Court may make one or more of the following:

(a) an order restraining the exercise of any voting or other rights attached to shares in the company;

(b) an order that any exercise of the voting or other rights attached to shares in the company be disregarded;

(c) an order directing the disposal of, or of any interest in, shares in the company;

(d) an order directing the company not to register the transfer or transmission of shares;

(e) an order directing the company not to make payment, or to defer making payment, of any sum or sums due from the company in respect of shares in the company;

(f) an order cancelling, or declaring to be voidable, an agreement, arrangement or offer relating to shares in the company.

"(4) If the Court is satisfied that a person has suffered, or is likely to suffer, loss or damage:

(a) as a result of the contravention or of the company having a relevant interest or relevant interests in more than 10% of the voting shares in itself; or

(b) as a result of conduct engaged in by the company in connection with, and whether before, at the time of or after, the contravention;

the Court may make against the company or a person who was in any way, by act or omission, directly or indirectly, knowingly concerned in or party to:

(c) if paragraph (a) applies - the contravention; or

(d) if paragraph (b) applies - the conduct;

any order that the Court thinks just and equitable, including, but not limited to, one or more of the following:

(e) an order directing the refunding of money or the return of property;

(f) an order directing the payment to a person of damages in respect of loss or damage so suffered;

(g) an order directing that a person be indemnified against any loss or damage that the person may so suffer.

"(5) In order to secure compliance with any other order made under this section, the Court may make an order directing a person to do or refrain from doing a specified act.

"(6) The Court may only make an order under this section on the application of the Commission or of a person whose fights or interests have been or are affected by, or who has suffered, or is likely to suffer, loss or damage as a result of:

(a) the contravention;

(b) the company having a relevant interest or relevant interests in more than 10% of the voting shares in itself; or

(c) conduct engaged in by the company in connection with, and whether before, at the time of or after, the contravention.

"(7) The power of a court under section 535 to relieve a person to whom that section applies, wholly or partly and on such terms as the court thinks fit, from a liability referred to in that section extends to relieving a person against whom an order may be made under subsection (4) of this section from the liability to have such an order made against the person.

"(8) Section 49 of the Companies (Acquisition of Shares) Act 1980 10 applies in relation to an order under this section in the same way as it applies in relation to an order under section 45 of that Act.

"(9) Nothing in this section limits the generality of anything else in it.

#### **Effect of Subdivision**

"130D. Nothing in this Subdivision limits the generality, or affects the operation, of a provision of:

(a) Subdivision C; or

(b) the Companies (Acquisition of Shares) Act 1980.

#### **"Subdivision E - Other".**

#### **OPTION B**

#### **"Subdivision D - Unacceptable Self-acquisition Schemes**

#### **Interpretation**

"130A. (1) In this Subdivision, unless the contrary intention appears:

'agreement' means an agreement, arrangement or understanding:

(a) whether formal or informal or partly formal and partly informal;

(b) whether written or oral or partly written and partly oral; and

(c) whether or not having legal or equitable force and whether or not based on legal or equitable rights;

'connected transaction', in relation to a self-acquisition scheme relating to a company, means a transaction that:

(a) is or will be, or forms or will form part of, the scheme;  
or

(b) has been, or is proposed to be, entered into in connection with the scheme;

whether or not the company is or will be a party to the transaction;

'eligible agreement' means:

(a) an agreement;

(b) a proposed agreement;

(c) an agreement as varied or as proposed to be varied;

(d) where an agreement has been varied - the agreement as in force at any time before the variation; or

(e) where an agreement has been discharged - the agreement as in force at any time before its discharge;

'enter into' includes engage in or become a party to;

'in connection with', in relation to a scheme or transaction, includes in the course of carrying out the scheme or transaction;

'party', in relation to a scheme or transaction, includes:

(a) in so far as the scheme or transaction consists of an eligible agreement - a party to the eligible agreement;

(b) in so far as the scheme or transaction consists of a proposed or discharged agreement - a person who would be a party to the agreement if it were in effect; and

(c) otherwise - a person who has entered into or carried out, or proposes to enter into or carry out, the whole or a part of the scheme or transaction;

'scheme' includes:

(a) a transaction;

(b) any plan, proposal, action, course of action, or course of conduct, even if unilateral; and

(c) a unilateral scheme;

'transaction' includes conduct (even if unilateral) and an eligible agreement.

"(2) A reference in this Subdivision to a person carrying out a scheme includes a reference to the person carrying out the scheme together with any other person or persons.

### **Self-acquisition scheme**

"130B. (1) A reference in this Subdivision, in relation to a company, to a self-acquisition scheme is a reference to a scheme to which the company has become a party for the purpose, or for purposes including the purpose, of doing any

of the following, even if only at a future time or in particular circumstances:

(a) obtaining, securing, retaining, increasing the extent of, or exercising, power:

(i) to exercise, or control the exercise of, the right to vote attached to voting shares in the company; or

(ii) to dispose of, or to exercise control over the disposal of, shares in the company;

(b) bringing about a situation where, or ensuring that, a body corporate that has such power is, or the directors of such a body are, accustomed or under an obligation, whether formal or informal, to act in accordance with the company's directions, instructions or wishes in relation to the exercise of the power;



(c) obtaining, securing, retaining, or increasing the extent of, a controlling interest in such a body;

(d) obtaining, securing, retaining, increasing the extent of, or exercising, the voting power attached to not less than the prescribed percentage of the voting shares in such a body; or

(e) otherwise obtaining, securing, or retaining, a relevant interest in a share in itself.

"(2) Section 9 of the Companies (Acquisition of Shares) Act 1980 has effect for the purposes of this section as if:

(a) subsection (1) of this section were a provision of that section; and

(b) without limiting the generality of anything in that section, a reference in subsection 9 (2) of that Act to power included a reference to power sought to be obtained.

"(3) A transaction or proposed transaction permitted by section 133BA, 133BBA or 133BB:

(a) shall not be taken to have been, or to be proposed to be, entered into in connection with; and

(b) shall be disregarded in determining what constitutes;

a self-acquisition scheme relating to the company.

**Relevant matters affecting self-acquisition scheme**

"130BA. (1) For the purposes of this Subdivision, each of the following is a relevant matter affecting a self-acquisition scheme relating to a company:

(a) to how many shares in the company the scheme relates;

(b) the likely effect of the scheme or a connected transaction on the company's state of affairs;

(c) what consideration the company has provided, or is to provide, in connection with the scheme or a connected transaction;

(d) how much information about the scheme or a connected transaction the company has given to its members or creditors, or to securities exchanges;

(e) what opportunity the company's members or creditors have had to consider the likely effects of the scheme or of a connected transaction;

(f) whether or not the company's members or creditors have been consulted about, or have participated in making, the decision for the company to become a party to the scheme;

(g) whether or not the company's members have had reasonable and equal opportunities to participate, or to become entitled to participate, in benefits accruing, whether directly or indirectly and whether immediately or in the future, in connection with the scheme or a connected transaction, to a party to the scheme or a connected transaction or to a person associated with such a party;

(h) the effect of the scheme or a connected transaction on:

(i) a takeover bid in relation to shares in the company that a person has made or proposes to make; or

(ii) the likelihood of a person making such a takeover bid;

(j) any other matter that appears to the Commission to be relevant in all the circumstances of the case.

"(2) Nothing in subsection (1) limits the generality of anything else in it.

#### **Declaration by Commission**

"130C. (1) This section applies where the Commission is satisfied that:

(a) a transaction that has been, or is proposed to be, entered into is a connected transaction in relation to a self-acquisition scheme relating to a company; and

(b) having regard to the relevant matters affecting the scheme, the scheme or a connected transaction has materially prejudiced, or is likely to prejudice materially, the rights or interests of the company, its creditors or members or a class of its creditors or members.

"(2) The Commission:

(a) if the transaction referred to in paragraph (1) (a) has been entered into - may, within 90 days after the day on which it was entered into, declare the transaction; or

(b) otherwise - may declare the proposed transaction referred to in paragraph (1) (a);

to form part of an unacceptable self-acquisition scheme relating to the company.

"(3) The Commission may make a declaration under this section in relation to the scheme even if it has already become entitled on at least one occasion to make such a declaration.

"(4) A declaration under this section shall be in writing.

"(5) As soon as practicable after making a declaration under this section, the Commission shall:

(a) give a copy of the declaration to the company; and

(b) cause such a copy to be published in the Gazette.

(6) The validity of a declaration is not affected by a contravention of subsection (5).

**Commission may make interim orders**

"130D. (1) Subject to this section, where the Commission makes a declaration under section 130c, it may, whether or not it has already made at least one order under this section in reliance on the declaration, by writing published in the Gazette, make one or more of the following:

(a) an order restraining a specified person from disposing of any interest in specified shares in the company;

(b) an order restraining a specified person from acquiring any interest in specified shares in the company;

(c) an order restraining the exercise of voting or other rights attached to specified shares in the company;

(d) an order directing the holder of shares in respect of which an order under this section is in force to give written notice of that order to any person whom the holder knows to be entitled to exercise a right to vote attached to any of those shares;

(e) an order directing the company not to make payment, except in the course of winding up, of a sum due from the company in respect of specified shares;

(f) an order directing the company not to register the transfer or transmission of specified shares;

(g) an order directing the company not to issue to a person who holds shares in the company shares that the body proposed to issue to the person:

(i) because the person holds shares in the company; or

(ii) pursuant to an offer or invitation made or issued to the person because the person holds shares in the company.

"(2) The Commission may, by written order published in the Gazette, vary or revoke an order made under subsection (1).

"(3) A copy of an order under subsection (1) and of any order by which it is revoked or varied shall be served on the company and on any person to whom the order is directed.

"(4) Where an order made under subsection (1) is in force, a person aggrieved by the order may apply to the Court for variation or revocation of the order, and the Court may, if it is satisfied that it is reasonable to do so, vary the order or revoke the order and any order by which it has been varied.

"(5) A person shall not contravene an order under subsection (1).

Penalty: \$2,500 or imprisonment for 6 months, or both.

"(6) Where a body corporate contravenes subsection (5), each officer of the body who is in default contravenes this subsection.

Penalty: \$2,500 or imprisonment for 6 months, or both.

"(7) An order made under subsection (1) ceases to operate at the end 35 of 30 days after it is made or at the end of the day specified in it as the day on which it ceases to operate, whichever is earlier.

"(8) The Commission may only make an order under subsection (1) if it has afforded the person to whom the order is directed an opportunity to appear at a hearing before the Commission and to make submissions and 40 give evidence to the Commission in relation to the matter.

"(9) The Commission is not empowered to make an order under subsection (1) in reliance on a declaration made by the Commission if:

(a) an application has been made to the Court under section 130F in relation to the declaration; or

(b) the Court has revoked under subsection (4) of this section an order made in reliance on the declaration.

**Court may reverse Commission's declaration**

"130E. (1) Where the Commission makes a declaration under section 130C, the Court may, on an application by the company or on an application made under section 130F in relation to the declaration, declare the transaction or proposed transaction not to be part of an unacceptable self-acquisition scheme.

"(2) On the making of a declaration under subsection (1), the Commission's declaration ceases to have effect.

**Court may act on Commission's declaration**

"130F. (1) This section applies where the Commission makes a declaration under section 130C.

"(2) The Court may make any order it thinks necessary or expedient:

(a) to protect the rights or interests of a person who is affected by the scheme or by a connected transaction;

(b) to prevent a person from entering into or carrying out the whole or a part of the scheme or of a connected transaction; or

(c) to put a person in the position in which the person would have been if the whole or a part of the scheme or of a connected transaction had not been entered into or carried out.

"(3) The Court may make one or more of the following:

(a) an order directing a person to supply specified information to members or creditors of the company;

(b) an order restraining the exercise of any voting or other rights attached to shares in the company;

(c) an order that any exercise of the voting or other rights attached to shares in the company be disregarded;

(d) an order restraining the disposal of, or of any interest in, shares in the company;

(e) an order directing the disposal of, or of any interest in, shares in the company;

(f) an order vesting in the Commission shares, or any interest in shares, in the company;

(g) an order directing the company not to register the transfer or transmission of shares;



(h) an order directing the company not to make payment, or to defer making payment, of any sum or sums due from the company in respect of shares in the company;

(j) an order cancelling, or declaring to be voidable, an arrangement or offer that is a connected transaction in relation to the scheme.

"(4) If the Court is satisfied that a person has suffered, or is likely to suffer, loss or damage as a result of the scheme or of a connected transaction, the Court may make, against the company or a person who was in any way, by act or omission, directly or indirectly, knowingly concerned in or party to the company becoming a party to the scheme or transaction, any order that the Court thinks just and equitable, including, but not limited to, one or more of the following:

(a) an order directing the refunding of money or the return of property;

(b) an order directing the payment to a person of damages in respect of loss or damage so suffered;

(c) an order directing that a person be indemnified against any loss or damage that the person may so suffer.

"(5) The Court may, in order to secure compliance with any other order made under this section, make an order directing a person to do or refrain from doing a specified act.

"(6) The Court may only make an order under this section on the application of the Commission, the company or a member or creditor of the company.

"(7) The power of a court under section 535 to relieve a person to 25 whom that section applies, wholly or partly and on such terms as the court thinks fit, from a liability referred to in that section extends to relieving a person against whom an order may be made under subsection (4) of this section from the liability to have such an order made against the person.

"(8) Section 49 of the Companies (Acquisition of Shares) Act 1980 applies in relation to an order under this section in the same way as it applies in relation to an order under section 60 of that Act.

"(9) Nothing in this section limits the generality of anything else in it.

**Effect of Subdivision**

"130G. Nothing in this Subdivision limits the generality, or affects the operation, of a provision of:

(a) Subdivision C; or

(b) the Companies (Acquisition of Shares) Act 1980.

**"Subdivision E - Other".**

11. After section 133 of the Principal Act the following Division is inserted:

**"Division 3A - Buy-backs of Shares and Options**

**"Subdivision AA - How this Division Works**

**Outline of structure**

"133AAA. (1) Subdivision B creates exceptions to the section 129 prohibition on a company acquiring its own shares or interests in its own shares.

"(2) These permitted acquisitions are called 'buy-backs', a term defined in Subdivision A along with most of the Division's other terminology.

"(3) Buy-backs are permitted subject to:

(a) a condition prescribed by Subdivision C, which applies to all buy-backs of shares; and

(b) conditions prescribed by Subdivisions E, F, G, J, K and L, each condition applying to a specified kind of buy-backs.

"(4) Subdivision D prescribes no conditions, but sets out what a buy-back scheme is and contains rules about such schemes. Buy-back schemes are central to many provisions of the Division.

"(5) Each of the Subdivisions prescribing conditions contains:

(a) at least one condition, usually only at the beginning of the Subdivision, but in the case of Subdivision J also at the end; and

(b) ancillary provisions about the subject matter of the condition or conditions.

"(6) The ancillary provisions relating to one of the conditions in Subdivision G are in Subdivision H.

"(7) The other Subdivisions contain further ancillary provisions and rules about the consequences of buy-backs and about the effect of certain events on buy-backs.

"(8) It should be noted that, although the Division prescribes only one condition for buy-backs of options, many provisions in Subdivisions M to T apply to both option buy-backs and share buy-backs.

**"Subdivision A - Interpretation**

## **Interpretation**

"133AA. In this Division, unless the contrary intention appears: 'auditor', in relation to a company, means:

(a) if Part VI requires the company to have an auditor - the auditor of the company for the purposes of that Part; or

(b) otherwise - a person who is entitled to act as auditor of the company for those purposes;

'buy' includes agree to buy;

'buy back' has the meaning given by section 133AB;

'buy-back' means an acquisition by a company constituted by the company buying back shares or an option;

'buy-back authorisation', in relation to a company, means a provision to the effect that the company may buy fully-paid ordinary shares in itself, being a provision contained, or proposed to be inserted, as the case requires, in the company's articles;

'buy-back offer' means any of the offers constituting a buy-back scheme;

'buy-back scheme' means offers that by virtue of section 133DA constitute a buy-back scheme;

'class', in relation to shares, has a meaning affected by sections 133AK and 133DAA;

'completed' has a meaning affected by section 133AH;

'compliance certificate' means a certificate given for the purposes of section 133NFA;

'distributable profits' means profits that are available for dividends;

'employee-shares purchase' means a buy-back of shares where:

(a) immediately before the buy-back, shares (in this definition called the 'relevant shares') being or including the first-mentioned shares were held by, or for the benefit of, particular persons; and

(b) each of those persons was, on the last occasion when any of the relevant shares began to be held by or for the benefit of the person (whether alone or jointly with any other person or persons), a participating employee in relation to the company;

even if some or all of those persons are no longer such employees;

'entitled' means entitled for the purposes of the Companies (Acquisition of Shares) Act 1980;

'externally-administered company' means a company:

(a) in respect of which a provisional liquidator has been appointed and not since removed;

(b) that is being wound up; or

(c) that is under official management;

'listed body' means a body corporate that has been admitted to an official list of a securities exchange and has not been removed from that official list;

'marketable parcel', in relation to shares in a listed body, means:

(a) if the body has been admitted to an official list of the Exchange and has not been removed from that official list -

a marketable parcel of shares in the body within the meaning of the rules of the Exchange; or

(b) in any other case - the smallest number of shares in the body that constitute a marketable parcel of such shares within the meaning of the rules of a securities exchange (other than the Exchange) to an official list of which the body has been admitted, being an official list from which the body has not been removed; 'modifications' includes additions, omissions and substitutions;

'national newspaper' means a daily newspaper that circulates generally in each State, the Territory and the Northern Territory;

'non-cash consideration' means consideration other than money;

'notifiable exchange', in relation to a listed body, means:

(a) if the body has been admitted to an official list of the Exchange and has not been removed from that official list - the securities exchange designated to the company, for the purposes of the rules of the Exchange relating to the conduct of bodies so admitted, as the body's Home Exchange; and

(b) in any case - each securities exchange (other than the Exchange) to an official list of which the body has been admitted, being an official list from which the body has not been removed.

'odd lot', in relation to shares in a listed body, means a number of shares in the listed body that is less than one marketable parcel of such shares;

'odd-lot purchase' means a buy-back by a listed body, where the number of shares acquired is an odd lot of shares in the body;

'offer period', in relation to an offer made under a buy-back scheme, means the period during which the offer remains open or, if the offer has been accepted, would have remained open had it not been accepted;

'ordinary resolution' means a resolution other than a special resolution;

'proportional buy-back scheme' means a buy-back scheme constituted by offers in relation to which paragraph 133DA (11) (b) applies;

'pro-rata buy-back scheme' means a buy-back scheme constituted by offers in relation to which paragraph 133DA (11) (a) applies;

'provide', in relation to consideration, includes pay;

'purchase' includes an agreement to buy;

'relevant date', in relation to a winding up of a company, means:

(a) in the case of a company ordered to be wound up by a court that has not previously commenced to be wound up voluntarily - the date of the winding up order; or

(b) otherwise - the date of the commencement of the winding up;

'resolution' includes a special resolution;



'rights offer or invitation', in relation to a body corporate, means a share offer made, or a share invitation issued, by the body to members of the body and to no-one else;

'rule', in relation to a securities exchange, means a provision of:

(a) the constituent documents of the securities exchange; or

(b) any other rules, regulations or by-laws:

(i) made by the securities exchange; or

(ii) made by another person and adopted by the securities exchange;

'securities exchange' means the Exchange or a body corporate (wherever incorporated) that is declared by the regulations to be a securities exchange for the purposes of this Division;

'seller's claim', in relation to a company, means a claim in respect of obligations of the company under an agreement constituting a buy-back by the company;

'share invitation', in relation to a body corporate, means an invitation to apply or offer to subscribe for or buy ordinary shares in the body that is issued by the body or on its behalf;

'share offer', in relation to a body corporate, means an offer of ordinary shares in the body for subscription or purchase that is made by the body or on its behalf;

'shares', in Subdivision D, has a meaning affected by section 133DAA;

'solvency declaration' has the meaning given by section 133AF;

'solvency period', in relation to an offer made under a buy-back scheme, means the period beginning at the start of the offer period and ending when the company first provides consideration that it is to provide under an agreement resulting from the acceptance of an offer made under the buy-back scheme;

'solvent', in relation to a company, means able to pay its debts as and when they become due and payable;

'takeover aspects' has the meaning given by section 133AD;

'terms' includes conditions;

'trading' has the same meaning as in the Companies  
(Acquisition of Shares} Act 1980;

'trading day', in relation to a securities exchange, means a  
day on which 35 a stock market of the securities exchange is  
open for trading in securities;

'transfer':

(a) in relation to an option - includes assign; and

(b) in relation to shares - has a meaning affected by section  
40 133AJ.

**What constitutes buying back shares or an option**

"133AB. (1) Where a company buys shares in itself, it shall be taken to buy back the shares.

"(2) Where a company buys an option to acquire unissued shares in itself, it shall be taken to buy back the option.

**The 10% in 12 months limit**

"133AC. A buy-back exceeds the 10% in 12 months limit if, and only if, the number calculated in accordance with the following formula exceeds 10:

$$\frac{A}{B} \times 100;$$

where:

**A** is the aggregate nominal value of all shares bought back by the company during the period of 12 months ending on the day of the first-mentioned buy-back;

**B** is the aggregate nominal value of all the issued shares, as at the start of that period, in the company.

**Takeover aspects of proposed resolution**

"133AD. (1) A notice that sets out the intention to propose a resolution of a company sets out the takeover aspects of the proposed resolution if, and only if, the notice complies with this section.

"(2) It shall set out whether or not, as at the time when it is prepared, any of the company's directors is aware of:

(a) a proposal by a person:

(i) to acquire, or to increase the extent of, a substantial interest in the company; or

(ii) without limiting the generality of subparagraph (i), to make a takeover bid in relation to shares in the company; or

(b) a takeover bid that has been made by a person in relation to shares in the company and offers under which remain open as at that time.

"(3) If any of the directors is so aware, the notice shall set out:

(a) whether or not such a proposal or takeover bid has influenced the decision to propose the resolution; and

(b) if so - particulars of:

(i) each proposal and takeover bid concerned; and

(ii) the extent to which each has influenced that decision.

**When directors presumed to be aware of proposed or actual takeover bid**

"133AE. (1) This section has effect for the purposes of this Division.

"(2) Where a person who proposes to make a takeover bid in relation to shares in a company has:

(a) made a public announcement to the effect that the person proposes to make the takeover bid; or

(b) served on the company a Part A statement within the meaning of the Companies (Acquisition of Shares) Act 1980 relating to the proposed takeover bid; a director of the company shall, unless the contrary is established, be presumed to be aware of the proposal.

"(3) A director of a company shall, unless the contrary is established, be presumed to be aware of a takeover bid that a person has made in relation to shares in the company.

"(4) Where:

(a) a person has made a takeover bid in relation to shares in a company; and

(b) a director of the company was aware that the person proposed to make, but is not aware that the person has made, the takeover bid;

subsection 133AD (2) and paragraph 133EB (b) apply in relation to the director, in relation to the takeover bid, as if the person had not made, but still proposed to make, the takeover bid.

### **Solvency declaration**

"133AF. (1)A solvency declaration by a company's directors is a declaration in writing that:

(a) is signed in person by everyone who, on the day on which the declaration is first signed by a director of the company, is such a director;

(b) specifies that day;

(c) states to the effect that it is the directors' opinion that the company was solvent on that day;

(d) specifies each buy-back scheme that related to shares in the company and:

(i) offers under which remained open; or

(ii) agreements resulting from the acceptance of offers under which remained uncompleted;

as at that day;

(e) specifies each agreement that:

(i) constituted a buy-back made by the company otherwise than under a buy-back scheme; and

(ii) remained uncompleted as at that day;

(f) specifies, as at that day:

(i) each proposed buy-back scheme (if any) under which the company proposed to make offers during the period of 12 months starting on that day; and

(ii) each buy-back that the company proposed to make, otherwise than under a buy-back scheme, during that period; and

(g) states to the effect that it is the directors' opinion that the company will remain solvent throughout that period even if:

(i) each buy-back offer (if any) that related to shares in the company and remained open as at that day is accepted, and the resulting agreement completed, during that period;

(ii) each agreement (if any) that resulted from the acceptance of a buy-back offer relating to such shares and remained uncompleted as at that day is completed during that period;

(iii) each agreement (if any) of the kind referred to in paragraph (e) is completed during that period;

(iv) all offers made under each such proposed buy-back scheme (if any) are accepted, and the resulting contracts completed, during that period; and

(v) each such proposed buy-back (if any) is made during that period.

"(2) Each director of a company who signs a solvency declaration by the company's directors shall be taken to have stated in it that he or she had, when signing the declaration, the opinions described in it.

"(3) A solvency declaration by a company's directors shall be taken to have been made on the day specified in it under paragraph (1) (b).

"(4) Unless sooner revoked under section 133KC, a solvency declaration by a company's directors remains in force for 12 months starting on the day on which it is made.

"(5) A solvency declaration by a company's directors relates to a buy-back scheme or buy-back if, and only if, the declaration specifies the buy-back scheme or buy-back under paragraph (1) (d) or (e).

"(6) In subsection (5):

'buy-back' includes a proposed buy-back;

'buy-back scheme' includes a proposed buy-back scheme.

#### **Auditor's report on solvency declaration**

"133AG. An auditor's report on a solvency declaration by a company's directors is a report in writing that the company's

auditor prepares, and sends to the company, on or after the day on which the declaration is made and that states to the effect that the auditor:

(a) has inquired into the company's state of affairs; and

(b) is aware of nothing to indicate that it is unreasonable in all the circumstances to form the opinions described in the declaration.

**When buy-back agreement is completed**

"133AH. For the purposes of this Division, an agreement constituting a buy-back by a company is completed when the company has provided all the consideration that it is to provide under the agreement.



**When shares are transferred**

"133AJ. For the purposes of this Division, shares in a body corporate are transferred pursuant to an agreement when the transfer of the shares pursuant to the agreement is registered by the body.

**Classes of shares**

"133AK. For the purposes of this Division, the shares in a company, if not divided into 2 or more classes, constitute a class.

**"Subdivision B - Power to Buy Back Shares and Options**

**Power to buy back shares**

"133BA. (1) A company may buy back fully-paid ordinary shares if, and only if, the conditions prescribed by this Division (other than subsection 133KB (2)) are satisfied.

"(2) The power conferred by subsection (1) may only be exercised by the directors.

"(3) The order in which this Division prescribes conditions does not 15 indicate that the conditions must be satisfied in a particular order.

**Power to buy back an option**

"133BBA. (1) A company may buy back an option if, and only if, the condition prescribed by subsection 133KB (2) is satisfied.

"(2) The power conferred by subsection (1) may only be exercised by 20 the directors.

**Completion of buy-back**

"133BB. Subject to this Division (other than sections 133BA and 133BBA), where a company buys back shares or an option as permitted by section 133BA or 133BBA, the shares or option may be transferred to the company pursuant to the buy-back.

**Effect of Division**

"133BC. (1) This Division has effect despite:

(a) Subdivisions C and D of Division 3;

(b) section 11 of the Companies (Acquisition of Shares) Act 1980;

(c) the constituent documents, or a resolution, of a company;

(d) the rules of a securities exchange; or

(e) any agreement.

"(2) Without limiting the generality of subsection (1), a buy-back or transfer permitted by subsection 133BA, 133BBA or 133BB does not contravene any of the provisions referred to in paragraphs (1) (a) and (b) of this section.

"(3) Nothing in this Division affects section 82.

"(4) Shares bought back as permitted by section 133BA shall, so long as the rights attached to them are suspended because of section 133KJ, be disregarded in ascertaining, for the purposes of paragraph 130B (1) (b), the voting shares in which the company has a relevant interest or relevant interests.

[Subsection (4) is required only if Option A is adopted].

**Other obligations and liabilities not affected**

"133BD. (1) Except as expressly provided in this Division, nothing in this Division affects an obligation, or a liability (whether civil or criminal), arising otherwise than under this Division.

"(2) Without limiting the generality of subsection (1), nothing in this Division relieves a director of any duty to the company, whether arising under section 229 or otherwise and whether of a fiduciary nature or not.

**"Subdivision C - Buy-back Authorisation in Articles**

**Articles to contain buy-back authorisation**

"133CA. (1) The first condition is that the company's articles contain a buy-back authorisation at the relevant time.

"(2) For the purposes of subsection (1), the relevant time is:

(a) in the case of a buy-back that is made by a proprietary company under a buy-back scheme and does not exceed the 10% in 12 months limit - the time when the first offer is made under the buy-back scheme;

(b) in the case of any other buy-back made under a buy-back scheme or of an employee-shares purchase - the time when an ordinary resolution of the company that approves the buy-back scheme or employee-shares purchase is passed;

(c) in the case of any other buy-back by a proprietary company - the time when a special resolution of the company approving the buy-back is passed; or

(d) in the case of an odd-lot purchase by a listed body - the time of the buy-back.

**Inclusion, effect and renewal of buy-back authorisation**

"133CB. (1) In this section:

'renew', in relation to a buy-back authorisation, means renew under subsection (4);

'requirement', in relation to a company, includes a requirement of a law or of the company's constituent documents.

"(2) A company's buy-back authorisation, unless sooner omitted from the company's articles, ceases to have effect at the end of:

(a) if the articles provide that the buy-back authorisation has effect for a specified period of less than 3 years and the buy-back authorisation has not been renewed - the specified period;

(b) if the buy-back authorisation has been renewed on at least one occasion and the resolution, or the later or last of the resolutions, as the case requires, renewing it states that it is renewed for a specified period of less than 3 years--the specified period; or

(c) otherwise - 3 years;

beginning:

(d) if the buy-back authorisation was contained in the articles at the time when the company was incorporated and has not been renewed - at that time;

(e) if the buy-back authorisation was inserted in the articles and has not been renewed - at the time when it was so inserted; or

(f) if the buy-back authorisation has been renewed on at least one occasion - at the time when the buy-back authorisation was last renewed.

"(3) Where a company's buy-back authorisation ceases to have effect, the company's articles are, by force of this subsection, altered by omitting the buy-back authorisation.

"(4) A company may renew its buy-back authorisation in any manner in which it may alter its articles by inserting a buy-back authorisation and shall, in relation to a renewal of its buy-back authorisation, comply with the requirements that apply in relation to such an alteration of its articles, being an alteration in the manner in which the renewal is effected.

"(5) A company shall, with every notice that:

(a) sets out the intention to propose:

(i) a resolution for the alteration of the company's articles by inserting a buy-back authorisation; or

(ii) a resolution to renew its buy-back authorisation; and

(b) is sent to a person who is entitled to vote on the proposed resolution;

send a statement that:

(e) states to the effect that the consequence of the proposed alteration or renewal is to empower the company, during the period during which the buy-back authorisation is in effect, to buy fully-paid 35 ordinary shares in itself as provided in this Division;

(d) explains the reasons for proposing the resolution and sets out the factual matters and principles underlying those reasons;

(e) if subparagraph (a) (ii) applies - reviews the buy-backs (if any) of shares by the company since the buy-back authorisation took effect, or was last renewed, as the case requires, and the effects of those buy-backs (if any) on the company and on the directors, and the members, of the company, respectively;

(f) discusses both the potential advantages, and the potential disadvantages, of the proposed buy-back authorisation, or of the buy-back authorisation proposed to be renewed, as the case may be, for the company and for the directors, and the members, of the company, respectively.

"(6) Where a company contravenes subsection (4), the company and any officer of the company who is in default are each guilty of an offence.

Penalty: \$5,000 or imprisonment for 12 months, or both.

### **"Subdivision D - Buy-back Schemes**

#### **Shares and classes of shares**

"133DAA. (1) Except so far as the contrary intention appears, a reference in this Subdivision to shares is a reference to ordinary shares.

"(2) Where the shares in a company are divided into 2 or more classes, the provisions of this Subdivision (other than this subsection and subsection 133DA (10)) apply in relation to each of those classes:

(a) as if the shares in that class were the only shares in the company; and

(b) without prejudice to their application by force of this subsection in relation to any other class of shares.

"(3) Subject to subsection (4), a class of shares in a company that consists of both fully-paid shares and partly-paid shares shall, for the purposes of this Subdivision (other than this subsection), be taken to be 2 classes, one constituted by the fully-paid shares and the other by the partly-paid shares.

"(4) Where, after the first offer is made by a company under a buy-back scheme, partly-paid shares in the company become fully-paid, they shall, for the purposes of the application of this Subdivision (other than this subsection) in relation to the buy-back scheme, be taken to continue to be included in the class in which they were included when the offer was so made.

#### **Buy-back scheme**

"133DA. (1) A buy-back is made under a buy-back scheme if, and only if, it results from the acceptance of an offer made under the buy-back scheme.

"(2) An offer is made under a buy-back scheme if, and only if, it is one of the offers constituting the buy-back scheme.

"(3) Offers by a company to buy back shares constitute a buy-back scheme if, and only if, the following requirements of this section are complied with.

"(4) Each offer must be in writing.



"(5) Each offer must have the same date, being a date that is not earlier than 3 days before the day on which the offer is sent and not later than that day.

"(6) Each offer must state that it will, unless withdrawn, remain open during a period ending on a specified day that is not earlier than one month, nor later than 6 months, after the date of the offer.

"(7) Each offer must specify the consideration that under the offer is to be provided for the buy-back of each share to which the offer relates.

"(8) Each offer must set out how and when the company's obligations are to be satisfied.

"(9) The offers must relate only to shares in the company.

"(10) Each offer must specify, in relation to each class of shares (including shares other than ordinary shares) in the company:

(a) the total number of shares in the class as at the time immediately before the first of the offers is sent; and

(b) the number of shares (if any) in the class that, as at that time, have been bought back but not yet cancelled (which may be expressed as a number of shares or as a percentage of the number referred to in paragraph (a)).

"(11) One of the following paragraphs must apply:

(a) each offer relates to all the shares in the company that the offeree holds;

(b) each offer relates to a proportion of the shares in the company that the offeree holds, being a proportion that is the same in respect of each offer.

"(12) If paragraph (11) (a) applies, each offer must specify the maximum number of shares that the company proposes to buy back as a result of the acceptance of some or all of the offers.

"(13) The number to be specified under subsection (12) may be expressed as a number of shares or as a percentage of the total number of shares in the company as at the time immediately before the first of the offers is sent.

"(14) The offers must be the same disregarding:

(a) the fact that the number of shares that may be acquired under each offer is limited by the number of shares held by the offeree; and

(b) any differences in the consideration specified for each share in the offers that are attributable only to the fact that the offers relate to shares having different accrued dividend entitlements.

"(15) The offeror must send an offer in an approved manner to each person who holds shares in the company when the first of the offers is sent.

"(16) Section 8A of the Companies (Acquisition of Shares) Act 1980 has effect for the purposes of subsection (15) of this section as if that subsection were a provision of that Act.

#### **Withdrawal or variation of buy-back offers**

"133DB. A buy-back offer is not capable of being withdrawn or varied without the Commission's written consent, which may be given subject to such conditions (if any) as are specified in it.

#### **Acceptance of offers made under pro-rata buy-back scheme**

"133DC. (1) Where:

(a) offers have been made under a pro-rata buy-back scheme; and

(b) the total number of shares (in this section called the 'available number') in relation to which offers made under the buy-back scheme have been accepted exceeds the number of shares (in this section called the 'desired number') that the offers specify under subsection 133DA (12);

subsections (2) and (3) of this section apply in relation to each offer that was made under the buy-back scheme and has been accepted.

"(2) The offer shall be taken always to have related only to, to relate only to, and to have been accepted only in relation to, a number of shares (in this section called the 'primary number') in the company that bears to the number of shares (in this section called the 'acceptance number') in respect of which the offeree purported to accept the offer the same proportion, as nearly as practicable, as the desired number bears to the available number.

"(3) If the company is a listed body and the acceptance number exceeds the primary number by a number of shares consisting of:

(a) an odd lot of shares; or

(b) a marketable parcel or marketable parcels of shares and an odd lot of shares;

then, despite subsection (2), the offer shall be taken always to have related only to, to relate only to, and to have been accepted only in relation to, a number of shares in the

company equal to the sum of the primary number and the number of shares in that odd lot.

"(4) Subsections (2) and (3) do not have effect for the purposes of 35 paragraph 133DA (11) (a) and subsection (1) of this section.

**Avoiding odd lots under proportional buy-back scheme**

"133DD. Where, at a particular time:

(a) an offer relating to a proportion of particular shares has been made under a proportional buy-back scheme;

(b) the company is a listed body;

(c) the offer is accepted; and

(d) a proportion of the shares, being the proportion to which the offer does not relate, consists of an odd lot of shares or consists of a marketable parcel or marketable parcels of shares and an odd lot of shares;

the offer shall, except for the purposes of paragraph 133DA (11) (b) and this section, be taken always to have related to, to relate to, and to have been accepted in relation to, a number of shares in the company equal to the sum of:

(e) the number of shares of which the proportion referred to in paragraph (a) of this section consists; and

(f) the number of shares in that odd lot.

**Odd lots to be disregarded for purposes of 10% in 12 months limit**

"133DE. (1) This section applies where, because of subsection 133DC (3) or section 133DD, an offer made by a listed body under a buy-back scheme is taken to have been accepted in relation to a number of shares in the body equal to the sum of a particular number of such shares and the number of shares in an odd lot of such shares.

"(2) In determining whether or not a buy-back made under the buy-back scheme exceeds the 10% in 12 months limit, the odd lot shall be taken not to have been bought back.

**"Subdivision E - Approval of Buy-back Schemes by Ordinary Resolution**

**Public company**

"133EA. If the company is a public company and the buy-back is made under a buy-back scheme, the next conditions are:

(a) that the buy-back does not exceed the 10% in 12 months limit; and

(b) that the buy-back offers were made under an ordinary resolution of the company.

**Proprietary company**

"133EB. If the company is a proprietary company, the buy-back is made under a buy-back scheme and:

(a) the buy-back exceeds the 10% in 12 months limit; or

(b) at the time when the first offer was made under the buy-back scheme, at least one of the company's directors was aware of:

(i) a proposal by a person to make a takeover bid in relation to shares in the company; or

(ii) a takeover bid that had been made by a person in relation to shares in the company and offers under which remained open at that time;

the next condition is that the buy-back offers were made under an ordinary resolution of the company.

**Buy-back offers made under a resolution**

"133EC. Buy-back offers are made under a particular resolution if, and only if:

(a) the resolution:

(i) approves the buy-back scheme constituted by the offers;

(ii) complies with section 133ED; and

(iii) was passed at a meeting held before the first offer was made under the buy-back scheme;

(b) the offers are in accordance with the resolution; and

(c) subject to paragraph (b), such of the terms of the offers as are not specified in the resolution are not materially different from the terms particulars of which were specified under subsection 133~E (2) in notices relating to the resolution that were sent for the purposes of the meeting.

**Resolution to approve proposed buy-back scheme**

"133ED. (1) A resolution of a company that is passed at a meeting and approves a proposed buy-back scheme complies with this section if, and only if:

(a) every notice of the meeting sent to a person entitled to vote on the resolution set out, or was accompanied by a notice setting out:

(i) the intention to propose the resolution; and

(ii) the matters required by section 133EE; and

(b) the resolution complies with subsection (2) of this section.

"(2) The resolution shall specify:

(a) the latest date that the proposed buy-back offers may have for the purposes of subsection 133DA (5), being a date at most 12 months after the day on which the resolution is passed;

(b) the minimum period, being at least one month and at most 6 months, during which the offers are to remain open unless they are withdrawn;

(c) the consideration, or each alternative consideration included in the consideration, as the case requires, that under each of the offers is to be provided for the buy-back of each share to which the offer relates;

(d) if the buy-back scheme is to be a pro-rata buy-back scheme - the maximum number of shares that the company proposes to buy back as a result of the acceptance of some or all of the offers; and

(e) if the buy-back scheme is to be a proportional buy-back scheme - the proportion to be specified in the offers for the purposes of paragraph 133DA (11) (b).

"(3) A resolution may specify a consideration under paragraph (2) (c) as a consideration to be determined by the directors, being:



(a) not less than a minimum consideration specified in the resolution; and

(b) not more than a maximum consideration so specified.

"(4) A resolution may specify a consideration under paragraph (2) (c) or (3) (a) or (b) as a consideration to be determined by the directors in a manner specified in the resolution.

"(5) The number to be specified under paragraph (2)(d) may be expressed as a number of shares or as a percentage of the total number of fully-paid shares in the class concerned as at the time immediately before the first of the offers is sent.

"(6) A resolution of a company to approve a proposed buy-back scheme may require specified terms to be included in the proposed buy-back offers.

**Notice of resolution to approve proposed buy-back scheme**

"133EE. (1) A notice that:

(a) sets out the intention to propose a resolution to approve a proposed buy-back scheme; and

(b) is sent to a person entitled to vote on the resolution;

shall comply with this section.

"(2) It shall set out the text of the proposed resolution and full particulars of such of the terms of the proposed buy-back offers as are not specified in the resolution.

"(3) It shall set out the reasons why the buy-back scheme is being proposed and the facts and principles underlying those reasons.

"(4) It shall set out the takeover aspects of the proposed resolution.

"(5) It shall set out what the directors consider will be the likely effect on the company's state of affairs if the offers are made and all are accepted.

"(6) It shall set out a copy of a solvency declaration by the directors that relates to the proposed buy-back scheme and was made within 7 days before the day on which the notice is prepared.

"(7) It shall set out, in relation to each person who, at the time when the notice is prepared, is a director of the company or is associated with such a director:

(a) whether or not the person intends at that time, if:

(i) the resolution is passed in a form not substantially different from that set out in the notice;

(ii) buy-back offers are made under the resolution; and

(iii) the person holds shares in the company when the offers are made;

to accept the offer made to the person under the buy-back scheme; or

(b) if the person has not decided whether or not the person so intends - that the person has not so decided.

"(8) It shall set out all other information that is known to any of the directors and may reasonably be expected to influence a person in deciding whether or not to vote in favour of the resolution.

#### **"Subdivision F - Employee-shares Purchases**

##### **Approval by ordinary resolution**

"133FA. If the buy-back is an employee-shares purchase, the next conditions are:

(a) that:

(i) if the company has an approving holding company or approving holding companies - the company, and that holding company or those holding companies, have each; or

(ii) otherwise - the company has;

approved the buy-back by an ordinary resolution passed at a meeting of the company or holding company held before the agreement constituting the buy-back is entered into;

(b) that each of the resolutions, or the resolution, as the case may be, complies with section 133FB;

(c) that the agreement is in accordance with each of the resolutions, or the resolution, as the case may be; and

(d) subject to paragraph (c) of this section, that such of the terms of the agreement as are not specified in any of the resolutions, or in the resolution, as the case may be, are not materially different from the terms particulars of which were specified under subsection 133FC (2) in notices relating to the resolutions or resolution that were sent for the purposes of the meetings or meeting.

##### **Resolution to approve proposed employee-shares purchase**

"133FB. (1) A resolution of a corporation that is passed at a meeting and approves a proposed employee-shares purchase complies with this section if, and only if:

(a) every notice of the meeting sent to a person entitled to vote on the resolution set out, or was accompanied by a notice setting out:

(i) the intention to propose the resolution; and

(ii) the matters required by section 133FC;

(b) the resolution specifies the consideration, or each alternative consideration included in the consideration, as the case requires, that under the agreement constituting the proposed purchase is to be provided for the purchase; and

(c) no votes are cast, in relation to the resolution, in respect of any shares held by:

(i) a party to the agreement (other than the company that proposes to make the purchase or a holding company of that company); or

(ii) a person associated with such a party.

"(2) A resolution may specify a consideration under paragraph (1) (b) as a consideration to be determined by the directors, being:

(a) not less than a minimum consideration specified in the resolution; and

(b) not more than a maximum consideration so specified.

"(3) A resolution may specify a consideration under paragraph (q) (b) or (2) (a) or (b) as a consideration to be determined by the directors in a manner specified in the resolution.

"(4) A resolution of a corporation to approve a proposed employee-shares purchase may require specified terms to be included in the agreement constituting the purchase.

**Notice of resolution to approve proposed employee-shares purchase**

"133FC. (1) A notice that:

(a) sets out the intention to propose a resolution of a corporation to approve a proposed employee-shares purchase; and

(b) is sent to a person entitled to vote on the resolution;

shall comply with this section.

"(2) It shall set out the text of the proposed resolution and full particulars of such of the terms of the agreement constituting the proposed purchase as are not specified in the resolution.

"(3) It shall set out the reasons why the purchase is being proposed and the facts and principles underlying those reasons.

"(4) It shall set out, in relation to each person by whom, or for whose benefit, shares to which the proposed purchase relates are held:

(a) the person's name; and

(b) particulars of the employment by virtue of which the person is a participating employee in relation to the corporation, or was such an employee immediately before the person last ceased to be such an employee, as the case requires.

"(5) If the proposed purchase relates to shares in the corporation, the notice shall set out:

(a) the takeover aspects of the proposed resolution;

(b) what the directors consider will be the likely effect on the corporation's state of affairs if the purchase is made; and

(c) a copy of a solvency declaration by the directors that relates to the proposed purchase and was made within 7 days before the day on which the notice is prepared.

"(6) If the proposed purchase relates to shares in a subsidiary of the corporation, the notice shall set out:

(a) what the subsidiary's directors consider will be the likely effect on the subsidiary's state of affairs if the purchase is made;

(b) a copy of a solvency declaration by the subsidiary's directors that relates to the proposed purchase and was made within 7 days before the day on which the notice is prepared; and

(c) what the corporation's directors consider will be the likely effect on the corporation's state of affairs if the purchase is made.

"(7) The notice shall set out all other information that is known to any of the directors referred to in subsection (5) or (6), as the case may be, and may reasonably be expected to influence a person in deciding whether or not to vote in favour of the resolution.

#### **"Subdivision G - Other Share Buy-backs**

##### **Other buy-backs by public company**

"133GA. If:

(a) the company is a public company; and

(b) the buy-back is not made under a buy-back scheme and is not an employee-shares purchase;

the next condition is that the buy-back is an odd-lot purchase.

##### **Selective buy-backs by proprietary company**

"133GB. If:

(a) the company is a proprietary company; and

(b) the buy-back is not made under a buy-back scheme and is not an employee-shares purchase;

the next conditions are:

(c) that, before it is entered into, the agreement constituting the buy-back is approved by a special resolution

of the company in relation to which no votes were cast in respect of any shares held by:

(i) a party (other than the company) to the agreement; or

(ii) a person associated with such a party;

(d) that every notice of the meeting at which the resolution was passed that was sent to a person entitled to vote on the resolution set out, or was accompanied by a notice setting out:

(i) the intention to propose the resolution; and

(ii) the matters required by Subdivision H;

(e) that a copy of the agreement as proposed when the first such notice was so sent was available in accordance with the statement set out in each such notice as required by subsection 133HC (1);

(f) that, apart from the modifications (if any) specified in the resolution, the terms of the agreement as entered into are not materially different from the terms of the agreement as so proposed; and



(g) that those modifications (if any) have been made,

**"Subdivision H - Notice of Resolution to Approve Selective Share Buy-back**

**Notice to comply with Subdivision**

"133HA. A notice that:

(a) sets out the intention to propose at a meeting a resolution of a company to approve a proposed agreement constituting a proposed buy-back; and

(b) is sent to a person entitled to vote on the resolution;

shall comply with this Subdivision.

**Contents of resolution and proposed agreement**

"133HB. (1) It shall set out the text of the proposed resolution.

"(2) It shall set out a summary of all material terms of the proposed agreement.

**Availability of agreement for inspection**

"133HC. (1) It shall set out a statement to the effect that a copy of the proposed agreement will be available:

(a) at the company's registered office at any time when the office is required to be open and accessible to the public during the period starting on a specified day at least 14 days before the day of the meeting and ending on the day of the meeting; and

(b) at the meeting;

for inspection without charge by any person entitled to vote on the proposed resolution.

"(2) The same day shall be specified under paragraph (1)(a) in all notices of the kind referred to in section 133HA that relate to the same meeting and the same proposed resolution of a company.

**Valuation of non-cash consideration**

"133HD. If the consideration that under the proposed agreement is to be provided for the buy-back consists, or includes at least one alternative consideration that consists, wholly or partly of non-cash consideration, the notice shall set out, in relation to the first-mentioned consideration or each such alternative consideration, as the case may be:

(a) particulars of the non-cash consideration; and

(b) a copy of a statement that each of the company's directors signed within 7 days before the notice was prepared and that sets out:

(i) what, in their opinion, was the money value of the non-cash consideration when the statement was first signed by one of them; and

(ii) what, in their opinion, will be the money value of the non-cash consideration if and when the agreement is entered into

and completed and, in the case of an alternative consideration, the seller chooses that alternative.

**Reasons for buy-back**

"133HE. (1) The notice shall set out the reasons why the buy-back is being proposed and the facts and principles underlying those reasons.

"(2) The notice shall set out the takeover aspects of the proposed resolution.

**Solvency aspects**

"133HF. (1) The notice shall set out what the directors consider will be the likely effect on the company's state of affairs if the proposed buy-back is made.

"(2) The notice shall set out a copy of a solvency declaration by the directors that relates to the proposed buy-back and was made within 7 days before the day on which the notice is prepared.

**Directors' interests**

"133HG. (1) The notice shall set out, in relation to each of the directors, in relation to each person who, at the time when the notice is prepared, is associated with that director in relation to the proposed buy-back:

(a) the name of that person; and

(b) particulars of the circumstances by virtue of which that person is so associated with that director at that time.

"(2) The notice shall set out each declaration (if any) that, before the notice was prepared, a director of the company has made under section 228 in relation to the proposed agreement.

**Effect on control of company**

"133HH. (1) The notice shall set out what the directors consider will be the likely effect on the control of the company if the proposed buy-back is made.

"(2) The notice shall set out, in relation to each of the directors:

(a) whether or not the directors consider it likely that, if the proposed buy-back were made and the shares to which it relates were cancelled immediately afterwards, that director would, immediately after the cancellation, be entitled to more than 20% of the shares in the company; and

(b) if so - the respective percentages to which the directors consider it likely that that director would be entitled immediately before, and immediately after, the cancellation.

**Other relevant information**

"133HJ. The notice shall set out all other information that is known to any of the directors and may reasonably be expected to influence a person in deciding whether or not to vote in favour of the resolution.

**"Subdivision J - Creditors may Object to Proposed Share Buy-backs**

Advertising proposed buy-backs

"133JA. (1) This section applies if:

- (a) the buy-back is made under a buy-back scheme; or
- (b) the company is a proprietary company and the buy-back is not made under a buy-back scheme and is not an employee-shares purchase.

"(2) The next condition is that a notice:

- (a) setting out the intention to make the offers constituting the buy-back scheme, or to enter into the agreement constituting the buy-back, as the case may be;
- (b) specifying the documents referred to in paragraphs (3) (a) and (b) and, if applicable, paragraph (3) (c);
- (c) stating to the effect that those documents would be available as mentioned in paragraph (3)(a) during the period referred to in subsection (3); and
- (d) setting out the matters required by section 133JB;

was published in accordance with section 133JC on a day that, or on days each of which, was not earlier than 42 days, and not later than 28 days, before the day (in this section called the 'critical day') on which the first of the offers was made, or the agreement is entered into, as the case may be.

"(3) The next condition is that, throughout the period starting on the day, or on the first of the days, when the notice was so published and ending at least 21 days after that day or the last of those days:

- (a) a copy of one of the offers, or of the agreement, as proposed on that day, or on the first of those days, was available for inspection without charge by any creditor of the company at the company's registered office at any time during that period when the office was required to be open and accessible to the public;
- (b) a solvency declaration by the company's directors that related to the buy-back scheme or buy-back and was made not

more than 2 months before the critical day was in force and so available; and

(c) unless the company is a proprietary company and the buy-back does not exceed the 10% in 12 months limit - an auditor's report on the declaration was so available.

"(4) The next condition is that the terms of the offers, or of the agreement, as so proposed were not materially different from the terms of the offers as made, or of the agreement as entered into, as the case may be.

**Content of advertisement**

"133JB. (I) A notice that sets out the intention to:

- (a) make offers constituting a buy-back scheme; or
- (b) enter into an agreement constituting a buy-back;

and is published in accordance with section 133JC shall comply with this section.

"(2) The notice shall set out:

(a) in relation to the consideration; or

(b) in relation to each alternative consideration included in the consideration;

as the case requires, that under each of the proposed offers, or under the proposed agreement, as the case may be, is to be provided for the buy-back of the shares to which the offer or agreement relates:

(c) the amount of money (if any), and the non-cash consideration (if any), that under each of the proposed offers, or under the proposed agreement, as the case may be, is or are to be provided:

(i) as the consideration for each share to which that offer or the proposed agreement relates; or

(ii) as the consideration for each such share if the offeree or seller chooses that alternative;

as the case may be; and

(d) an amount that it is reasonable to expect will be, if:

(i) all the proposed offers are made and accepted, all resulting agreements are completed and, if paragraph (b) applies, all offerees choose that alternative; or

(ii) the proposed agreement is entered into and completed and, if paragraph (b) applies, the seller chooses that alternative;

as the case may be, the greatest total of:

(iii) the amounts (if any) that the company will have paid for the buy-backs made under the buy-back scheme, or for the buy-back constituted by the agreement, as the case may be; and

(iv) the money value, as at the time when the last of those buy-backs, or that buy-back, as the case may be, is completed, of the non-cash consideration (if any) that the company will have provided for the buy-backs or buy-back.

"(3) The notice shall set out the effect of section 133JD as it applies in relation to the proposed buy-back scheme or proposed buy-back, as the case 35 may be.

**Newspapers in which advertisement to be published**

"133JC. A notice relating to a proposed buy-back scheme or buy-back is published in accordance with this section if, and only if, a copy of the notice is published:

(a) in a national newspaper;

(b) if a daily newspaper (other than a national newspaper) circulates generally in the Territory - in such a newspaper that so circulates; and



(c) in each State and Territory (other than the Territory) in which the company carries on business and in which a daily newspaper (other than a national newspaper) circulates generally, in such a newspaper that circulates generally in that State or Territory;

whether on the same day or on different days.

**Creditor may apply to Court**

"133JD. Where a copy of a notice relating to a proposed buy-back scheme or buy-back is published in a newspaper, a creditor of the company:

(a) may apply to the Court at any time within the period of 21 days after the day, or the last of the days, on which a copy of the notice is published in a newspaper; and

(b) may, with the leave of the Court, apply to the Court at any time after that period and before the first of the proposed offers is made, or the agreement constituting the proposed buy-back is entered into, as the case may be; for an order prohibiting the making of the offers or the entering into of the agreement.

**How application to be dealt with**

"133JE. (1) On an application made in accordance with section 133JD, the Court shall, if satisfied that:

(a) the company is insolvent;

(b) the declaration specified in the notice referred to in that section is no longer in force; or

(c) it is unlikely that the company will remain solvent as specified in that declaration;

by order prohibit the company, except on such conditions (if any) as the order specifies, from making the offers or entering into the agreement, as the case may be, but otherwise shall refuse the application.

"(2) On application by the company or a creditor of the company, the Court may by order vary or revoke an order in force under this section.

"(3) An order under this section does not take effect until a copy of it is served on the company.

**Buy-backs not to proceed while application pending**

"133JF. (1) This section applies if section 133JA applies and notice of an application made in accordance with section 133JD in relation to the 35 buy-back offers or the agreement constituting the buy-back, as the case may be, was served on the company before the time when the first of the offers was made or when the agreement is entered into.

"(2) The next condition is that:

(a) each such application of which notice was so served; and

(b) each appeal (if any) arising out of such an application of which notice was so served;

was determined or otherwise disposed of before the time referred to in subsection (1).

"(3) The period beginning on the day when the first notice of such an application was so served and ending on the day when the last such application or appeal was determined or otherwise disposed of shall be disregarded in determining, for the purposes of subsection 133JA (2) and paragraph 133JA (3) (b), how long before a particular day:

(a) a notice relating to the offers or agreement was published in accordance with section 133JC; and

(b) a solvency declaration by the company's directors that relates to the offers or agreement was made.

#### **Company to comply with order of Court**

"133JG. (1) The next condition is that:

(a) if the buy-back results from the acceptance of an offer made under a buy-back scheme - the making of the offer; or

(b) otherwise - the entering into of the agreement constituting the buy-back;

did not contravene an order in force under section 133JE.

"(2) Nothing in this section affects the powers of the Court in relation to punishment of contempts of the Court.

#### **"Subdivision K - Solvency Requirements**

##### **Solvency requirements for buy-back scheme**

"133KA. If the buy-back is made under a buy-back scheme, the next condition is that, when the first offer was made under the buy-back scheme:

(a) there was in force a solvency declaration by the company's directors that relates to the buy-back scheme and was made within 2 months before the day on which that first offer was made; and

(b) unless the company is a proprietary company and the buy-back does not exceed the 10% in 12 months limit - the company's auditor had sent to the company an auditor's report on that declaration.

### **Solvency requirements for other buy-backs**

"133KB. (1) If the buy-back is not made under a buy-back scheme, the next condition is the one referred to in subsection (3).

"(2) The condition on which a company may buy back an option is the 35 one referred to in subsection (3).

"(3) The condition is that, as at the time of the buy-back:

(a) there is in force a solvency declaration by the company's directors that relates to, and was made within 2 months before the day of, the buy-back;

(b) unless the company is a proprietary company and the buy-back does not exceed the 10% in 12 months limit - the company's auditor

has sent to the company an auditor's report on that declaration; and

(c) the company is not an externally-administered company.

**Copy of solvency declarations and auditor's reports to be lodged with Commission**

"133KBA. (1) Where a solvency declaration by a company's directors is made, the company shall lodge a copy of the declaration with the Commission:

(a) if, within 6 days after the day on which the declaration is made, a notice setting out a copy of the declaration is sent to a person entitled to vote on a resolution to approve a proposed buy-back scheme or buy-back to which the declaration relates - on or before the day after the first day on which such a notice is so sent; or

(b) otherwise - within 7 days after the day on which the declaration is made.

"(2) Within 7 days after a company's auditor sends to the company an auditor's report on a solvency declaration by the company's directors, the company shall lodge with the Commission a copy of the report.

**Revocation of solvency declaration**

"133KC. (1) Where:

(a) a solvency declaration by a company's directors is in force; and

(b) a director of the company (whether he or she signed the declaration or not) becomes of the opinion that it is likely that the company will not remain solvent as mentioned in the declaration;

he or she shall, as soon as practicable:

(c) sign a notice stating that he or she is of that opinion;

(d) give the notice to the company; and

(e) lodge a copy of the notice with the Commission.

"(2) A notice given to a company under subsection (1) in relation to a solvency declaration by the company's directors revokes the declaration.

"(3) Where a solvency declaration by a company's directors that relates to a buy-back scheme or buy-back is revoked under subsection (2) at a particular time, the other solvency declarations (if any) by the company's directors that relate to the buy-back scheme or buy-back are also revoked at that time.

"(4) In subsection (3):

'buy-back' includes a proposed buy-back;

'buy-back scheme' includes a proposed buy-back scheme.

**Solvency requirements for completion of buy-back under buy-back scheme**

"133KD. A company shall not provide any of the consideration that it is to provide under an agreement constituting a buy-back made by it under a buy-back scheme unless, when it first provides consideration that it is to provide under an agreement constituting a buy-back made under the buy-back scheme:

(a) the offer period of the offers made under the scheme has ended; (b) a solvency declaration by the company's directors that relates to the buy-back scheme is in force; and

(c) unless the company is a proprietary company and the first-mentioned buy-back does not exceed the 10% in 12 months limit - the company's auditor has sent to the company an auditor's report on the declaration.

**Company not to register certain transfers during solvency period**

"133KE. Where an offer made by a company under a buy-back scheme is accepted, the company shall not, during the solvency period of the offer, register a transfer to the company of shares, being a transfer pursuant to an agreement resulting from the acceptance.

**"Subdivision L - Share Buy-backs and other Securities Issues**

**Buy-back consideration not to consist of other securities in the company**

"133KF. The next condition is that the consideration that has been or is to be provided for the buy-back does not consist, or include an alternative consideration that consists, wholly or partly of securities of the company.

**No buy-backs during rights issue or placement**

"133KG. The next condition is that:

(a) if the buy-back is made under a buy-back scheme - the first offer made under the scheme was not made; or

(b) otherwise - the agreement constituting the buy-back is not entered into;

during, or within 3 months after the last day of:

(c) a period during which a rights offer or invitation by the company remains open;

(d) without limiting the generality of paragraph (e), a period during which there remains open:

(i) a share offer by the company that will, if accepted, result in a placement of shares in the company; or

(ii) a share invitation by the company that is issued to a person and will, if the person subscribes for or buys shares in the company as a result of an application or offer made by the person in response to the invitation, result in a placement of such shares; or

(e) a period:



(i) beginning on a day when the company, or a person acting on its behalf, starts to negotiate with a view to placing shares in the company; and

(ii) ending on the day when the shares are placed or the negotiations stop for some other reason.

**No rights issue or placement during offer period or within 3 months after buy-back**

"133KH. (1) A company shall not:

(a) during, or within 3 months after the last day of, the offer period of a buy-back offer made by the company; or

(b) within 3 months after a day on which the company buys back shares;

make or issue a rights offer or invitation, place shares in the company or cause such shares to be placed.

"(2) A contravention of subsection (1) does not affect the validity or enforceability of an act, transaction, agreement, instrument, matter or thing.

**"Subdivision M - Effect of Buy-back on Shares or Option**

**Rights attaching to bought back shares or option**

"133KJ. (1) Where a company buys back shares or an option, all rights attached to the shares or option are suspended:

(a) so long as the agreement constituting the buy-back is in effect; and

(b) if the agreement is discharged by performance--until the shares are, or the option is, transferred to the company pursuant to the agreement.

"(2) Subsection (1) shall be disregarded in determining, for the purposes of Division 4, whether or not a person has a relevant interest in particular shares.

**Company not to sell bought back shares or option**

"133KK. (1) A company shall not sell, or agree to sell, shares, or an option, that it has bought back or units of such shares.

"(2) An agreement entered into in contravention of subsection (1) is void.

**Cancellation of shares or option after transfer to company**

"133KL. (1) Immediately after shares in a company are, or an option to acquire Unicode shares in a company is, transferred to the company:

(a) the shares are, or the option is, cancelled; and

(b) all rights attached to the shares or option are extinguished:

by force of this subsection.

"(2) Where shares are cancelled by force of subsection (1), the company's paid-up share capital is reduced by the nominal value of the shares, but the company's nominal share capital is not affected.

**Accounting for money spent on buy-back where amount exceeds nominal value of shares**

"133KM. (1) This section applies where a company buys back shares.

"(2) The company shall apply:

(a) if it has a share premium account--the amounts (if any) standing to the credit of that account; and

(b) its distributable profits (if any);

in writing off the buy-back premium (if any) and, if paragraph (a) applies, shall not so apply any of those profits while an amount is standing to the credit of that account.

"(3) Until the buy-back premium (if any) has been written off in full, the company shall not pay, apply or otherwise deal with:

(a) if paragraph (2) (a) applies - an amount standing to the credit of that account; or

(b) in any case - any of its distributable profits.

"(4) In this section:

'buy-back premium' means the amount (if any) by which the total of:

(a) the amounts (if any) that the company has paid for the buy-back; and

(b) the greater of:

(i) the total of the amounts that the company has spent on acquiring the non-cash consideration (if any) provided by it for the buy-back; and

(ii) the money value of the non-cash consideration (if any) so provided, as at the time when the last of it was so provided;

exceeds the nominal value of the shares.

## **"Subdivision N - Effect of Insolvency**

### **Buy-back offer by externally-administered company void**

"133LA. Where an externally-administered company makes an offer under a buy-back scheme, the offer is void.

### **Effect of supervening insolvency on buy-back scheme**

"133LB. (1) This section applies where, at the end of the offer period of an offer made under a buy-back scheme:

(a) no solvency declaration by the company's directors that relates to the buy-back scheme is in force; or

(b) unless the company is a proprietary company and no buy-back made under the buy-back scheme exceeds the 10% in 12 months

limit - such a declaration is in force but no auditor's report on the declaration has been sent to the company by its auditor.

"(2) This section also applies where, after the end of the offer period, but before the end of the solvency period, of an offer made under a buy-back scheme, a solvency declaration by the company's directors that relates to the buy-back scheme is revoked.

"(3) This section also applies where, during the solvency period of an offer made under a buy-back scheme:

- (a) a provisional liquidator of the company is appointed;
- (b) a court makes an order for the winding up of the company;
- (c) the company resolves that it be wound up; or
- (d) the company is placed under official management.

"(4) If the offer has been accepted and a binding agreement has resulted from the acceptance, the agreement is void.

"(5) Otherwise, the offer shall, despite section 133DB, be taken to have been withdrawn.

"(6) If the offer has been accepted by a person, the company shall, as soon as practicable, return to the person any documents that the person sent to the company with the acceptance.

**Directors to indemnify insolvent company for consideration provided within last 12 months under buy-back agreements**

"133LC. (1) This section applies where:

- (a) a company is placed under official management or commences to be wound up; and
- (b) during or after the 12 months ending on:
  - (i) in any case--the day of the commencement of the official management or winding up; or
  - (ii) if the company was insolvent throughout a period ending at that commencement - the day when the company last ceased, before that commencement, to be solvent;

the company provided consideration under an agreement:

(iii) resulting from the acceptance of an offer made under a buy-back scheme in relation to shares in the company; or

(iv) constituting a buy-back by the company otherwise than under a buy-back scheme.

"(2) To the extent (if any) that the consideration consisted of an amount of money, the indemnifying directors are jointly and severally liable to pay to the company an amount equal to that amount.

"(3) To the extent (if any) that the consideration consisted of non-cash consideration, the indemnifying directors are jointly and severally liable to pay to the company an amount equal to:

(a) if the company acquired the non-cash consideration in order to provide it under the agreement - the total of the amounts spent by the company on acquiring it; or

(b) otherwise - the money value of the non-cash consideration when the last of it was so provided.

"(4) For the purposes of this section, an indemnifying director is a person who:

(a) if subparagraph (1)(b)(iii) applies - signed, as a director of the company, a solvency declaration by the company's directors that related to the buy-back scheme and was in force at the end of the solvency period of the offer; or

(b) if subparagraph (1) (b) (iv) applies:

(i) signed, as a director of the company, a solvency declaration by the company's directors that related to the buy-back and was in force at the time when the agreement was entered into; or

(ii) if no such declaration was so in force - was a director of the company at that time and was in any way, by act or omission, directly or indirectly, knowingly concerned in or party to the entering into of the agreement by the company;

even if the person is no longer such a director.

"(5) A person who is an indemnifying director because of paragraph (4) (a) or subparagraph (4) (b) (i) is not liable under subsection (2) or (3) in relation to the consideration if it is established that:

(a) at the time when he or she signed the declaration, the person had:

(i) the opinions described in it; and

(ii) reasonable grounds for those opinions; and

(b) at all times when he or she was a director of the company after that time and before the end of the period referred to in paragraph (4) (a) or the time referred to in subparagraph (4) (b) (i), as the case may be, the person:

(i) was of the opinion that the company would remain solvent as mentioned in the declaration; and

(ii) had reasonable grounds for that opinion.

**Relief from liability under section 133LC**

"133LD. (1) Where, in a proceeding against a person in respect of an alleged liability of the person under section 133LC in relation to consideration provided under an agreement, it appears to the court that the person is or may be liable under that section in relation to the consideration but that he 40 or she:

(a) has acted honestly at all relevant times; and

(b) having regard to all the circumstances of the case, ought fairly to be excused in relation to the liability;



the court may relieve him or her from the liability on such terms (if any) as the court thinks fit.

"(2) A person who believes on reasonable grounds that a proceeding will be begun against the person in relation to an alleged liability of the person under section 133LC may apply to the Court for relief.

"(3) On an application under subsection (2), the Court has the same power to relieve the person under subsection (1) as it would have if a proceeding against the person in respect of the alleged liability were pending in the Court.

### **"Subdivision P - Rights of Unpaid Sellers**

#### **Specific performance of buy-back agreements**

"133MA. Subject to section 133MB, an agreement constituting a buy-back may be enforced by an order for specific performance made by a court of competent jurisdiction.

#### **Buy-back agreement unenforceable while company insolvent**

"133MB. (1) Subject to section 133MC, an agreement constituting a buy-back by a company is unenforceable while:

- (a) the company is being wound up;
- (b) there is a provisional liquidator of the company;
- (c) the company is under official management;
- (d) a receiver, or a receiver and manager, of property of the company, whether or not appointed by a court, is acting;
- (e) a compromise or arrangement between the company and its creditors or any class of them is being administered; or
- (f) subsection (2) applies to the company.

"(2) This subsection applies to a company on a particular day unless the company is solvent on that day and may reasonably be expected to remain solvent, throughout the period of 12 months starting on that day, even if:

- (a) each buy-back offer (if any) that relates to shares in the company and remains open as at that day is accepted, and the resulting agreement is completed, during that period; and

(b) each agreement (if any) that constitutes a buy-back by the company and remains uncompleted as at that day is completed during that period.

"(3) The onus of establishing that an agreement is unenforceable because of this section lies on the company.

**Unpaid seller may prove in winding up of company**

"133MC. (1) This section applies where, immediately before the relevant date in relation to a winding up of a company, obligations of the company under an agreement constituting a buy-back by the company have not been fully performed.

"(2) Subject to this Division, another party to the agreement may claim in the winding up in respect of the company's obligations under the agreement to that other party, in so far as they remain unperformed.

"(3) Subsection (2) does not limit the generality, or affect the operation, of section 438 or 439.

"(4) Section 454 does not apply in relation to the agreement.

"(5) A person is not entitled to a distribution of money or property in the winding up in connection with a claim in respect of obligations of the company under the agreement unless the seller's obligations under the agreement, so far as they relate to the supply of documents in connection with the buy-back, have been discharged.

"(6) Subsection (5) does not affect a person's entitlement to claim in the winding up.

#### **Ranking of seller's claim in winding up**

"133MD. (1) This section applies where a company is wound up.

"(2) A seller's claim against the company shall be postponed until all other claims in the winding up have been satisfied, other than:

(a) any other seller's claim against the company;

(b) a sum due to a member of the company in that capacity, whether by way of dividends, profits or otherwise; or

(c) a claim in connection with the adjustment of the rights of the contributories among themselves.

"(3) A seller's claim against the company shall be taken not to be, and shall be paid in priority to, a sum of the kind referred to in paragraph (1) (b).

"(4) A person is not entitled to a distribution of money or property in connection with the adjustment of the rights of the contributories among themselves unless all seller's claims against the company have been satisfied.

"(5) All seller's claims against the company rank equally between themselves and, subject to subsection (2), shall be paid:

(a) if the company's property is sufficient to pay them all in full; or

(b) otherwise--proportionately. [This subsection can be omitted if proposed section 450D in clause 16 of this draft Bill becomes law.]

## **"Subdivision Q - Certificates and Declarations of Compliance**

### **Certificate of compliance**

"133NFA. (1) This section applies where an offer made by a company under a buy-back scheme is accompanied by a copy of a certificate stating that this Division has been complied with in relation to each buy-back to be made under the buy-back scheme.

"(2) This section also applies where a certificate stating that this Division has been complied with in relation to a specified buy-back that a company proposes to make otherwise than under a buy-back scheme is given to a person.

"(3) A person to whom an offer is made under the buy-back scheme, or the person to whom the certificate is given, as the case may be, is not liable to have an order made against the person under subsection 130 (4) because of an agreement made or performed, or a transaction engaged in, by the person in reliance on the certificate.

"(4) No such agreement or transaction is invalid, or voidable under subsection 130 (2), because it:

(a) is made or performed, or engaged in, as the case may be; or

(b) is, for the purposes of section 130, related to an agreement made or performed, or to a transaction engaged in;

in contravention of section 129.

"(5) Subsections (3) and (4) do not apply if, on application by the company or a person who has suffered, or is likely to suffer, loss or damage as a result of the making or performance of an agreement, or the engaging in of a transaction, as mentioned in subsection (3), the Court declares by order that it is satisfied that the person referred to in subsection (1) or (2) became aware, before making the agreement or engaging in the transaction, that a condition prescribed by this Division had not been satisfied in relation to:

(a) the buy-back that would result from the acceptance of the offer referred to in subsection (3); or

(b) the proposed buy-back specified in the certificate; as the case may be.

#### **Presumptions about certain matters**

"133NFB. (1) In a prying, a document purporting to be a compliance certificate shall, unless the contrary is established, be presumed to be a certificate duly given for the purposes of section 133NFA.

"(2) In a prying, a document purporting to be a copy of a compliance certificate shall, unless the contrary is

established, be presumed to be a true copy of a certificate duly given for the purposes of section 133NFA.

"(3) Where a person to whom an offer was made under a buy-back 35 scheme has possession of a copy of a compliance certificate relating to the buy-back scheme, it shall be presumed, unless the contrary is established, that the copy accompanied the offer.

"(4) A person who has possession of a compliance certificate shall, unless the contrary is established, be presumed to be the person to whom 40 the certificate was given.

"(5) For the purposes of subsection 133NFA (5), a person shall, unless the contrary is established, be presumed to have been aware at a particular time of any matter of which an employee or agent of the person having duties, or acting on the person's behalf, in relation to the proposed buy-back concerned was aware at that time.

**Who must sign compliance certificate**

"133NFC. A compliance certificate shall be signed by at least 2 directors, or by a director and a secretary, of the company.

**Offences relating to compliance certificates: buy-back schemes**

"133NFD. (1) Where some but not all of the offers made by a company under a buy-back scheme are accompanied by a compliance certificate relating to the buy-back scheme, the company contravenes this subsection.

"(2) Where an offer made by a company to a person under a buy-back scheme was accompanied by a copy of a compliance certificate relating to the buy-back scheme and a buy-back made under the buy-back scheme contravenes section 129, the company shall be taken to have contravened this subsection by sending the copy to the person.

"(3) A company that contravenes subsection (1) or (2) is not guilty of an offence by virtue of this section or section 570, but each officer of the company who is in default contravenes that subsection.

"(4) It is a defence to a prosecution for a contravention of subsection (2) if it is established that when the copy of the certificate was sent to the person the defendant believed on reasonable grounds that no buy-back made under the buy-back scheme would contravene section 129.

Penalty: \$2,500 or imprisonment for 6 months, or both.

**Offences relating to compliance certificates: other buy-backs**

"133NFE. (1) Where:

(a) a person signs, or gives to another person, a compliance certificate relating to a buy-back that a company proposes to make, at a particular time or within a particular period, otherwise than under a buy-back scheme; and

(b) the buy-back is made before, at, or within a reasonable period after, that time or the end of the first-mentioned period and contravenes section 129;

the person shall be taken to have contravened this subsection by signing the certificate, or giving it to the other person, as the case may be.

"(2) It is a defence to a prosecution for a contravention of subsection (1) if it is established that the defendant, when signing the certificate or giving it to the other person, as the case requires, believed on reasonable grounds that the proposed buy-back would not, if made as mentioned in paragraph (1) (b), contravene section 129.

Penalty: \$2,500 or imprisonment for 6 months, or both.



**Declaration by Court of substantial compliance**

"133NFF. Where, on application to the Court by a party to an agreement or proposed agreement constituting a buy-back, the Court is satisfied that a particular condition prescribed by this Division has been substantially satisfied in relation to the buy-back or proposed buy-back, the Court may by order declare that that condition has been satisfied in relation to the buy-back or proposed buy-back.

**"Subdivision R - Notifying Commission and Securities Exchanges about Buy-backs**

**Company to notify Commission of buy-backs**

"133NG. (1) Within the notification period in relation to the last day of the offer period of an offer made by it under a buy-back scheme, a company shall lodge with the Commission a written notice that specifies the buy-back scheme and sets out:

(a) the total number of shares in relation to which offers made under the buy-back scheme have been accepted; and

(b) particulars of the total consideration that, under the agreements resulting from the acceptance of such offers, has been or is to be provided for the purchase of those shares.

"(2) Within the notification period in relation to a day on which a buy-back is made otherwise than under a buy-back scheme, the company shall lodge with the Commission a written notice that specifies the buy-back and sets out:

(a) the number of shares bought back, or the number of shares to which the option bought back relates, as the case requires; and

(b) particulars of the consideration that has been or is to be provided for the buy-back.

"(3) Within the notification period in relation to a day on which an agreement constituting a buy-back of shares is rescinded, or is discharged otherwise than by performance, the company shall lodge with the Commission 30 a written notice that specifies the agreement and sets out:

(a) when the agreement was rescinded or discharged;

(b) in the case of a buy-back of shares - the number of shares to which the agreement related; and

(c) in the case of a buy-back of an option - the number of shares to which the option related.

"(4) Subsections (2) and (3) do not apply in relation to a buy-back of an option by a company that is not a listed body.

"(5) For the purposes of this section, a company lodges a notice within the notification period in relation to a particular day if, and only if, it lodges the notice:

(a) in the case of a listed body - before 9.30 a.m. on the first day that is later than that day and is a business day or a trading day of a notifiable exchange; or

(b) otherwise - within 7 days after that day.

#### **Listed company to notify securities exchange of buy-backs**

"133NH. A listed body that section 133NG requires to lodge a notice with the Commission shall give to each notifiable exchange, before 9.30 a.m. on the next trading day of that notifiable exchange after the day referred to in subsection 133NG (1), (2) or (3), as the case requires, a copy of the 10 notice.

#### **"Subdivision S - Listed Company to Notify Members about Share Cancellations**

##### **Notifying member whose shares were cancelled**

"133NK. A company that is a listed body shall, within 2 business days after shares included in a class of voting shares in the company and held by a person are cancelled by force of subsection 133KL (1), send to the person a written notice that:

(a) states that the shares have been cancelled;

(b) specifies the day of the cancellation; and

(c) specifies the number of issued shares in that class as at the time immediately after the cancellation.

##### **Notifying members generally**

"133NL. (1) Subsection (3) applies where, as at the end of a day on which shares in a class of voting shares in a company that is a listed body are transferred to the company pursuant to an agreement constituting a buy-back made under a buy-back scheme, each agreement constituting a buy-back made under the buy-back scheme has been discharged, whether by performance or otherwise, or rescinded.

"(2) Subsection (3) also applies where, as at the end of a day on which shares in a class of voting shares in a company that is a listed body were transferred to the company, the number calculated in accordance with the following formula exceeds 5:

$$\frac{(\mathbf{A}-\mathbf{B}) \times 100,}{\mathbf{A}}$$

Where:

**A** is the number of issued shares in that class as at:

(a) if the company has previously become required to give under this section notices relating to shares in that class - the time when the company last became so required; or

(b) otherwise - the start of the first day on which shares in that class were transferred to the company;

**B** is the number of issued shares in that class as at the end of the first-mentioned day.

"(3) Within 2 business days after the day first referred to in subsection (1) or (2), as the case may be, the company shall send to each of its members a written notice specifying:

(a) the day on which the notice is sent; and

(b) the number of issued shares in that class as at the beginning of the last-mentioned day.

"(4) For the purposes of subsection (2), a company that this section requires to send notices because of a transfer of shares shall be taken to have become, at the end of the day of the transfer, required to give the notices.

#### **"Subdivision T - Register of Buy-backs**

##### **Company to keep register**

"133PA. A company:

(a) whose articles contain a buy-back authorisation; or

(b) that has at any time bought back shares or an option;

shall establish a register for the purposes of this Division and keep it in accordance with this Subdivision.

##### **Particulars of buy-back schemes**

"133PB. (1) As soon as practicable after making offers under a buy-back scheme, the company shall include in the register a copy of one of the offers.

"(2) As soon as practicable after an offer made by the company under a buy-back scheme is accepted, the company shall make in the register an entry that refers to the buy-back scheme and sets out:

(a) the name of the offeree;

(b) the date of the acceptance; and

(c) if the buy-back scheme is a pro-rata buy-back scheme - the number of shares in respect of which the offeree purported to accept the offer.

### **Particulars of other buy-backs**

"133PC. As soon as practicable after a buy-back is made by the company otherwise than under a buy-back scheme, the company shall:

(a) include in the register a copy of the agreement constituting the buy-back; and

(b) make in the register an entry that refers to the buy-back and sets out:

(i) the name of each party to the agreement (other than the company);

(ii) the date on which the agreement was made;

(iii) the number of shares bought back, or the number of shares to which the option bought back relates, as the case requires; and

(iv) particulars of the consideration that has been or is to be provided for the buy-back.

**Alteration of register where buy-back does not proceed**

"133PD. (1) As soon as practicable after an agreement resulting from the acceptance of an offer made by the company under a buy-back scheme becomes void, or such an offer is withdrawn, by virtue of section 133LB, the company shall remove from the register:

(a) the copy of an offer made under the buy-back scheme included under subsection 133PB (1); and

(b) each entry made under subsection 133PB(2) because of the acceptance of an offer made under the buy-back scheme.

"(2) As soon as practicable after an agreement constituting a buy-back by the company is rescinded, or is discharged otherwise than by performance, the company shall remove from the register the entry made under subsection 133PB (2) because of the acceptance that resulted in the agreement, or made under section 133PC because of the agreement, as the case requires, and the copy (if any) of the agreement included under section 133PC.

"(3) A reference in this section to removing an entry or copy from the register is a reference to:

(a) including the copy or entry in a part of the register separate from the part in which copies are included, and entries are made, under sections 133PB and 133PC; and

(b) removing the copy or entry from the last-mentioned part

**Entries in register after cancellation of shares or option**

"133PE. (1) As soon as practicable after shares in, or an option to acquire unissued shares in, the company are or is transferred to the company pursuant to an agreement, the company shall include in the register, in relation to the entry:

(a) made under subsection 133PB (2) because of the acceptance that resulted in the agreement; or

(b) made under section 133PC because of the agreement;

as the case requires, a notation indicating that the shares have, or the option has, been cancelled and specifying the day of the cancellation.

"(2) AS soon as practicable after a day on which shares in a class of shares in the company are cancelled by force of subsection 133KL (1), the company shall include in the register an entry specifying:

(a) the number of shares in that class that were cancelled on that day; and



(b) the number of issued shares in that class as at the end of that day.

**Inspection and copies of register**

"133PF. (1) The register shall be kept at the company's registered office and shall be open for inspection:

(a) by any member or creditor of the company - without charge; and

(b) by any other person - on payment for each inspection of such amount, not exceeding the prescribed amount, as the company requires, or, where the company does not require payment, without charge.

"(2) A person may request the company to give the person a copy of the register or any part of it and, where such a request is made, the company shall comply with the request:

(a) if the company requires payment of an amount not exceeding the prescribed amount - within 21 days after payment of the amount is received by the company or within such longer period as the Commission approves; or

(b) otherwise - within 21 days after the request is made or within such longer period as the Commission approves."

**Proofs of debts**

12. Section 438 of the Principal Act is amended by inserting in subsection 20 (2) "133MD," before "204".

**PART III - ANNUAL RETURNS**

**Annual return**

13. Section 263 of the Principal Act is amended:

(a) by omitting from subsection (1B) "may" and substituting "shall";

(b) by inserting after subsection (4) the following subsection:

"(4A) The amendment of subsection (1B) of this section made by section 13 of the Companies Amendment Act 1988 applies in relation to a company in relation to a financial year of the

company that ends at or after the commencement of that section.".

**PART IV - SUBORDINATION OF CERTAIN DEBTS OWED BY A COMPANY**

**Distribution of company's property**

14. Section 403 of the Principal Act is amended:

(a) by omitting "Subject to the provisions of this Act as to preferential payments, the" and substituting "The";

(b) by omitting "equally".

**Repeal of sections 440 and 444**

15. Sections 440 and 444 of the Principal Act are repealed.

16. After section 450 of the Principal Act the following sections are inserted:

**Subordination agreements**

"450A. (1) In this section:

'claim', in relation to a company, includes a debt or claim that:

(a) exists and would be admissible to proof in a winding up of the company; or

(b) does not yet exist but would, if it existed, be so admissible.

"(2) A creditor of a company may agree in writing with the company, or with the company and any other person or persons, that specified claims (in this section called the 'subordinated claims') of the creditor against the company shall be postponed until other specified claims (in this section called the 'prior claims') against the company have been satisfied.

"(3) Where a company commences to be wound up and, immediately before the relevant date, an agreement relating to claims against the company is in force under subsection (2), the subordinated claims shall be postponed until the prior claims have been satisfied.

**Subordination of debts under Part VIII compromise or arrangement**

"450B. Where:

(a) a company commences to be wound up;

(b) immediately before the relevant date, there is in force under Part VIII a compromise or arrangement (in this section called the 'scheme') between the company and its creditors or any class of them;

(c) the scheme was approved by order of the Court after the commencement of section 16 of the Companies Amendment Act 1988; and

(d) the scheme provides for particular debts or claims:

(i) in respect of which the company is liable to a creditor on whom the scheme is binding; and

(ii) that are admissible to proof in the winding up;

to be postponed until other particular debts or claims that are so admissible have been satisfied;

the first-mentioned debts or claims shall be postponed until the other debts or claims have been satisfied, even if some or all of the first-mentioned debts or claims, or of the other debts or claims, were not in existence when the scheme was so approved.

**Effect of sections 450A and 450B**

"450C. (1) Sections 450A and 450B have effect despite sections 133MD, 441,443, 445 and 446.

"(2) Section 450B has effect despite section 450A.

"(3) Neither of sections 450A and 450B shall be taken to affect by implication the interpretation of this Act as in force at any time before the commencement of section 16 of the Companies Amendment Act 1988.

**Debts of a class to rank equally**

"450D. (1) After provision is made in the winding up of a company for the costs, charges and expenses (if any) of the kinds referred to in paragraph 441 (1) (a), the debts and claims of a class that are proved in the winding up rank equally between themselves and shall be paid:

(a) if the company's property is sufficient to pay them all - in full; or

(b) otherwise--proportionately.

"(2) For the purposes of applying subsection (1) in relation to the 15 winding up of a company, a debt or claim is of the same class as another debt or claim if, and only if, neither debt or claim is required, by or under this Act:

(a) to be paid in the winding up in priority to the other', or

(b) to be postponed in the winding up until the other has been satisfied.

"(3) This section applies in relation to a winding up whenever commencing."

---

**NOTE**

1. No. 89, 1981, as amended. For previous amendments, see No. 153, 1981; Nos. 26 and 80, 1982; No. 108, 1983; No. 13, 1984; Nos. 140, 192 and 193, 1985; Nos. 68 and 163, 1986; and Nos. 6 and 99, 1987.

Printed by Authority by the Commonwealth Government Printer  
(134/88)

**PART C : CLAUSE BY CLAUSE COMMENTARY**

Outline of Paper

The remainder of this explanatory paper:

(a) contains an index of clauses of the exposure draft; and

(b) deals sequentially with the contents of each clause of the exposure draft.

(i)

EXPOSURE DRAFT OF COMPANIES AMENDMENT  
BILL 1988

<u>ITEM</u>	<u>PARAGRAPH</u>
<u>ED PART I - PRELIMINARY</u>	
Cl. 1 - Short Title etc	1
Cl. 2 - Commencement	3
<u>ED PART II - BUY-BACKS OF SHARES AND OPTIONS</u>	
Cl. 3 - Interpretation	5
Cl. 4 - Substitution of headings	8
Cl. 5 - Issue of shares at premium	9
Cl. 6 - Insertion of Subdivision heading	10
Cl. 7 - Insertion of Subdivision heading	11
Cl. 8 - Company financing dealings in its shares etc.	12
Cl. 9 - Consequences of company financing dealings in its shares etc.	17
Cl. 10 - Insertion of Subdivision and heading (Option A or Option B)	19
Cl. 11 - Insertion of new Division:	45
<u>Division 3A - Buy-backs of Shares and Options</u>	
<u>Subdivision AA - How this Division Works</u>	



<u>ITEM</u>	<u>PARAGRAPH</u>
133AAA Outline of structure	46
<u>Subdivision A - Interpretation</u>	
133AA Interpretation	47
133AB What constitutes buying back shares or an option	57
133AC The 10% in 12 months limit	58
133AD Takeover aspects of proposed resolution	59
133AE When directors presumed to be aware of proposed or actual takeover bid	62
133AF Solvency declaration	63
133AG Auditor's report on solvency declaration	66
133AH When buy-back agreement is completed	67
133AJ When shares are transferred	68
133AK Classes of shares	69
<u>Subdivision B - Power to Buy back Shares and Options</u>	
133BA Power to buy back shares	70
133BBA Power to buy back an option	71
133BB Completion of buy-back	72
133BC Effect of Division	73
133BD Other obligations and liabilities not affected	74
<u>Subdivision C - Buy-back Authorisation in Articles</u>	
133CA Articles to contain buy-back authorization	75

<u>ITEM</u>	<u>PARAGRAPH</u>
133CB Inclusion, effect and renewal of buy-back authorization	76
<u>Subdivision D - Buy-back Schemes</u>	
133DAA Shares and classes of shares	78
133DA Buy-back scheme	79
133DB Withdrawal or variation of buy-back offers	80
133DC Acceptance of offers made under pro-rata buy-back scheme	81
133DD Avoidance of odd lots under proportional buy-back scheme	84
133DE Odd lots to be disregarded for the purpose of the 10% in 12 months	85
<u>Subdivision E - Approval of Buy-back Schemes by Ordinary Resolution</u>	
133EA Public company	86
133EB Proprietary company	87
133EC Buy-back offers made under a resolution	88
133ED Resolution to approve proposed buy-back scheme	89
133EE Notice of resolution to approve proposed buy-back scheme	90
<u>Subdivision F - Employee - share Purchase</u>	
133FA Approval by ordinary resolution	91
133FB Resolution to approve proposed employee-shares purchase	92

<u>ITEM</u>	<u>PARAGRAPH</u>
133FC Notice of resolution to approve proposed employee-shares purchase	93
<u>Subdivision G - Other Share Buy-backs</u>	
133GA Other buy-backs by public company	94
133GB Selective buy-backs by proprietary company	96
<u>Subdivision H - Notice of Resolution to Approve Selective Share Buy-back</u>	
133HA Notice to comply with Subdivision	98
133HB Contents of resolution and proposed agreement	99
133HC Availability of agreement for inspection	100
133HD Valuation for non-cash consideration	101
133HE Reasons for buy-back	102
133HF Solvency aspects	103
133HG Directors' interests	104
133HH Effect on control of company	105
133HJ Other relevant information	106
<u>Subdivision J - Creditors may Object to Proposed Share Buy-backs</u>	
133JA Advertising proposed buy-backs	107
133JB Content of advertisement	109
133JC Newspapers in which advertisement to be published	110

<u>ITEM</u>	<u>PARAGRAPH</u>
133JD Creditor may apply to Court	111
133JE How application to be dealt with	112
133JF Buy-backs not to proceed while application pending	113
133JG Company to comply with order of Court	114
<u>Subdivision K - Solvency Requirements</u>	
133KA Solvency requirements for buy-backs scheme	115
133KB Solvency requirements for other buy-backs	117
33KBA Copy of solvency declarations and auditors' reports to be lodged with Commission	118
133KC Revocation of solvency declaration	119
133KD Solvency requirements for completion of buy-back under buy-back scheme	120
133KE Company not to register certain transfers during solvency period	121
<u>Subdivision L - Buy-backs and other Securities Issues</u>	
133KF Buy-back consideration not to consist of other securities in the company	122
133KG No buy-backs during rights issue or placement	123
133KH No rights issue or placement during offer period or within 3 months after buy-back	124
<u>Subdivision M - Effect of Buy-back on Shares or Options</u>	
133KJ Rights attaching to bought back shares or option	125

<u>ITEM</u>	<u>PARAGRAPH</u>
133KK Company not to sell bought back shares or option	126
133KL Cancellation of shares or option after transfer to company	127
133KM Accounting for money spent on buy-back where amount exceeds nominal value of shares	128
<u>Subdivision N - Effect of Insolvency</u>	
133LA Buy-back offer by externally-administered company void	129
133LB Effect of supervening insolvency on buy-back scheme	130
133LC Directors to indemnify insolvent company for consideration provided within last 12 months under buy-back agreements	131
133LD Relief from liability under section 133LC	133
<u>Subdivision P - Rights of Unpaid Sellers</u>	
133MA Specific performance of buy-back agreements	134
133MB Buy-back agreement unenforceable while company insolvent	135
133MC Unpaid seller may prove in winding up of company	136
133MD Ranking of seller's claim in winding up	137
<u>Subdivision Q - Certificates and Declarations of Compliance</u>	
133NFA Certificate of compliance	141

<u>ITEM</u>	<u>PARAGRAPH</u>
133NFB Presumptions about certain matters	142
133NFC Who must sign compliance certificate	143
133NFD Offences relating to compliance certificates: buy-back schemes	144
133NFE Offences relating to compliance certificates: other buy-backs	146
133NFF Declaration by Court of substantial compliance	147
<u>Subdivision R - Notifying Commission and Securities Exchange about Buy-backs</u>	
133NG Company to notify Commission of buy-backs	148
133NH Listed company to notify securities exchange of buy-backs	149
<u>Subdivision S - Listed Company to Notify Members about Share Cancellation</u>	
133NK Notifying member whose shares were cancelled	150
133NL Notifying members generally	151
<u>Subdivision T - Register of Buy-backs</u>	
133PA Company to keep register	152
133PB Particulars of buy-back schemes	153
133PC Particulars of other buy-backs	154
133PD Alteration of register where buy-back does not proceed	155

<u>ITEM</u>	<u>PARAGRAPH</u>
133PE Entries in register after cancellation of shares or option	156
133PF Inspection and copies of register	157
Cl. 12 Proofs of debts	158
<u>ED PART III - ANNUAL RETURNS</u>	
Cl. 13 Annual return	160
<u>ED PART V - SUBORDINATION OF CERTAIN DEBTS OWED BY A COMPANY</u>	
Cl. 14 Distribution of company's property	170
Cl. 15 Repeal of sections 440 and 444	171
Cl. 16 Insertion of new sections:	172
450A Subordination agreements	
450B Subordination of debts under Part VIII compromise or arrangement	
450C Effect of sections 450A and 450B	
450D Debts of a class to rank equally	

1.

ED PART I - PRELIMINARY

Cl. 1: Short title etc

Although this Bill's proposed short title is the Companies Amendment Bill 1988 after taking into account its exposure period and the subsequent review of submissions, the Bill will not actually be introduced into Parliament this year, (ED sub-cl.1(1)).

2. The Companies Act 1981 (referred to in this explanatory paper as 'CA') is referred to in the ED as the Principal Act (ED sub-cl.1(2)).

Cl. 2: Commencement

3. ED clauses 1 and 2 will come into operation on the day on which the Bill that is ultimately introduced into Parliament receives the Royal Assent.

4. The remainder of the provisions will come into operation on a day or days to be fixed by Proclamation.



## ED PART II - BUY-BACKS OF SHARES AND OPTIONS

### Cl.3 Interpretation

5. It is proposed to amend CA s-sec.5(1) by inserting definitions of words and phrases used in the Bill. The definitions include the following:

#### "approving holding company"

6. This term is used in ED cl.11, s.133FA which requires a company and, if it has a holding company or holding companies, those companies, to approve a buy-back which is an employee-share purchase by an ordinary resolution passed at a general meeting of the company or companies (ED cl. 3).

#### "participating employee"

7. This term is used in ED cl.11, s.133FC which sets out the matters required to be included in a notice of resolution to approve a proposed purchase of employee-shares. The notice of resolution is required, amongst other things, to set out certain details in relation to the beneficial owner of the shares which are proposed to be purchased, with the purpose of establishing that person's credentials as a participating employee in relation to the corporation (ED cl. 3).

### Cl. 4: Substitution of headings

8. It is proposed to insert new headings in CA Division 3 as a consequence of the proposed insertion of new Division 3A which deals with share buy-backs (ED cl. 4).

### Cl. 5: Issue of shares at premium

9. It is proposed to insert a new paragraph in CA s.119 consequent upon ED cl.11 s.133KM which provides that money spent on buy-backs, where the amount paid for the shares exceeds the nominal value of the shares, shall be written off

against any amounts standing to the credit of a share premium account before applying the distributable profits of the company (ED para. 5(b)).

Cl. 6: Insertion of Subdivision heading

10. It is proposed to insert in CA Division 3 a new subdivision heading - "Subdivision B - Class Rights" (ED cl. 6).

Cl. 7: Insertion of Subdivision heading

11. It is proposed to insert in CA Division 3 a new subdivision heading - "Subdivision C - Company Financing Dealings in its Shares, etc" (ED cl. 7).

Cl. 8: Company financing dealings in its share etc.

12. Background CA para. 129(1)(a) reinforces the CA para. 129(1)(b) prohibition on the purchase by a company of its own shares by further prohibiting a company from giving financial assistance for the acquisition of its own shares CA s-secs.129(8) and (9) set out several statutory exceptions to the CA s-sec.129(1) prohibition to conserve proper commercial transactions.

13. CA s-secs.12(10)-(15) set out a validation procedure for transactions which would otherwise breach the prohibition on a company giving financial assistance to others for the acquisition of its shares or shares in its holding company. The validation procedure mitigates the strict application of the CA para. 129(1)(a) prohibition in cases where the giving of financial assistance will not prejudice the company's financial position.

14. However, because CA para. 129(1)(b) strictly prohibits the purchase by a company of its own shares, companies have been increasingly resorting to the CA 129(10)-(15) validation procedure to achieve what is, in effect, a buy-back of shares.

4.

A practice of recent times has involved use of the financial assistance validation procedure to enable a company to give financial assistance to shareholders of the company's shares in return for the surrender of control over those shares.

Proposed Amendment

15. As a corollary to the proposal to introduce a self-purchase power it is proposed to dispense with the validation procedure for financial assistance transactions, which could frustrate the intention of the more stringent requirements of the proposed buy-back procedure set out in ED cl. 11 - proposed new Division 3A (ED para. 8(c)).

16. CA para. 129(9)(b) currently exempts the giving of financial assistance in respect of employee-share schemes from the CA para.129(1)(a) prohibition and it is proposed to maintain that exemption. However consequential drafting changes will need to be made to bring the wording of CA para. 129(9)(b) into line with that used for employee-share buy-backs in ED cl.11, s.133FA (ED para. 8(b)).

Cl. 9: Consequences of company financing dealings in its shares etc.

17. ED cl. 9 makes a consequential amendment to CA s.130 to preserve buy-back transactions carried out in accordance with proposed new Division 3A which lays down the ground rules for buying back shares (ED para. 9(a)).

18. ED cl. 9 also amends CA s.130 by omitting CA s-secs.130(6)-(12) inclusive which mirrors the amendments made by ED cl. 8 to CA s.129 dispensing with the financial assistance validation procedure (ED para. 9(c)).

Cl. 10: Insertion of Subdivision heading

Option A - Subdivision D - Company Acquiring Relevant Interests in its Voting Share

Option B - Subdivision D - Unacceptable Self-acquisition Schemes

19. Background The case of August Investments Pty. Ltd. v Poseidon and Samin Limited [1971] 2 SASR 71 established that a company may, at least in certain circumstances, effectively purchase a proportion of its own shares by acquiring an interest in one or more of its non-subsidiary corporate shareholders (subject to the restriction now imposed by the Companies (Acquisition of Shares) Act 1980 which restricts the manner of effecting an acquisition that could increase a person's entitlement to voting shares beyond 20%). The net result of the Poseidon rule appears to be that a company can legitimately purchase its own shares indirectly even though it is prohibited from doing so directly.

20. For example, Company A (the purchasing company) which acquires a controlling interest in Company B (the 'interposed' Company A shareholder) which owns a significant parcel of shares in Company A, is not required to consult its shareholders in relation to its purchase of Company B shares even if one effect of the purchase is to lessen the value of remaining shareholdings. Nor is there any obligation to give creditors notice of the intended acquisition even though the rationale for the buy-back prohibition is based on the rule in Trevor v Whitworth (1887) 12 App Cas. 409 that creditors are entitled to assume that a company will maintain its capital. The creditors, in any case, would have no right to intervene.

21. Although one result of the introduction of a buy-back capacity for both public and proprietary companies should be a reduced incentive to resort to the use of non-subsidiary companies for buy-back purposes, the incentive may not be removed entirely. For example, if a company intends to defend

itself against a takeover bid by directly purchasing its own shares, and subsequently cancelling those shares, it could be confronted with the unintended result of automatically increasing the bidder's stake in the company if the bidder is already a current shareholder. On the other hand, if it purchases its own shares indirectly it will be put in a stronger position vis-a-vis the bidder.

22. In order to prevent the use of interposed companies in the manner described so that the interests of shareholders who might prefer to accept a takeover offer are protected, two alternative approaches have been identified by the Ministerial Council for Companies and Securities. Both approaches have been translated into legislative provisions and are described in the Bill as Option A and Option B and are fully explained below. At the end of the Bill's exposure period Ministerial Council will assess the comments on both options and decide whether to include either Option A or Option B (or alternative formulations suggested in submissions) in the Bill which will ultimately be introduced into Parliament.

#### OPTION A

23. The essence of Option A is to allow a company to control one or more of its corporate shareholders that either alone or together own no more than 10% of its shares. This amounts to a lowering of the existing threshold inherent in the prohibition on a subsidiary purchasing shares in its holding company. Once a company's 'indirect' ownership of its shares exceeds 10% and unless it has been given Commission approval for the acquisition, it will become subject to any Court orders made on application of the Commission or a person whose interests have been affected in the manner set out in the Bill (see ED cl.10 - proposed s-sec.130C(b)). The central provision of Option A is ED cl.10, s.130B which prohibits cross-shareholdings which result in a company acquiring relevant interests in more than 10% of its voting shares. One effect of this provision might be to prohibit cross-shareholding which are at present quite legitimate at

20%. However, on balance Ministerial Council considers that the lowering of the threshold to 10% is justified on the basis that it is a reasonable limit on protective cross-shareholding webs between companies created to entrench existing management. The inflexibility of the provision is alleviated by the ability of the Commission to approve cross-shareholdings over 10% for legitimate commercial reasons.

#### Subdivision D - Company Acquiring Relevant Interests in its Shares

##### Proposed s.130A - Relevant interests

24. Proposed s.130A adopts the relevant interest test set out in s.9 of the Companies Acquisition of Shares Act 1980 but mitigates the effect of the test by omitting CASA s-sec.9(5). The relevant interest test is a mechanism employed to determine whether a company has a degree of control over its corporate shareholders which suggests that it in effect controls its shares owned by that corporate shareholder.

##### Proposed s.130B - Company not to acquire relevant interests in more than 10% of its voting shares

25. Proposed s.130B is designed to counter the avoidance of the creditor and shareholder protective mechanisms (see 'Key elements of share buy-back proposals at Part A para. 8) put in place by the buy-back of shares provisions (ED cl.11 -proposed new Division 3A) by adopting the relevant interest test found in s.9 of the Companies (Acquisition of Shares) Act 1980, to purchases by Company A in one or more of its corporate shareholders. The effect of the application of the relevant interest test to all cross-shareholdings would be to prohibit Company A indirectly controlling more than 10% of its own shares.

26. Company A shares held by all of Company A's corporate shareholders will be aggregated for the purposes of the test. For example: Company A has a controlling interest in

8.

Company B, Company C and Company D each of which own 5% of Company A's shares which would, in aggregation, amount to 15% which is the relevant figure for the purposes of the relevant interest test. In this example, Company A has by virtue of the relevant interest test breached the prohibition by crossing the 10% threshold.

27. Proposed s-sec.130A(2) allows the Commission to approve a cross-shareholding of above 10% for proper commercial reasons and also allows the Commission to exempt a class of transactions from the relevant interest provisions.

Proposed s.130C - Orders by Court where company contravenes section 130B

28. Proposed s.130C sets out a wide range of orders which a Court may make if it finds that a company has contravened proposed s.130B.

Proposed s.130D - Effect of Subdivision

29. Proposed s.130D simply ensures that the provisions of Subdivision D do not have the unintended effect of affecting the operation of provisions of Subdivision C of this Bill or the provisions of CASA.

**OPTION B**

30. The essence of Option B is the conferral of discretionary powers on the Commission to make interim orders in respect of a scheme which it has declared to be a self-acquisition scheme within the statutory definition found in proposed Option B ss.130B and 130BA. The criteria refer to matters such as to how many shares the scheme relates, the amount of consideration involved, the degree of disclosure made to shareholders, creditors and securities exchanges, consultation of shareholders and creditors and the takeover aspects of the scheme.

Subdivision D - Unacceptable Self-acquisition Schemes

Proposed s.130A - Interpretation

31. Proposed s.130A widely defines certain words and phrases used in proposed Subdivision D.

Proposed s.130B - self-acquisition scheme

32. Proposed s.130B describes a self-acquisition scheme in respect of which the Commission is empowered to make a declaration under proposed s.130C. The description is drawn in necessarily broad terms and revolves around the purpose behind the scheme, whether it is the sole purpose or is one of a number of purposes. Proposed paras. 130(1)(a) - (e) describe purpose in terms of acquiring control by various means over shares in a company.

33. It is also proposed to use s.9 of the Companies (Acquisition of Shares) Act 1980 to extend the meaning of Dower and control by using the relevant interest concept for the purposes of defining what is a self-acquisition scheme.

34. Proposed s-sec. 130B(3) excludes transactions associated with buy-backs permitted by proposed new Division 3A from the definition of the self-acquisition schemes which will be subject to the Commission's declaratory powers under proposed ss.130C and 130D.

Proposed s.130BA - Relevant matters affecting self-acquisition scheme

35. Proposed s.130BA sets out the matters to which the Commission must have regard in considering whether it shall declare a self-acquisition scheme or a connected transaction to be, or form part of, an unacceptable self-acquisition scheme. The matters are those relevant to the self-purchase issue generally, such as disclosure of information to members



and creditors and the opportunity for participation in the scheme by those members and creditors.

Proposed s.130C - Declaration by Commission

36. It is proposed to allow the Commission, after considering the matters listed in proposed s.130BA, to declare a transaction to form part of an unacceptable self-acquisition scheme which it considers will materially prejudice the rights or interest of the company, its creditors or member or a class of its creditors or members.

37. Proposed s-sec.130(2) gives the Commission 90 days in which to declare unacceptable a transaction already entered into. The Commission's declaratory powers in respect of proposed transactions are not subject to a time restriction for the reason that the rights and liabilities of parties are not established until they have actually entered into the transaction.

Proposed s.130D - Commission may make interim orders

38. Once the Commission has made a declaration under proposed s.130C it may make one or more of the orders described in proposed paras. 130D(1)(a)-(g) which have the effect of restraining a person or the company from carrying out obligations under a self-acquisition scheme or connected transaction which has been declared unacceptable.

39. Proposed s-sec.130D(4) gives a right to appeal to the Court against an order of the Commission.

40. Proposed s-sec.130D(8) prevents the Commission from making an order where it has not given a person the subject of the order an opportunity to appear at a hearing before the Commission and to make submissions and to give evidence.

Proposed s.130E - Court may reverse Commission's declaration

41. It is proposed to allow the Court to reverse the Commission's declaration so that a transaction or proposed transaction is no longer declared to be part of an unacceptable self-acquisition scheme.

Proposed s.130F - Court may act on Commission's declaration

42. Proposed s.130F allows the Court to make wide ranging orders, after the Commission has made a declaration under proposed s.130C, on the application of the Commission, the company or a member or creditor of the company.

Proposed s.130G - Effect of Subdivision

43. Proposed s.130G simply ensures that the provisions of Subdivision D do not have the unintended effect of affecting the operation of the provisions of Subdivision C of this Bill or the provisions of CASA.

Insertion of Subdivision and heading

44. It is proposed to insert in CA Division 3 a new sub-division heading - "Subdivision E - Other" (ED cl.10).

Cl. 11: Insertion of new Division

45. It is proposed to insert a new Division 3A, after CA Division 3, to deal with the proposed new share buy-back capacity (ED cl.11). Proposed new Division 3A will contain the following provisions:

Subdivision AA - How this Division works

46. Proposed s.133AAA explains how the proposed buy-back capacity exists alongside the CA s.129 prohibition on a

company acquiring its own shares. The proposed provision is self-explanatory.

Subdivision A - Interpretation

Proposed s.133AA - Interpretation

47. Proposed s.133AA defines certain words and definitions for the purposes of proposed new Division 3A which sets out the share buy-back procedure. Some of the terms defined are set out below with cross-references, as appropriate, to the substantive provisions in which the defined terms are employed.

'buy-back'

48. The meaning of this term is found in proposed s.133AB which says that where a company buys shares or an option in itself it shall be taken to buy back the shares or the option.

'buy-back'

49. The term 'buy-back' is descriptive of an acquisition by a company involving the buying back of shares or options as understood by proposed s.133AB.

'buy-back authorisation'

50. This term refers to the self-purchase capacity which must be contained in a company's constituent documents as required by proposed s.133CA.

'buy-back scheme'

51. A buy-back scheme will be one constituted by offers which fall within the limits set by proposed s.133DA.

'employee - share purchase'

52. A buy-back which fits into this definition of employee-shares purchase must meet the requirements set out in proposed ss.133FA, 133FB and 133FC which primarily relate to consultation of shareholders.

'marketable parcel'

53. This term has been defined for the purposes of proposed s.133DC which deals with acceptance of offers made under a pro-rata buy-back scheme where the number of shares in respect of which offers made under the scheme have been accepted exceeds the number of shares that the offers specify under proposed s-sec.133DA(12).

'odd-lot purchase'

54. This term is defined to mean a buy-back by a listed body, where the number of shares acquired is an odd lot of shares in the body to distinguish it from both a buy-back scheme and an employee-shares purchase which attract the operation of other provisions of the Bill.

'offer period'

55. Proposed s.133LB determines the effect of supervening insolvency on a buy-back scheme (namely, declaring buy-back agreements to be void or deeming offers to buyback shares to be withdrawn in certain circumstances) and uses the term "offer period" in pursuance of this result.

'solvency period'

56. A 'solvency period', being a term used in proposed Subdivision N of Division 3A, will commence at the same time as the buy-back offer period, but will extend beyond the offer period to the time when purchase money is first paid to sellers in the buy-back scheme.

Proposed s.133AB - What constitutes buying back shares or an option

57. Proposed s.133AB makes it clear that the use of the expression 'buy back the shares' in the Bill is a reference to a company buying shares in itself or an option to acquire unissued shares in itself.

Proposed s.133AC -The 10% in 12 months limit

58. Proposed s.133AC sets out the formula to be applied when calculating what is 10% of a company's shares for the purposes of complying with the limit placed on the number of shares which may be bought back within a 12 month period.

Proposed s.133AD - Takeover aspects of proposed resolution

59. The CSLRC Discussion Paper pointed to the experience of overseas jurisdictions which have had to introduce mechanisms to prevent the buy-back power being exercised by company management as a takeover defence strategy without the informed consent of shareholders.

60. To ensure effective shareholder participation, the exercise of the buy-back power requires shareholder approval by ordinary or special resolution and the notice of the proposed resolution will be required to inform the shareholders of the takeover aspects of the proposed purchase (for example proposed s-sec.133EE(4)).

61. Proposed s.133AD sets out the information which must be included in a notice of a proposed resolution to satisfy the requirement to set out the takeover aspects of the proposed resolution.

Proposed s.133.AE - When directors presumed to be aware of proposed or actual takeover bid

62. Proposed s.133AE creates a presumption that directors were aware of a proposed or actual takeover bid in certain circumstances with the result that directors will not be able to avoid the notice requirements of proposed s.133AD and related provisions.

Proposed s.133AF: Solvency declaration

63. A prerequisite to the exercise of the buy-back power will be the signing of a solvency statement by all of the directors of the purchasing company. Proposed s.133AF sets out the matters which must be included in a solvency declaration required by proposed ss.133KA and 133KB.

64. Although all directors will be required to sign the statement personally, duly appointed alternate directors will qualify as personal signatories for the purposes of the solvency statement requirements.

65. Proposed paras.133AF(1)(d),(e) and (f) require the solvency statement to specify all current and proposed buy-back schemes in order to establish a nexus between the directors' knowledge of the facts and their personal liability which may arise on the event of the company's insolvency.

Proposed s.133AG: Auditor's report on solvency declaration

66. Where an auditor's report is required by the Bill in relation to a proposed buy-back or proposed buy-back scheme, it must include a declaration of the kind described in proposed s.133AG.

Proposed s.133AH: When buy-back agreement is completed

67. Where all the consideration that is required by any agreement constituting a buy-back by a company has been

provided, that agreement is taken to be completed by proposed s. 133AH.

Proposed s.133AJ - When shares are transferred

68. Proposed s.133AJ provides that shares are taken to have been transferred, pursuant to an agreement, upon registration.

Proposed s.133AK - Classes of shares

69. Proposed s.133AK provides that, for the purposes of proposed new Division 3A, shares in a company will, unless they are divided into 2 or more classes, constitute a class of shares.

Subdivision B - Power to Buy Back Shares and Options

Proposed s.133BA: Power to buy back shares

70. Proposed s.133BA empowers a company, through its directors, to buy back its ordinary fully-paid shares subject to the conditions prescribed in proposed new Division 3A which essentially relate to disclosure, consultation of shareholders and creditors and equality of treatment as between shareholders - for example see proposed Subdivision E.

Proposed s.133BB: Power to buy back an option

71. Proposed s.133BBA allows a company to buy back an option over its unissued shares so long as it meets the proposed s-sec.133KB(3) requirements for a solvency declaration, an auditor's report in certain circumstances and is not an externally-administered company (i.e. a company under some form of insolvency administration).

Proposed s.133BB: Completion of buy-back

72. Subject to proposed new Division 3A, proposed s.133BB ensures that shares or an option purchased by a company pursuant to the buy-back provisions of the Bill can be transferred to the company.

Proposed s.133BC: Effect of Division

73. Proposed s.133BC confers independent operation on the buy-back provisions so that the self-purchase capacity is not re-defined by other legislative provisions other than those of proposed Division 3A, the constituent documents of a company, or the rules of a securities exchange or any agreement.

Proposed s-s.133BC(4) will only be included if Option A (relevant interest test) is adopted

Proposed s.133BD - Other obligations and liabilities not affected

74. Proposed s.133BD preserves obligations and liabilities, including those arising under CA s.229, which arise otherwise than under proposed new Division 3A.

Subdivision C - Buy-back Authorisation in Articles

Proposed s.133CA - Articles to contain buy-back authorisation

75. Proposed s.133CA requires a company to derive its self-purchase capacity from its constituent documents which might grant the power either at the time of incorporation or later by amendment by special resolution. The function of this restriction on the grant of a self-purchase capacity is to enable shareholders to determine, in principle, whether the company will have a buy-back capacity.



Proposed s.133CB - Inclusion, effect and renewal of buy-back authorization

76. The effect of proposed s.133CB will be to cause a company's self-purchase power to lapse every 3 years unless it is renewed by an amendment to the company's articles in the usual manner prescribed elsewhere in the CA.

77. Proposed s.133CB reinforces the principle that shareholders should decide whether the company should have a buy-back capacity by ensuring that shareholders who have become members after incorporation, or since a renewal of the buy-back power, are consulted.

**Subdivision D - Buy-back Schemes**

Proposed s.133DAA - Shares and classes of shares

78. It is proposed to restrict buy-backs to the purchase of ordinary fully-paid shares of the company.

Proposed s.133DA - Buy-back scheme

79. It is proposed that share purchases pursuant to a buy-back scheme may only be made by way of written offers to all shareholders. Proposed s.sec.133DA(11) further requires that an offer made pursuant to a buy-back scheme will either be on a proportional or a pro-rata basis (cf CASA para.16(2)(a)).

Proposed s.133DB - Withdrawal or variation of buy-back offers

80. Proposed s.133DB requires Commission approval for the withdrawal or variation of a buy-back to ensure that the rights of all parties are given due consideration if a company intends to withdraw or vary a buy-back offer.

Proposed s.133DC - Acceptance of offers made under pro-rata buy-back scheme

81. Proposed s.133DC deals with the situation where an offer has been made relating to all the shares in the company that an offeree holds, and that offer specifies the maximum number of shares that the offeror company proposes to buy back as a result of the acceptance of some or all of the offers, but the number of shares in respect of which the offeror company received acceptances (the 'available number' of shares) exceeds 'the desired number' of shares (specified in the offer as required by proposed s-sec.133DA(12)).

82. Proposed s-sec.133DC(2) will deem each offer accepted to have been accepted in relation only to a proportion of the offeree's holding which the desired number of shares bears to the available number of shares.

83. Once the operation of proposed s-sec.133DC(2) has been triggered by acceptances having been received in respect of more shares than the number of shares proposed to be acquired pro-rating will extend to all acceptances.

Proposed s.133DD - Avoidance of odd lots under proportional buy-back scheme

84. Proposed s.133DD deems odd lots of shares remaining after the acceptance of a proportional buy-back offer to have been included in the offer and acceptance. The purpose of the provision is to avoid the creation of unmarketable parcels of shares which would otherwise be an unavoidable consequence of some proportional offers.

Proposed s.133DE - Odd lots to be disregarded for the purpose of the 10% in 12 months limit

85. Where an odd lot has been deemed part of a buy-back scheme, the number of shares in that odd lot shall not be counted in calculating the 10% in 12 months limit.

Subdivision E - Approval of Buy-back Scheme by Ordinary Resolution

Proposed s.133EA - Public company

86. The Bill limits a public company to buying back 10% of its own shares in a 12 month period and, to further the principle of shareholder involvement (see PART A para. 9(a)), requires buy-back offers to be approved by an ordinary resolution of the company (proposed s.133EA).

Proposed s.133EB - Proprietary company

87. The Bill allows the management of a proprietary company to use its own discretion in exercising the buy-back power up to a 10% in 12 months limit. If that limit is exceeded, or at least one of the company's directors is aware of the matters detailed in proposed sub-paras.133EB(b)(i) and (ii) relating to a takeover bid, then proposed s.133 EB requires shareholders to be consulted and any further buy-back offers to be approved by ordinary resolution of the company.

Proposed s.133EC - Buy-back offers made under a resolution

88. If the Bill requires particular buy-back offers to be made under a resolution of the company, the resolution must satisfy proposed s.133EC.

Proposed s.133ED - Resolution to approve proposed buy-back scheme

89. So that members may make a fully informed decision where exercise of the buy-back power requires the prior consent of shareholders, proposed s.133ED sets out matters which must be included in a notice of the meeting to vote on a resolution to approve a proposed buy-back scheme and matters that the resolution must specify. One of the matters which the resolution must specify is the price to be paid for the shares the subject of the proposed buy-back scheme although proposed

s-secs.133ED(3) and (4) allow that price to be specified to be somewhere in a range between a specified minimum and maximum amount and to be determined by the directors, or the price may be determined by the directors in another manner specified in the resolution.

Proposed s.133EE - Notice of resolution to approve proposed buy-back scheme

90. Proposed s.133ED requires the matters specified in proposed s.133EE to be included in a notice of resolution to approve a proposed buy-back scheme. Those matters include a copy of the solvency declaration by the directors (proposed s-sec.133EE(6)) and the takeover aspects of the proposed resolution (proposed s-sec.133EE(4)).

Subdivision F - Employee-share Purchase

Proposed s.133FA - Approval by ordinary resolution

91. Proposed s.133FA requires the prior consent of the shareholders of a company, and of its holding company, by ordinary resolution to a buy-back which is an employee-shares purchase. The agreement to purchase the shares must be in accordance with the resolution(s), which in turn must comply with proposed s.133FB.

Proposed s.133FB - Resolution to approve proposed employee-share purchase

92. Proposed s.133FB requires that a resolution to approve an employee-shares purchase must be preceded by a notice which complies with proposed s.133FB, must set out the consideration to be provided for the purchase or the manner in which it is to be determined by the directors and, must not be voted on by a party to the agreement or a person associated with such a party.

Proposed s.133FC - Notice of resolution to approve proposed employee-share purchase

93. Proposed s.133FC sets out the information which should be given to shareholders in the notice of resolution required by proposed s.133FB.

Subdivision G - Other buy-backs by public company

Proposed s.133GA - Other buy-backs by public company

94. It is proposed that a public company will be able to acquire 'odd lots' in the company without shareholder approval (proposed s.133GA).

Proposed s.133GB - Selective buy-backs by proprietary company

96. It is proposed to allow proprietary companies to selectively self-purchase so long as the purchasing company complies with certain prescribed conditions. Proposed s.133AB requires selective buy-backs to be approved by special resolution of the company preceded by a notice of resolution complying with the requirements of proposed Subdivision H.

97. Proposed para.133GB(c) disqualifies a party to the purchase agreement, or a person associated with such a person, from voting on the special resolution to approve the selective buy-back.

Subdivision H - Notice of Resolution to Approve Selective Share Buy-Backs

Proposed s.133HA - Notice to comply with subdivision

98. Proposed s.133HA requires a notice of resolution to approve a selective buy-back to comply with proposed Subdivision H.

Proposed s.133HB - Contents of resolution and proposed agreement

99. Proposed s.133HB requires the notice of resolution to set out the text of the proposed resolution and a summary of all the material terms of the proposed selective self-purchase contract.

Proposed s.133HC - Availability of agreement for inspection

100. Proposed s.133HC ensures that shareholders entitled to vote on the special resolution to approve a selective self-purchase can inspect the relevant contract both at the company's registered office at least 14 days before the date of the relevant meeting and at the meeting itself.

Proposed s.133HD - Valuation of non-cash consideration

101. Where the consideration provided by the company is in a non-cash form or contains a non-cash element or alternative, proposed s.133HD requires the notice of resolution to set out the particulars of the non-cash consideration and a copy of a statement by directors as to its equivalent cash value.

Proposed s.133HE - Reasons for buy-back

102. Proposed s.133HE requires the notice of resolution to set out the directors' reasons for proposing the buy-back, together with the takeover aspects of the proposed resolution.

Proposed s.133HF ; Solvency aspects

103. Proposed s.133HF requires the notice of resolution to include the opinion of the directors on the effect of the buy-back on the company's state of affairs as well as a copy of a solvency declaration by the directors that relates to the proposed buy-back.

Proposed s.133HG - Director's interests

104. Proposed s.133HG ensures that each of the directors has disclosed any interest in the proposed buy-back in the notice of resolution including any declaration made in accordance with CA s.228 which requires directors to declare any interest in a contract or proposed contract with the company.

Proposed s.133HH - Effect on control of company

105. Proposed s.133HH further requires the notice of resolution to set out what the directors consider will be the likely effect on the control of the company if the proposed buy-back is made.

Proposed s.133HJ - Other relevant information

106. Proposed s.133HJ ensures that all relevant information is included in the notice of resolution.

Subdivision J - Creditors may Object to Proposed Share Buy-backs

Proposed s.133JA - Advertising proposed buy-backs

107. Proposed s.133JA requires certain buy-back proposals to be advertised to give creditors notice of the company's intention to self-purchase and access to the information necessary to form a decision on whether to exercise rights under proposed s.133JD (proposed s.135JD will allow creditors to apply to the Court for an order prohibiting the making of buy-back offers or the entering into a buy-back agreement -see para. 111).

108. The categories of buy-back proposals which are required to be advertised under proposed s.133JA are pari passu offers by public companies and selective buy-backs by proprietary companies. The advertisement will be required to notify creditors that certain information relating to the proposed

buy-back, specified in proposed s-sec.133JA(3), will be available for inspection, free of charge, at the company's registered office.

Proposed s.133JB - Content of Advertisement

109. Proposed s.133JB sets out the details in relation to the consideration to be provided for the proposed buy-back of shares, which are required to be included in a notice published in accordance with proposed s.133JC.

Proposed s.133JC - Newspapers in which advertisement to be published

110. The advertisement of proposed buy-backs required by proposed s.133JA will be required to be published in a national newspaper and a daily newspaper in each State or Territory in which the company carries on business.

Proposed s.133JD - Creditor may apply to Court

111. Proposed s.133JD puts in place a protective mechanism for creditors who might be adversely affected by a buy-back scheme which would seriously reduce the company's margin of financial viability. Under this provision a creditor would be able to apply to the Supreme Court, within 21 days of the advertisement of a buy-back proposal, to seek an order prohibiting the making of the buy-back offers or the entering into of a buy-back agreement.

Proposed s.133JE - How application to be dealt with

112. Proposed s.133JE sets out the grounds on which the Court may decide to prohibit a company from proceeding with a proposed buy-back of shares.



Proposed s.133JF - Buy-backs not to proceed while application pending

113. Proposed s.133JF provides that the period of time during which a proposed buy-back of shares was delayed due to the Court proceeding under proposed s.133JD shall not count in determining whether the requirements of proposed s-sec.133JA(2) and para.133JA(3)(b) have been complied with.

Proposed s.133JG - Company to comply with order of Court

114. It is proposed that a company will be prevented from proceeding with a buy-back scheme or other buy-back, if to do so would contravene an order in force under proposed s.133JE.

Subdivision K - Solvency Requirements

Proposed s.133KA - Solvency requirements for buy-back scheme

115. Proposed s.133KA requires a solvency declaration by the company's directors in relation to a pari passu self-purchase as well as an auditor's report. Proprietary companies will not be required to have an auditor's report if the buy-back does not exceed the 10% in 12 months limit.

116. Proposed s.133KA also requires a solvency declaration to have been signed by directors within 2 months of the buy-back offer. The reason for this requirement is to ensure that directors' liability connected to the solvency declaration does not arise as a result of a solvency declaration made without advantage of the knowledge of relevant facts which may have occurred between the giving of notice of intention to propose a resolution to approve a buy-back scheme (see proposed s.133EE) and the making of the buy-back offer.

Proposed s.133KB - Solvency requirements for other buy-backs

117. Proposed s.133KB imposes similar solvency requirements to proposed s.133KA to buy-backs not made by way of a pari passu offer.

Proposed s.133KBA - Copy of solvency declarations and auditor's reports to be lodged with Commission

118. Proposed s.133KBA requires solvency declarations and auditor's reports required by the Bill to be lodged with the Commission within certain time periods (the maximum permissible being 7 days).

Proposed s.133KC - Revocation of solvency declaration

119. A solvency declaration will be capable of revocation by a director or the directors in the manner provided by proposed s.133KC.

Proposed s.133KD - Solvency requirements for completion of buy-back under buy-back scheme

120. Proposed s.133KD delays settlement of any of the buy-back agreements comprising a buy-back scheme until the offer period has ended. This provision is intended to ensure equality of treatment for all shareholders, which would not be guaranteed in the event of intervening insolvency where some shareholders had already been paid for the shares sold to the company.

Proposed s.133KE - Company not to register certain transfers during solvency period

121. Proposed s.133KE logically extends proposed s.133KD, so that a company shall be prohibited from becoming the registered owner of shares which are part of a buy-back scheme until the offer period of that buy-back scheme has ended and the company has provided consideration. This provision is intended to prevent a company from circumventing the proposed

s.133KD prohibition by registering a transfer of shares, thereby creating a debt in favour of a particular shareholder.

Subdivision L - Buy-backs and other Securities Issues

Proposed s.133KF - Buy-back consideration not to consist of other securities in the company

122. It is proposed to prohibit the use of a company's securities as consideration for buy-backs.

Proposed s.133KG - No buy-backs during rights issue or placement

123. Proposed s.133KG, as a measure against market manipulation, prevents a company from buying back shares during or within 3 months after the last day of a rights issue or a placement of shares.

Proposed s.133KH - No rights issue or placement during offer period or within 3 months after buy-back

124. Proposed s.133KH expands the principle applied by proposed s.133KG to rights issues or placements during the buy-back offer period or within 3 months after a buy-back.

Subdivision M - Effect of Buy-Back on Shares or Option

Proposed s.133KJ - Rights attaching to bought back share or option

125. Proposed s.133KJ suspends all rights attached to bought back shares or an option as soon as the buy-back agreement is entered into and until the shares or option are transferred to the purchasing company.

Proposed s.133KK - Company not to sell bought back shares or option

126. Proposed s.133KK prohibits a company from selling shares or an option it has bought back.

Proposed s.133KL - Cancellation of shares or option after transfer to company

127. Proposed s.133KL automatically cancels bought back shares or options and extinguishes all rights attaching to those shares or options upon registration of the transfer of the shares or options to the purchasing company.

Proposed s.133KM - Accounting for money spent on buy-back where amount exceeds nominal value of shares

128. Proposed s.133NF provides that the buy-back acquisition premium cost to the company should be applied by writing off that acquisition premium first against the share premium account (if any) and then against distributable profits (if any) of the company.

Subdivision N - Effect of Insolvency

Proposed s.133LA - Buy-back offer by externally-administered company void

129. Proposed s.133LA declares void any offer under a buy-back scheme made by an externally-administered company, which is a company:

- (a) in respect of which a provisional liquidator has been appointed and not since removed;
- (b) that is being wound up; or
- (c) that is under official management.

Proposed s.133LB - Effect of supervening insolvency on buy-back scheme

130. The effect of proposed s.133LB would be to declare a binding buy-back agreement void or deem an offer to buy back shares to be withdrawn if:

(a) any requirements in respect of a solvency declaration and an auditor's report have not been met by the end of the offer period; or

(b) a solvency declaration is revoked before any consideration for the shares bought under a buy-back scheme has been paid; or

(c) before any consideration has been paid in relation to the buy-back scheme:

(a) a provisional liquidator of the company is appointed;

(b) a Court makes an order for the winding up of the company;

(c) the company resolves that it be wound up; or

(d) the company is placed under official management.

Proposed s.133LC - Directors to indemnify insolvent company for consideration provided within last 12 months under buy-back agreement

131. Proposed s.133LC imposes personal liability on directors who have signed a solvency declaration so that each director will be liable jointly and severally to compensate the company for the total funds (as well as the value of any non-cash consideration) expended on self-purchases in the 12 months prior to insolvency (whether or not there is a causal link

between the self-purchase and the insolvency subject to proposed s.133LD).

132. Directors will be relieved of personal liability under proposed s-sec.133LC(5) wherever they can establish that at the time of making the relevant declaration, they had reasonable grounds for the solvency opinion.

Proposed s.133LD - Relief from liability under section 133LC

133. Proposed s.133LD gives further relief to directors from personal liability under proposed s.133LC where it can be established that the director acted honestly at all times and, having regard to all the circumstances of the case, ought fairly to be excused in relation to the liability.

Subdivision P - Rights of Unpaid Sellers

Proposed s.133MA - Specific performance of buy-back agreements

134. Proposed s.133MA allows a buy-back agreement to be enforced by a Court order for specific performance against a solvent company.

Proposed s.133MB - Buy-back agreement unenforceable while company insolvent

135. Proposed s.133MB will prevent buy-back agreements being enforced against an insolvent company and the onus of establishing that an agreement is unenforceable will lie with the company.

Proposed s.133MC - Unpaid seller may prove in winding up of company

136. Proposed s.133MC would allow a vendor shareholder to claim a debt in a winding up of the purchasing company which arose out of a buy-back agreement.

Proposed s.133MD - Ranking of seller's claim in winding up

137. Proposed s.133MD provides that a vendor shareholder's claim allowed by proposed s.133MC shall rank after all other claims in the winding up of the purchasing company except other sellers' claims, other sums due to members and claims arising out of the adjustments of rights as between contributories.

Subdivision Q - Certificates and Declarations of Compliance

138. The CSLRC considered whether irregular (i.e. in breach of procedural requirements) self-purchase transactions should be void, voidable or valid and concluded that all completed transactions made on the basis of irregular authorisations should be valid. The Committee cited concern about possible detriment to bona fide vendors and undue market uncertainty in support of its conclusion.

139. However, such an approach could be seen to be favouring vendor shareholders over creditors and would also limit the remedies to those seeking damages as a result of the irregularly authorised but valid transaction. It would be difficult to restore the parties to their pre-transaction status because the bought back shares are subject to cancellation and company funds have been depleted as a result of the share re-purchase. Consequently, this Bill applies CA s.130 to irregularly authorised transactions with the result that those transactions will be voidable at the option of the company.

140. To mitigate the harshness of CA s.130 bona fide shareholders will be immune to orders for compensation under CA s-sec.130(4) if the agreement or transaction was entered into on reliance of a duly signed certificate of compliance. This proposed amendment would mirror the present protective mechanism in CA s-sec.130(6) in respect of persons receiving

financial assistance from a company for the purposes of buying shares in that company.

Proposed s.133NFA - Certificate of compliance

141. It is proposed that a compliance certificate to be made and given in accordance with the provisions of Subdivision Q will remove a person's liability under CA s-sec.130(4), except where that person was aware before making the agreement or entering into the transaction that the buy-back had not satisfied all the conditions of proposed new Division 3A.

Proposed s.133NFB - Presumptions about certain matters

142. Proposed s.133NFB establishes several presumptions in relation to certificates of compliance.

Proposed s.133NFC - Who must sign compliance certificate

143. The compliance certificate must be signed by at least 2 directors of the company, or a director and a secretary of the company.

Proposed s.133NFD - Offences relating to compliance certificates: buy-back schemes

144. Proposed s.133NFD prohibits a compliance certificate being given in respect of only a proportion of offers under a buy-back scheme.

145. Where a compliance certificate accompanies an offer which if accepted will contravene CA s.129, proposed s-sec.133NFD(2) will also be contravened with the result that each officer of the defaulting company will be guilty of an offence unless a defence can be established under proposed s-sec.133NFD(4).



Proposed s.133NFE - Offences relating to compliance certificate : other buy-backs

146. Proposed s.133NFE creates an offence, of the kind created by proposed s.133NFD, in respect of compliance certificates given in relation to other buy-backs which contravene CA s.129.

Proposed s.133NFF - Declaration by Court of substantial compliance

147. Proposed s.133NFF allows the Court to declare, upon application by a party to an agreement or proposed agreement constituting a buy-back, that a condition of proposed new Division 3A has been satisfied.

Subdivision R - Notifying Commission and Securities Exchange about Buy-backs

Proposed s.133NG - Company to notify Commission of buy-backs

148. To assist in maintaining a fully informed market, proposed s.133NG requires certain information to be notified to the Commission.

Proposed s.133NH - Listed company to notify securities exchange of buy-backs

149. Proposed s.133NH further requires listed bodies to provide to the relevant securities exchange a copy of the notice required by proposed s.133NG to be lodged by them with the Commission.

Subdivision S - Listed Company to Notify Members About Share Cancellation

Proposed s.133NK - Notifying member whose shares were cancelled

150. Proposed s.133NK ensures that members who have sold back shares to a company are notified that those shares were

cancelled immediately after the shares had been transferred to the company, by force of proposed s-sec.133KL(1).

Proposed s.133NL - Notifying member generally

151. Proposed s.133NL ensures that all members of a listed company are aware of completed buy-back schemes which result in a 5% or more reduction of the company's share capital. Shareholders will need to be aware of completed buy-backs which could result in an automatic upwards adjustment of their percentage shareholding entitlement thereby having implications for their obligations under the CA substantial shareholdings provisions.

Subdivision T - Register of Buy-backs

Proposed s.133PA - Company to keep register

152. In order that shareholders may have access to relevant information, proposed s.133PA requires the purchasing company to establish a register for the purposes of new Division 3A containing the information set out below.

Proposed s.133PB - Particulars of buy-back schemes

153. Proposed s.133PB requires a purchasing company to enter on its buy-back register details of buy-back offers made pursuant to a buy-back scheme and subsequent purchases.

Proposed s.133PC - Particulars of other buy-backs

154. Where a buy-back is made other than pursuant to a buy-back scheme, proposed s.133PC requires the purchasing company to enter certain information in its buy-back register.

Proposed s.133PD - Alteration of register where buy-back does not proceed

155. Proposed s.133PD requires a company to ensure the accuracy of its buy-back register by removing entries which relate to buy-back offers or agreements which have been withdrawn or have become void.

Proposed s.133PE - Entries in register after cancellation of shares or option

156. Proposed s.133PE requires a purchasing company to amend its buy-back register to show that particular bought-back shares or an option have or has been cancelled.

Proposed s.133PF - Inspection and copies of register

157. Proposed s.133PF allows company buy-back registers to be inspected by members and creditors of the company and by any other person on payment of an amount not exceeding a prescribed amount.

Cl. 12: Proofs of debt

158. ED c1.12 makes an amendment to CA s.438 consequential upon proposed s.133MD which ranks a seller's claim arising from a debt due from a buy-back agreement.

ED PART III - ANNUAL RETURNS

159. The amendments proposed in this Part and the following Part of this Bill are not related to the buy-back proposals.

Cl. 13: Annual return

160. Background In some States it is now possible for companies to lodge their annual returns by completing and returning to the local Corporate Affairs Commission (CAC) partially-completed returns prepared and dispatched to companies by the CAC.

161. Under this system the CAC uses information lodged previously with it and which is stored on its computer system to partially prepare an annual return for every company. At the time this system was developed it was envisaged that companies, upon receiving the partially-completed return, would correct any errors in the information inserted by the CAC (using the "Statement of Changes" attached to the annual return), add any additional information that might have to be inserted and lodge the completed return with the CAC. Benefits expected to come from the preparation of the annual return in this manner included less burden on companies when finalising their returns and faster processing of returns by CACs (especially in identifying matters that necessitated the updating of computer records).

162. In practice, it has been found that as many as 40% of companies receiving partially-completed annual returns find it more expedient to discard that return and have their professional advisers prepare a return generated on their own word processors using company records maintained by the professional advisers. The CACs have found that the processing of such word processor-produced returns takes considerably longer than the processing of a return partially-completed by a CAC - mainly because of the variations in which details of changes are presented on the word processor-produced returns.

This, in turn, has caused delays in the updating of CAC computer records.

163. The Ministerial Council has, therefore, decided to seek comments on a proposal that where a company receives a partially-completed annual return from a CAC, it will no longer be permissible to discard the return from the CAC and, in its place, lodge a word processor-produced return.

Proposed amendment

164. ED para.13(a) of the Bill will give effect to the proposal by amending CA s.sec.263(1B) to provide that where the Commission serves on a company a partly-completed annual return of the company, the company shall complete and lodge the return. ED para.13(b) of the Bill will insert a new CA s.sec.263(4A) which provides that CA s.sec.273(1B), as amended, will only apply to a financial year ending at or after the commencement of ED cl.13.

ED PART IV - SUBORDINATION OF CERTAIN DEBTS OWED BY A COMPANY

165. B~ These amendments arose out of the proposal of the Companies and Securities Law Review Committee (CSLRC) that the voluntary subordination of debts by creditors should be specifically permitted by CA s.440. Section 440 provides that except as otherwise provided by CA, all debts in a winding up rank equally. If the property of the company is insufficient to meet them in full, debts must be paid proportionately. Similarly, CA s.444 provides that, in a winding up, all debts of a particular class rank equally.

166. The CSLRC was of the view that when a company is seeking finance by way of loan, it could be useful to that company to arrange that an existing indebtedness be deferred to the new loan, so that an existing creditor could become a junior creditor in relation to a new creditor.

167. However the CSLRC noted that it is unclear as to whether CA s.440 enables a liquidator to recognise the effect of subordination of debt agreements in a winding up. For example, the reasoning in Re Walker Construction Co Ltd. (1960) NZLR 523, Re Industrial Welding Co Pty. Ltd. (1978) 3 ACLR 754, and Horn v Chester & Fein Property Developments Pty. Ltd. (1987) 11 ACLR 485 suggests that a liquidator can recognise a subordination agreement, whereas British Eagle International Air Lines Ltd. v Compañie National Air France (1975) 1 WLR 758, Re NBT Builders Pty. Ltd. (1984) 8 ACLR 724 and Re Orion Sound Ltd. (1979) 2 NZLR 514 suggest the opposite.

168. The CSLRC also suggested that while it is clear that one group of creditors should not be able to set up a priority payment arrangement that can prejudice other creditors: British Eagle International Air Lines Ltd. v Compañie National Air France, there is no objection in principle to a voluntary deferment by a creditor of his or her claim to the claims of other creditors, nor should there be any objection to a

deferment of a class of debts as part of a scheme of arrangement under CA s.315.

169. ED clauses 14 to 16 will give effect to the Ministerial Council's decision to amend CA to give force to voluntary subordination of debt agreements.

#### Proposed Amendments

##### Cl. 14: Distribution of company's property

170. This amendment to CA s.403 is consequential upon the deletion of CA ss.440 and 444 and their replacement by a series of provisions, proposed CA ss.450A, 450B, 450C and 450D.

##### Cl.15: Repeal of sections 440 and 444

171. CA ss.440 and 444 are to be repealed and replaced by a series of new provisions, proposed ss.450A, 450B, 450C and 450D, which will have the same effect as CA ss.440 and 444 but which will clarify the position with respect to the voluntary subordination of debts.

##### Cl.16: Insertion of new sections

##### Proposed s.450A - Subordination agreement

172. Proposed s.450A will permit the voluntary subordination of a debt by a creditor of a company. A creditor will be able to agree in writing with the company, or with the company and another creditor or other creditors, that the creditor's claims against the company are to be postponed until other specified claims have been satisfied (proposed s-sec.450A(2)). Proposed s-sec.450A(3) makes it clear that, in the event of a winding up of the company, the subordinated claims will be postponed in favour of prior claims. This amendment will not permit one group of creditors to set up an arrangement which could prejudice other creditors. Such an arrangement would

continue to be overridden by the general rule that debts in a winding up rank equally.

Proposed s.450B - Subordination of debts under Part VIII  
compromise or arrangement

173. Proposed s.450B will provide that, where a creditor's debt or claim is subordinated by reason of a compromise or arrangement under CA s.315 which binds the creditor, that subordination will be given effect on a winding up.

Proposed s.450C - Effect of sections 450A and 450B

174. This is a machinery provision, which specifies that:

(i) proposed ss.450A and 450B will have effect notwithstanding the general effect of other provisions in CA;

(ii) where a subordination agreement falls within the terms of both proposed ss.450A and 450B, the provisions of proposed s.450B will apply; and

(iii) the insertion of proposed ss.450A and 450B shall not be taken to affect the interpretation of the CA as in force before the commencement of proposed ss.450A and 450B in relation to transactions which had been entered into before the amendment took effect.

Proposed s.450D - Debts of a class to rank equally

175. This provision re-states the general rule that on a winding up debts and claims of the same class rank equally, and if the company's property is insufficient to pay them all, they shall be paid proportionately. The question of whether a debt or claim is of the "same class" as another will be determined by reference to proposed s.sec.450D(2). A debt or



42.

claim will be of the same class as another debt or claim, unless CA requires the first debt or claim to be paid in a winding up in priority to the other, or to be postponed until the other has been satisfied.

(R88/21418) Cat. No. 88 1520 6