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THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

HOUSE OF REPRESENTATIVES

COMPANY LAW REVIEW BILL 1997

EXPLANATORY MEMORANDUM

(Circulated by authority of the
Treasurer, the Hon Peter Costello, MP)

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Outline and financial impact

1.1 The Company Law Review Bill 1997 rewrites the provisions in the Corporations Law on:

(a) forming companies

(b) meetings

(c) share capital

(d) financial statements and audit

(e) annual returns

(f) deregistering and reinstating defunct companies

(g) names.

1.2 In each area, the Bill will significantly improve the substance and the drafting of the current rules, eliminating unnecessary or redundant regulation and making the Law more readily understandable.

1.3 The Bill comprises 3 clauses dealing with formal matters and 5 schedules containing the amendments proposed to be made by the Bill.

1.4 Schedule 1 of the Bill substitutes new provisions for Chapters 2 (Constitution of Companies), 3 (Internal Administration) and 4 (Various Corporations) of the Law, apart from the provisions concerning:

(a) company registers;

(b) officers, financial benefits to related parties of public companies and oppression; and

(c) charges and auditors.

1.5 Schedule 1 of the Bill also:

(a) substitutes an up-to-date small business guide at Part 1.5 of the Corporations Law which takes account of changes to the Law made by the Bill

(b) simplifies the rules for deregistering and reinstating defunct companies

(c) includes the transitional provisions for the Bill.

1.6 Schedule 2 of the Bill makes consequential amendments to the provisions not being re-written in Schedule 1.

1.7 Schedule 3 of the Bill makes structural amendments to the Corporations Law. These are outlined in Chapter 4 of the Explanatory Memorandum.

1.8 Schedule 4 of the Bill makes consequential amendments to other Commonwealth legislation.

1.9 Schedule 5 of the Bill will amend the Corporations Law to abolish par value for shares and court confirmation for capital reductions. The *Taxation Laws Amendment (Company Law Review) Bill 1998* will make amendments to the taxation laws consequential upon these amendments. The amendments made by Schedule 5 will therefore commence at the same time as the *Taxation Laws Amendment (Company Law Review) Bill 1998*. Schedule 5 of the Bill will also amend other Commonwealth legislation affected by the abolition of par value or court confirmation for capital reductions.

Financial impact statement

1.10 The Bill will not have any impact on Government expenditure.

1.11 The Bill will reduce compliance costs for business by removing unnecessary regulation, reducing the complexity of the rules and simplifying their expression.

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Regulation Impact Statement

Objective of the Bill

2.1 The objective of the Company Law Review Bill 1997 is to improve the efficiency of corporate regulation, and reduce regulatory burdens on business and other users of the Corporations Law. The Bill will achieve this by removing unnecessary regulation and reducing the complexity of existing Corporations Law rules. The Bill has received strong support from the business community.

2.2 The Bill will not have any impact on Government expenditure.

The reforms to be made by the Bill

Overview

2.3 The Bill rewrites and makes significant improvements to the core areas of registering companies, meetings, share capital, financial reports and audit, annual returns, deregistration of defunct companies, and company names, with a view to facilitating business and investment.

2.4 While there will be transitional costs because the core company law provisions are being replaced, the provisions that are replacing them are more streamlined, and easier to comply with. In addition, the draft legislation was exposed for public comment in June 1995. Most users of the Corporations Law are therefore already familiar with the overall direction and content of the Bill.

Why the reforms are necessary - alternatives

2.5 The provisions covered by the Bill in the existing Law are complex, use complicated legal concepts unfamiliar to most business people, and impose excessive regulation. For example, the Law currently requires companies to incur the expense of obtaining shareholder approval for a range of transactions that involve the company giving financial assistance for the acquisition of its shares, even though many of these are

ordinary commercial transactions that do not involve any material prejudice to the interests of the company, or its shareholders and creditors.

2.6 For several years the business and professional communities have been calling for a reduction in the complexity of the Law, to enable them to reduce costs incurred in complying with the Law. These costs are incurred in 2 ways:

(a) users of the Law must find out and understand their rights and obligations under the Law - this is made difficult because the Law is expressed in unnecessarily complex language, so average business users may need professional advice (eg from accountants or lawyers) before undertaking routine company activities; and

(b) compliance with the Law's obligations may involve costs, including administrative costs and costs associated with obtaining professional advice, yet some of these obligations are redundant or unduly onerous.

2.7 The alternative to introducing the reforms in the Bill would be to leave the provisions in the Law in their current state. However, this approach would fail to address the legitimate concerns of business about the cost of complying with existing Corporations Law obligations.

Benefits of the Bill's reforms

2.8 The benefits of the Bill flow from 2 sources:

(a) reduction of regulatory burdens; and

(b) simplified expression and organisation of the Law.

2.9 Each of these is described below.

Reduction of regulatory burdens

2.10 The Bill will remove obligations that are redundant, and streamline those that are currently unduly onerous. The major areas of potential benefit to business are:

(a) *Simplified procedure for setting up and running a company:* The procedure for setting up a company will be streamlined: the only formality will be lodgment of a completed application form. It will therefore be possible to register a company suitable for operating a typical small business by lodging a single form with the Australian Securities Commission (ASC), instead of the several that are currently required. The concept of memorandum of association will be abolished (the memorandum of existing companies will be treated as part of their constitution). Also, the adoption of a constitution will be optional. The basic rules that are available to the internal management of companies (Table A of the Law) will be updated and moved into the main body of the Law as replaceable rules. Companies will be able to adopt a constitution displacing some or all of these rules. These reforms will reduce the cost of registering a company for the approximately 80 000 new companies that are registered each year. Doing business with a company will also become easier, especially for those who provide finance to companies, because of the reduced need for third parties to make inquiries about the company's internal affairs.

(b) *Electronic communications:* The provisions in the Bill on meetings recognise the use of electronic communication in providing notice of meetings, appointing proxies for meetings and conducting meetings, consistent with the recommendation of the Financial System Inquiry that the Law should facilitate electronic commerce. For example, companies will be able to serve notice of meetings to an electronic address or fax number nominated by the member. This will reduce the administrative costs associated with company meetings. The Bill also facilitates the electronic lodgment of annual returns and other documents with the Australian Securities Commission.

(c) *Reducing the need to hold formal company meetings:* Proprietary companies will be able to pass resolutions (except for removal of an auditor) by arranging for every member to sign a statement setting out the terms of the resolution (this procedure is not currently available for special resolutions). These companies will therefore be able to conduct their day-to-day business without having to regularly incur the cost of holding meetings.

(d) *No court approval for capital reductions:* Companies will be able to return capital to their shareholders without the expense and inconvenience of having the transactions confirmed by the court and their shareholders.

(e) *No par value for shares:* This will remove a range of redundant rules affecting the financial affairs and financial reporting obligations of companies. It will also mean that companies whose shares are valued at a price less than their par value will be able to raise fresh capital without incurring the cost of convening a members' meeting, and without the delay and expense involved in seeking court approval for this.

(f) *Reduced need for shareholder approval in relation to financial assistance transactions:* The rules restricting a company from financially assisting a person to acquire its shares without shareholder approval will be relaxed so that they will no longer have to incur the expense of holding a members' meeting to seek approval for a range of ordinary commercial transactions. (Shareholder approval will only be required for financial assistance given by a company for the acquisition of its own shares if the financial assistance would materially prejudice the company's or shareholders' interests, or the company's ability to pay its creditors.)

(g) Reduced costs in relation to annual reports: Companies and managed investment schemes will have the option of sending concise annual reports to members, saving printing and distribution costs. To avoid the need for members to incur additional search costs if they require more information than is contained in the concise report, members will be able to choose to receive a full annual report.

(h) Smaller Annual returns: Over half of the items currently required to be included in annual returns will be removed. This will result in annual returns being shorter and less expensive to prepare.

(i) *Dealings in relation to defunct companies:* It will be cheaper and easier to deregister a company that has no liabilities: in particular, it will no longer be necessary to incur the expense of a newspaper advertisement of a proposed deregistration. Further, a person will be able to sue a deregistered company's insurer directly, without having to first incur the time and expense of a court application for reinstatement of the company's registration.

Simplified expression and organisation of the Law

2.11 The Bill replaces long, complicated provisions with succinct provisions that are expressed in plain English. This is illustrated by the fact that the Bill will replace around 95000 words of text with about 54000 words: a saving of 43% (41000 words).

2.12 Also, provisions have been organised in a more logical order, to avoid as far as possible the need to refer to several parts of the Law to understand a single topic.

2.13 The result will be reduced costs for all users of the Law because it will be quicker and easier for users of the Law to find provisions relevant to them. Further, the simpler expression of provisions will make it easier for business users to understand their rights and obligations without recourse to professional advisers. This effect will be enhanced by the amended Small Business Guide, which is included in the Law to help small business operators understand their rights and obligations in running a company.

New obligations

2.14 The Bill will introduce some new obligations, set out below.

21 days notice for company general meetings

2.15 All general meetings will require 21 days notice to be given to members. This introduces a uniform period for all meetings which at present require 14 days notice for meetings to consider ordinary resolutions and 21 days for meetings to consider special resolutions. However, this change is unlikely to affect the cost of holding meetings. It will facilitate shareholder participation in meetings, as members will have more time to prepare for and consider the matters to be dealt with and, where appropriate, appoint a proxy. Furthermore, members will be free to agree to a shorter notice for most meetings. It will be open to companies to establish longer notice periods in their constitution or to offer a longer notice period in practice.

Asking questions at annual general meetings of public companies

2.16 The Bill will expressly recognise that the annual general meeting is an opportunity for shareholders to seek information about particular matters. To achieve this, the Bill will require the chairman of the annual general meeting for a public company to allow members as a whole a reasonable opportunity to ask questions about, or comment on, the company's management and to ask auditors questions about the audit report. This is a new obligation in the Law. However, in practice most companies already provide members with an opportunity to ask questions at the annual general meeting.

Managed investment schemes

2.17 As far as possible, the Bill will apply the rules on company meetings to meetings of managed investment schemes. This will involve certain rules being prescribed for managed investment schemes in situations where the content of these rule is currently left up to the individual scheme. Further, as the use of consistent rules will promote greater certainty, the time and expense involved for members of managed investment schemes to discover their rights in relation to meetings of a particular scheme will arguably be reduced.

Consultation

2.18 The amendments to be introduced by the Bill have been the subject of extensive consultation with the business community and other users of the Law. Between May and December 1994, 7 proposals were released for public comment on the topics covered by the Bill, explaining the major changes proposed for the Bill and raising specific issues for consideration. Over 250 written submissions were received on the proposals. In June 1995 an exposure draft of the Bill was released, together with a commentary explaining the proposed changes. During the 3-month consultation period on the Bill, public seminars to discuss the proposals were held in 6 capital cities. Throughout this process testing sessions were conducted with users of the Law to ensure that the Bill was comprehensible to its ordinary users. Other seminars and numerous meetings with interested organisations and individuals were held. Over 70 written submissions were received on the Bill. These comments have been taken into account in finalising the Bill. Overall, the comments were strongly supportive of the Bill.

2.19 In June 1996 the Government referred the draft Bill to the Parliamentary Joint Committee on Corporations and Securities. This provided an additional opportunity for input by users of the Law. The Committee received 26 written submissions on the draft Bill and held hearings on 13 September and 2 October 1996 in Canberra and Sydney respectively.

2.20 The Committee's report was tabled in the Senate on 18 November 1996. In its report the Committee expressed its approval of the general content of the draft Bill, as well as the extensive process of consultation undertaken in its preparation. The Committee also made 11 specific recommendations which the Government has addressed in a separate response to the Committee's report.

3

Principal changes to the Corporations Law

Summary of changes

Forming companies

3.1 The process of setting up a company will be streamlined. A person will be able to set up a company by lodging a completed application form with the ASC. Directors, secretaries and members listed with their consent in the application form will be automatically appointed upon the company's registration.

3.2 The memorandum of association will be abolished. Companies will not need to have articles of association. To enable companies to function without articles of association, the basic rules of internal management which are now normally in a company's articles will be placed in the Law as 'replaceable rules'. The rules will be replaceable in that a company will be able to adopt a constitution which displaces some or all of them. These rules are based on Table A, which currently provides model articles of association and will operate in substantially the same way. Table A will be abolished. The new rules will operate in substantially the same way as Table A. Existing companies will continue to have their memorandum and articles as their constitution unless they repeal them.

3.3 Companies limited by guarantee will be able to convert into companies limited by shares. This will be of particular importance for mutual companies (often companies limited by guarantee) converting into companies limited by shares. The other types of conversion will be retained. Conversion will only be permitted where the rights of creditors would not be materially prejudiced. The existing mechanism for challenging conversions by 10% (by value) of shareholders or debenture holders will be repealed. Instead, members will be able to use the oppression remedy and creditors will be able to seek review of the ASC's decision to register the change of a company's status. If a decision of the ASC to change the status of a company is not challenged within 1 month, the ASC's registration of the change of type will be conclusive, although this will not restrict the availability of other remedies (for example, damages).

3.4 In light of the capacity for companies limited by guarantee to convert to companies limited by shares, future registrations of companies limited by both guarantee and by shares will not be permitted, although existing companies of this type will continue.

3.5 Proprietary companies will no longer be required to keep their registered offices open to the public. In addition, companies will no longer need to have a common seal.

Meetings

3.6 The use of electronic technology to hold meetings will be facilitated. For directors' meetings, it will be possible to use any form of technology agreed to by the directors. For members' meetings, it will be possible to use any form of technology that gives members a reasonable opportunity to participate in the meeting.

3.7 Members of a proprietary company will be able to pass all forms of resolution (except for the removal of an auditor) by signing a circulating resolution: they will not need to hold a meeting if all members sign.

3.8 All general meetings will require at least 21 days notice to be given individually to members, although members will be able to agree to shorter notice (except for voting on removal of an auditor and, for public companies, voting on the removal or replacement of a director and to appoint or reappoint a director who is more than 72 years old). A general meeting will have to be held at a reasonable time and place.

3.9 Members holding 5% of the votes, or 100 members entitled to vote at a general meeting, will be able to require:

(a) the directors to call and arrange for the holding of a general meeting,

(b) a proposed resolution to be put on the agenda of a general meeting, or

(c) a statement about a proposed resolution to be distributed to members.

3.10 The Law will recognise members' rights to ask questions about or comment on company management at annual general meetings (which are held only by public companies) by requiring the chairman to provide a reasonable opportunity for members as a whole to do so. Similarly, members will also be able to question auditors about their audit report at annual general meetings.

3.11 The process for appointing a proxy will be streamlined to ensure that appointments are valid if they are signed and contain certain minimum information. Appointments will not need to be dated or witnessed. To minimise the number of appointments required, members will be able to appoint any person who holds a particular office and make standing appointments.

3.12 Members of both public companies and proprietary companies will be able to appoint a proxy (however, proprietary companies will be able to replace this right due to the closely-held nature of some of these companies). They will also be able to specify the proportion or number of votes that the proxy may exercise. Members who are entitled to cast two or more votes will be able to appoint 2 proxies. If this is not specified and 2 proxies are appointed, each proxy will be able to exercise half of the

votes (under the current law, such an appointment would be invalid). Fractions of votes will be disregarded.

3.13 To be effective, all proxy documents must be given or transmitted to the company at least 48 hours before the meeting, or in a shorter period set out in the company's constitution or the notice of meeting. Proxy documents will be able to be transmitted to the company if the company specifies a fax number or electronic address in the notice of meeting.

3.14 A proxy will be able to vote on a show of hands, unless the company's constitution provides otherwise. The proxy's authority to speak and vote for a member at a meeting will be suspended while the member is present at the meeting. If another proxy is appointed and both appointments could not be validly exercised at the meeting, the later appointment will revoke the earlier one.

3.15 If an appointment specifies the way the proxy is to vote on a particular resolution:

(a) the proxy will not be required to vote on a show of hands, but if they do, they must vote that way

(b) if the proxy has 2 or more appointments that specify different ways to vote on the resolution - the proxy must not vote on a show of hands

(c) if the proxy is the chairman - the proxy must vote on a poll and must vote that way

(d) if the proxy is not the chairman - the proxy need not vote on a poll, but if they do, they must vote that way.

3.16 The quorum for a general meeting will be 2 for both proprietary and public companies. A body corporate will be able to make a standing appointment of an individual to represent it at company meetings. Each individual will be counted only once towards the quorum. The quorum will be required to be present at all times during the meeting. (Under the Bill, the minimum number of members for public companies will be reduced to 1, making it consistent with that for proprietary companies. However, 1 member companies cannot hold meetings and any decisions required to be made by a general meeting can be made by the member recording the decision and signing the record.)

3.17 Companies will no longer be required to hold a statutory meeting or send their members a statutory report following the issue of shares under their first prospectus.

3.18 The rules for meetings of members of collective investment schemes will be based on those for companies.

Share capital

3.19 Shares will no longer have a par value. This will cover all shares, whether issued before or after commencement of the new provisions. Transitional provisions will preserve the effect of existing contractual arrangements that refer to par value.

3.20 Streamlined provisions will be introduced to deal with:

(a) the issue of shares (including bonus shares)

(b) conversion of shares

(c) the redemption of redeemable preference shares

(d) partly-paid shares

(e) dividends.

3.21 Capital reductions will no longer require court confirmation. Instead, a capital reduction must:

(a) be fair and reasonable to all shareholders

(b) not materially prejudice the company's ability to pay its creditors

(c) be approved by the company's shareholders (if the reduction involves the cancellation of shares, it must also be approved by a special resolution of those shareholders whose shares will be cancelled).

3.22 The rules against a company acquiring its own shares will focus on the company's actual control over those shares. The meaning of 'control' will be clarified along the lines of the use of this concept in the accounting standards. A company will be unable to take security over its own shares except for the purpose of an employee share ownership scheme or, if the company is a financial institution, in the ordinary course of providing financial accommodation.

3.23 Shareholder approval of financial assistance given by a company for the acquisition of its own shares will only be required if the financial assistance would materially prejudice the company's or shareholders' interests, or the company's ability to pay its creditors.

3.24 In light of these changes to the share capital rules, the buy-back provisions will be amended to enable the buy-back of redeemable preference shares and to require that a buy-back not materially prejudice the company's ability to pay its creditors.

Financial statements and audit

3.25 The Bill will provide a general framework for comprehensive financial disclosure, by retaining the requirement to prepare a profit and loss statement and balance sheet, and introducing into the Law a requirement to prepare a cash flow statement. The detail of how these statements are to be prepared will be set out in accounting standards made by the Australian Accounting Standards Board (AASB). The new rules will be largely uniform for different types of investments, in particular, companies and collective investments. The special accounting rules for banks, life insurance companies, investment companies and collective investment schemes now in the Law will be repealed and left to be determined by the AASB.

3.26 A company or collective investment scheme will be able to send its members a concise version of its annual report. However, the full report will be lodged with the ASC and members will be entitled to request a copy of this report from the company or scheme without charge.

Annual returns

3.27 Over half of the items currently required to be included in annual returns will be removed. Annual returns for collective investment schemes will be required on a similar basis as for companies.

3.28 The Law will facilitate electronic lodgment of returns with the ASC.

Defunct companies

3.29 The process of deregistering defunct companies will be streamlined, with newspaper advertisement of a proposed deregistration no longer required. New procedures for ASC deregistration will assist the ASC in finalising the affairs of defunct companies.

3.30 A person will be able to sue a deregistered company's insurer directly, without having to first apply to a court for reinstatement of the company's registration.

Names

3.31 The rules for obtaining and using company names, and Australian Company Numbers, will be rewritten.

3.32 The companies permitted to omit 'Limited' from their names will be restricted to charitable companies and the conditions applicable to this right will be set out in the Law (rather than in ASC licences). Existing licences will be preserved.

Setting up and running a company

3.33 This section describes how the Law will operate after the Company Law Review Bill commences.

3.34 To set up a new company, a person must apply to the ASC for registration of the company.

3.35 A proprietary company must have a share capital and must not engage in any activity which would require lodgment of a prospectus unless shares are offered only to existing shareholders or employees. A public company may have a share capital or be limited by guarantee.

3.36 A company must have at least 1 member and, if it is a proprietary company, can have no more than 50 shareholders (not counting employee shareholders). A proprietary company may have a single director who may also be the company secretary. A public company must have at least 3 directors and a company secretary.

3.37 A company can choose any name unless it is identical to a name reserved or registered under the Law for another body, or a name that is included on the National Business Names Register, or is unacceptable (for example, the name includes the word 'ANZAC'). These rules will be in the Corporations Regulations.

3.38 A company must have a registered office. A public company must display its name and the words 'registered office' prominently at that office. A public company's registered office must be open for at least 3 hours each business day. A proprietary company does not need to keep its registered office open, but must, on request, provide access to relevant documents and registers.

3.39 A company must keep (generally at its registered office) registers of members, options, debenture holders and charges. Members of the public may inspect and obtain copies of these registers. A person must not use or disclose information obtained from a register to contact or send material to the holder of securities unless the use or disclosure is approved by the company or is relevant to the holding of the securities.

3.40 When a company is registered, the ASC allocates to it a unique Australian Company Number (ACN). A company's name and ACN must appear on its public documents. A company may elect to have a common seal. If it does, the seal must contain the company's name and ACN.

3.41 A company does not need to have a constitution. Instead, it can use the replaceable rules contained in the Law to govern the management of its internal affairs.

3.42 If a company wishes to replace or discard any replaceable rule contained in the Law, it may do so by adopting a constitution by special resolution passed at a general meeting of the company. The replaceable rules and a company's constitution have effect as a contract.

3.43 The replaceable rules will not apply to proprietary companies with a single member who is also the sole director. Special rules will facilitate the operation of these companies.

3.44 All shares are no par value shares. Shares are issued at a price determined by the directors. A company may pay dividends but only out of profits.

3.45 A company must not acquire shares in itself unless it follows the procedures set out in the Law. If a company acquires control of an entity that holds shares in the company, then within the following 12 months either the company must cease to control that entity or the entity must cease to hold shares in the company.

3.46 A company may financially assist a person to acquire shares in the company or a holding company if the assistance does not materially prejudice the interests of the company, its shareholders or its creditors, or if it is given in the ordinary course of certain commercial dealings, or as part of an employee share scheme.

3.47 Before a company can return capital to its shareholders or undertake a share buy-back, it must be solvent and the transaction must not materially prejudice the company's ability to pay its creditors. A company may redeem redeemable preference shares out of profits or the proceeds of a fresh share issue.

3.48 Capital returns which treat all shareholders equally require shareholder approval by ordinary resolution passed at a general meeting of the company. A share buy-back which treats all shareholders equally requires shareholder approval if it exceeds the 10/12 limit, ie 10% of the smallest number, at any time during the last 12 months, of votes attaching to voting shares in the company. Selective capital reductions and selective

buy-backs must be approved by shareholders by special resolution or by a resolution agreed to by all ordinary shareholders. The company is required to disclose relevant information of which it is aware to members to enable them to make informed decisions.

3.49 Shareholder approval is not required for other capital reductions unless they involve a diminution of liability in respect of unpaid share capital or the cancellation of paid up share capital.

3.50 A shareholder or a creditor may apply to the court for an injunction if the capital reduction or share buy-back would materially prejudice the company's ability to pay its creditors. A shareholder may also apply to the court for an order opposing a capital reduction on the grounds that it is not fair and reasonable to all the company's shareholders.

3.51 A company's directors may be personally liable if the company would be insolvent immediately after payment of a dividend, a reduction of capital, a redemption of preference shares, the giving of financial assistance or a share buy-back. A shareholder or creditor may apply to the court for an injunction if the company would be insolvent immediately after the happening of any of those events.

3.52 The company has the burden of proof in any court application made to challenge a capital reduction or buy-back.

3.53 A directors' meeting may be held using any technology agreed to by all of the directors. A resolution may be passed by the directors without a directors' meeting if they all sign a document containing a statement that they are in favour of the resolution.

3.54 A proprietary company with more than 1 member may pass a resolution, other than one to remove an auditor, without a general meeting if all shareholders entitled to vote on the resolution sign a document stating that they are in favour of the resolution.

3.55 A director may call a general meeting. The directors must hold a general meeting on the request of members who hold at least 5% of the votes that may be cast at the meeting or 100 members who are entitled to vote at the meeting. Members holding at least 5% of the votes which may be cast at the general meeting may call and hold a general meeting.

3.56 A company may hold a meeting of its members at 2 or more venues using any technology that gives members a reasonable opportunity to participate. At least 21 days notice must be given for all meetings.

3.57 A single director of a proprietary company may pass a resolution by recording it and signing the record. A single member company similarly does not hold meetings. The member may pass a resolution by recording it and signing the record.

3.58 A company must keep sufficient accounting records to enable annual financial statements to be prepared and audited. Public companies and large proprietary companies must prepare annual financial statements in accordance with applicable accounting standards, have those statements audited and send them to members. Except for those large proprietary companies which have had annual accounts audited under the previous Law and elect to continue operating under those rules, the statements must be lodged with the ASC. A small proprietary company need only prepare annual financial

statements if required to do so by the ASC or shareholders with 5% of the company's voting shares.

3.59 Directors of companies which are required to prepare financial statements must state whether, in their opinion, there are reasonable grounds to believe that the company will be able to pay its debts as and when they fall due.

3.60 A company can elect to send shareholders a concise financial report, rather than the full annual financial statements, although a member can choose to receive the full statement and directors' report. Shareholders may also elect to receive nothing at all.

3.61 The directors of a company which has not lodged accounts with the ASC in the previous 12 months must pass a resolution stating whether, in their opinion, there are reasonable grounds to believe that the company will be able to pay its debts as and when they fall due.

3.62 A public company must hold an annual general meeting to enable members to consider its financial statements, directors' report and auditor's report. Proprietary companies do not hold annual general meetings. The chairman of an annual general meeting must allow a reasonable opportunity for the members as a whole at the meeting to ask questions about or make comments on the management of the company and to ask the company's auditor questions relevant to the auditor's report.

3.63 A company must lodge an annual return for each calendar year with the ASC to update key information available on the public record.

4

Structure of the Law

The following table indicates where in the Corporations Law the new provision will be located after the Bill commences.

New Chapter Number	Topic
Chapter 2A	Registering a company
Chapter 2B	Basic features of a company
Chapter 2C	Registers (Existing Part 2.5)
Chapter 2D	Directors (Existing Part 3.2)
Chapter 2E	Financial benefits to related parties (Existing Part 3.2A)
Chapter 2F	Members' rights and remedies
Chapter 2G	Meetings
Chapter 2H	Shares
Chapter 2J	Transactions affecting share capital
Chapter 2K	Charges (Existing Part 3.5)
Chapter 2L	Debentures (Reserved for Division 4 of Part 7.12)
Chapter 2M	Financial reports and audit
Chapter 2N	Annual returns and lodgments with the ASC
Chapter 5A	Deregistration of companies

What will happen to existing Chapters 2, 3 and 4?

4.1 Chapter 2 will be repealed, apart from:

(a) section 208 (new section 1096A)

(b) section 213 (new section 1091C)

(c) section 216A to 216K (new Chapter 2C)

(d) Division 2 of Part 2.2, which will be moved to transitional provisions

(e) Divisions 3 and 5 of Part 2.2, which will be moved to Chapter 5B

(f) Divisions 4 and 4A of Part 2.2, which will be moved to Chapter 10.

4.2 Chapter 3 will be repealed, apart from:

(a) Part 3.2 (new Chapter 2D)

(b) Part 3.2A (new Chapter 2E)

(c) Part 3.4 (moved to Part 2F.1)

(d) Division 2 of Part 3.5 (new Chapter 2K)

(e) Division 1 of Part 3.7 (moved to Part 2M.4).

4.3 Chapter 4 will be repealed, apart from Part 4.1 (new Chapter 5B).

5

Formal clauses

Clause 1: Short title etc.

5.1 Upon enactment, the Bill will be known as the *Company Law Reform Act 1997*.

Clause 2: Commencement

5.2 The Bill will commence 6 months after it receives the Royal Assent, unless commenced earlier by Proclamation.

5.3 The amendments made by Schedules 1, 2, 3 and 4 commence in the order specified in clause 2(4) to facilitate the restructuring of the Law to be undertaken by the Bill.

Clause 3: Schedules

5.4 This clause effects the amendments to be made the in Schedules of the Bill to the Corporations Law, the *Corporations Act 1989* the *Australian Securities Commission Act 1989* and other Commonwealth Acts.

6

Part 1.5: Small business guide

6.1 The small business guide was inserted into the Corporations Law by the *First Corporate Law Simplification Act 1995*. It summarises the main provisions of the Law that are likely to be relevant to small companies.

6.2 The guide is designed for the people who operate small businesses and aims to help them understand their rights and responsibilities if they choose to incorporate their businesses. It gives an overview and provides short answers to basic questions about the Law, and then directs the reader to the relevant part of the Law if more detail is required.

6.3 The Bill will substitute a revised guide so that it continues to reflect the substantive provisions of the Law relevant to small companies.

7

Chapter 2A: Registering a company

7.1 New Chapter 2A will replace current Part 2.1 and Division 1 of Part 2.2.

What companies can be registered

7.2 Companies registered as at 30 June 1997 are:

(a) limited by shares

  (i) proprietary (1,009,132)

  (ii) public (7,367)

(b) limited by guarantee (8,989)

(c) limited both by shares and by guarantee (408)

(d) no liability (986)

(e) unlimited (602).

7.3 The Law will no longer allow registration of companies limited both by shares and by guarantee (Bill s 112). However, existing companies of this type will not be affected (Bill ss 1415 and 1416).

7.4 There are relatively few companies limited both by shares and by guarantee. Some aspects of the existing Law do not operate satisfactorily in relation to these companies (for example, the current class rights provisions). Further, companies limited by guarantee are only able to raise equity by converting into companies limited both by shares and by guarantee, because the Law currently does not enable them to convert directly into companies limited by shares.

7.5 The United Kingdom ceased to facilitate the incorporation of companies limited both by shares and by guarantee in 1981. Comparable overseas jurisdictions do not have this type of company.

7.6 The Bill will retain the capacity to register new unlimited companies. However, under the Bill, only unlimited companies with share capital will be able to be registered, as these companies are used by those States which allow the incorporation of legal firms.

7.7 As at present, a proprietary company will be required to have no more than 50 non-employee shareholders. Unless it is raising funds from its employees or its shareholders, a proprietary company will not be able to engage in fundraising which would require the issue of a prospectus under Part 7.12 of the Law (Bill s 113). If a proprietary company does not comply with the requirements in section 113, the ASC will have the power to direct the company to change to a public company (Bill s 165).

7.8 The provision dealing with outsize partnerships has been redrafted without changing its effect, except that the reference to bodies formed under letters patent has been deleted. It is no longer necessary to retain the possibility of relying on the prerogative power to form bodies corporate for purposes of gain because company registration is now a simple, administrative matter (Bill s 115).

7.9 The provision prohibiting registration of trade unions under the Corporations Law has also been redrafted without changing its effect (Bill s 116).

How a company is registered

7.10 The current rules for setting up a company are complicated because the necessary steps are separated in time and require the lodgment of several forms. The rules are framed in terms of the incorporation of a group of persons (subscribers to the memorandum) which has its basis in 19th century English company law. Under the new rules, setting up a company will be easier and will focus on the creation of a separate legal entity through registration.

7.11 New Part 2A.2 sets out the process for forming a company. The Law will provide that a company comes into existence as a body corporate at the beginning of the day on which it is registered (Bill s 119). The 1 member proprietary company was introduced by the *First Corporate Law Simplification Act 1995*. The Bill extends to public companies the facility to have only 1 member (Bill s 114). If a company ceases to have any members, the ASC will be able to seek its winding up after giving the company at least 1 month's notice.

7.12 Registration of a company will be simpler in that the lodgment of the prescribed application form will become the only step required (Bill s 117). Persons specified with their consent in the form as directors and secretaries will be appointed automatically on registration of the company and so no further notification to the ASC of their appointment will be necessary (Bill s 120(1)). Persons specified with their consent as members will automatically become members (Bill s 120(1)). For companies limited by shares, the shares specified in the application will be taken to be issued to the members (Bill s 120(2)). For companies limited by guarantee, the members will become liable as contributories on a winding up of the company under current Chapter 5 provisions. Notice of the issue of shares will not have to be lodged with the ASC, but details will need to be recorded in the register of members (current s 216B(1)).

7.13 The facility in current section 242 for directors and secretaries to change their residential address to an alternative address in the ASC records will be extended to allow the application form to specify an alternative address for a director or secretary (Bill Schedule 2 Item 94). The application will continue to require the date and place of birth of directors and secretaries for identification purposes.

7.14 As at present, the application will be required to specify the address of the company's proposed registered office. It will become the company's registered office on registration (Bill s 121). The application will also be required to disclose the address of the proposed principal place of business if it is to be different from the registered office (Bill s 117). This is to enable this important information about the company to be placed on the ASC database and thus be available to the public. If a public company is to have a constitution on registration, a copy will have to be lodged with the application (Bill s 120(3)). As at present, there will be no requirement for a proprietary company to lodge a copy of its constitution.

7.15 The Bill will allow expenses incurred before registration in promoting and setting up a company to be paid out of the company's assets (Bill s 122). Payment of expenses incurred after registration will be a matter for the company itself.

7.16 Historically, company seals have performed an important security function. However, over time the importance of this function has diminished. The Bill will remove the requirement for companies to have a seal. However, if a company adopts or retains a seal, it will have to show the company's name and ACN (Bill s 123). Companies will continue to be able to have duplicate seals. Companies will be able to execute documents (including deeds) without the application of a seal and outsiders will be able to make appropriate assumptions of regularity in relation to the execution of documents (Bill ss 127(1) and 129(5)).

7.17 When the ASC receives an application for registration, it may register the company, give it an ACN and issue a certificate of registration (Bill s 118). If a proposed company would, when registered, be in breach of another provision of the Law (for example, by having a disqualified director), the ASC may exercise its discretion to refuse registration. However, it is not envisaged that the ASC will ordinarily attempt to verify the information contained in applications or otherwise investigate whether the Law is being complied with before registering a company.

7.18 Certificates of registration have been retained (Bill s 118). A certificate issued under the Corporations Law of any jurisdiction will be conclusive evidence that the company was duly registered at the beginning of the day shown in the certificate. The fact that the company was brought into existence on a particular date will not therefore be subject to challenge (Bill Schedule 2 Item 155). The provision will cover certificates issued by the ASC in other circumstances (for example, a new certificate of registration issued when a company changes its name or type).

7.19 The ASC will be required to retain a record of certificates issued by it through the operation of current subsection 1274(2) (Bill s 118(2)).

7.20 The transitional provisions will ensure that a company registered under the Law before Bill Schedule 2 commences will continue to be registered as a company of that type after commencement (Bill s 1413). Other basic features of pre-existing companies will be preserved by sections 1417, 1418, 1419 and 1420 of the Bill. For example, the current name, registered office and opening hours of an existing company will not be affected by the commencement of the Bill.

Other bodies corporate

7.21 The provisions dealing with companies existing at the commencement of the Law have been redrafted without changing their effect. These provisions now appear at the beginning of the Chapter on transitional provisions at Part 11.1 (Bill ss 1362CA-1362CI).

7.22 The provisions now in Part 2.2 Divisions 3 and 5 dealing with registration of a body corporate that is not a company, recognised company or corporation sole have been re-enacted (Bill ss 601BA-601BS). The provisions have been brought into line with the new rules introduced by the Bill. For example, the registration requirements, as far as practicable, will reflect the new requirements for registration of a company (Bill ss 117 and 601BC). Where the law of the body's place of origin does not require consent of the body's members to the transfer, the application for registration must include evidence that at a meeting of the body's members, 75% of members consented to the transfer either by voting in person or by proxy (Bill s 601BC(7)(e)).

7.23 The provisions dealing with the processes for changes of jurisdiction of incorporation of companies in current Part 2.2 Divisions 4 and 4A will be moved into the Corporations Regulations. However, the existing requirement for the consent of the federal Minister and the relevant Minister of the jurisdiction where the company is currently registered (other than the Australian Capital Territory) will be retained in the Law itself (Bill ss 1362A and 1362B).

7.24 The provisions dealing with registrable Australian bodies and foreign companies in current Part 4.1 Divisions 1 - 3 have been renumbered (Bill ss 601CA-601CY). The provisions dealing with names of registrable Australian bodies and foreign companies have been redrafted consistent with the new provisions dealing with company names (Bill ss 601DA-601DJ).

8

Chapter 2B: Basic features of a company

8.1 New Chapter 2B will replace current Part 2.3 and Part 4.2 (insofar as it deals with companies). The provisions in Part 4.2 which deal with other bodies corporate will be re-enacted in Part 5B.3.

Company powers and how they are exercised

8.2 New Part 2B.1 contains 3 important changes from the current provisions.

8.3 First, the provisions dealing with the powers and attributes of a company will be combined (Bill s 124). Companies will have all the powers of an individual and of a body corporate. The more important of these powers are listed in paragraphs 124(1)(a) to (h). The specific powers listed in current subsection 123(2) (power to hold land and sue) will be omitted as these are inherent in the powers of an individual. Similarly, the specific reference to perpetual succession will be abandoned as the Bill provides that a company will come into existence on registration and cease to exist on deregistration.

8.4 Secondly, although companies will still be able to restrict the exercise of their powers or set out their objects in a constitution, acts contrary to these restrictions or objects will no longer constitute contraventions of the Law (Bill s 125). However, acts contrary to these restrictions or objects will still be able to be asserted or relied on in other actions under the Law (for example, an action for dishonesty under current subsection 232(2), an action for oppression under current section 260 or a winding up action under current paragraph 461(k)).

8.5 Thirdly, current paragraph 162(7)(g) has been interpreted as preserving the common law doctrine that a director of a company who causes the company to act outside its powers is automatically liable to the company for any loss resulting from the breach. Repealing this provision will make it clear that the doctrine has no further application. This will complete the reforms commenced by the 1983 amendments to the Companies Code by removing the last vestiges of the doctrine of ultra vires. Acts which are contrary to restrictions on a company's exercise of its powers will now be treated in the same way as any other breach of a company's constitution.

8.6 Part 2B.1 also sets out a company's powers to execute a document (including a deed) or to appoint an agent to make contracts on behalf of the company. It will be clear

that a company can exercise these powers without using a common seal, whether or not the company has a seal (Bill ss 126 and 127). Having a common seal will be optional for companies.

Assumptions people dealing with companies are entitled to make

8.7 New Part 2B.2 deals with assumptions that can be made about a company by a person dealing with the company and the effect of constructive notice (Bill ss 128, 129 and 130). A person will not be entitled to make an assumption if they knew or suspected that the assumption was incorrect (Bill s 128(4)). This objective test is stricter than the current law and makes it clear that the common law 'put on inquiry' test has no application to the statutory provisions: see *Bank of New Zealand v Fiberi Pty Ltd* (1994) 12 ACLC 48, 14 ACSR 736.

8.8 To facilitate the execution of deeds without the use of a seal, a person will be able to make assumptions regarding the execution of documents by company officers (Bill s 129(5)).

8.9 The assumptions contained in section 129 of the Bill will have cumulative operation (Bill s 129(8)). For example, when making an assumption that an officer of the company has properly performed their duties to the company (Bill s 129(4)), a person may rely on an assumption that the officer has been duly appointed and has authority to perform those duties (Bill 129(3)).

8.10 Subsections 129(2) and (3) of the Bill use the term 'a similar company' as a plainer version of current subsection 164(3) which refers to 'a company carrying on a business of the kind carried on by the company'.

Contracts before registration

8.11 New Part 2B.3 deals with 'pre-incorporation contracts'. At common law, a company cannot ratify a contract entered into on its behalf before its registration. These provisions will allow a company to ratify a pre-registration contract.

8.12 The new provisions address the criticism that current section 183 does not cover contracts entered into 'for the benefit' (as opposed to 'on behalf') of a company before its registration and that it does not allow parties to set the time for the ratification of the contract (Bill ss 131, 132 and 133). Contracts entered into in the name of a company to be registered will be covered by the expression 'on behalf of the company'.

Replaceable rules and constitution

8.13 The Bill will insert in the Law a set of basic rules necessary for the internal management of companies. These rules will be called 'replaceable rules'. The current set of rules in Table A will be repealed. As a result, many companies will no longer need a constitution. New companies will have a choice whether or not to adopt one (Bill s 134). For each company, the replaceable rules will be so much of those rules that apply to that particular company.

8.14 The replaceable rules will apply to all new companies to the extent that they are not displaced or modified by provisions in the company's constitution. This approach is consistent with the present operation of Table A. Under current subsection 175(2), the regulations in Table A apply to all companies limited by shares incorporated under the Law except insofar as they are displaced or modified by the company's articles.

8.15 The articles and memorandum of existing companies will be taken to be their constitution after commencement of the Bill (Bill s 1415). The replaceable rules will apply to existing companies as follows:

(a) if they repeal their constitution and do not adopt a new constitution - the rules will apply

(b) if they repeal their constitution and adopt a new constitution - the rules will apply to the extent that they are not displaced or modified by the new constitution.

8.16 The replaceable rules will not apply to existing companies where they merely amend their constitution. For example, if an existing company only repeals part of its constitution, the replaceable rules would not apply and the transitional provisions would ensure that so much of Table A not displaced by the constitution would continue to apply.

8.17 Companies may wish to adopt a constitution to supplement the replaceable rules. For example, a company wanting to issue partly paid shares may wish to adopt provisions dealing with calls and forfeiture. Similarly, a company may wish to adopt rules dealing with rotation of directors, appointment of associate directors or indemnity of company officers.

8.18 Some of the rules will apply to public companies as ordinary provisions of the Law, in that they will not be replaceable by the company's constitution. Headings to the replaceable rules will tell the reader whether a particular rule is replaceable for all companies or only for proprietary companies (Bill s 135). The rules will be replaceable for proprietary companies only while they are proprietary companies.

8.19 To ensure that breaches of these rules have the same effect as breaches of a company constitution, the Law will provide that both the constitution and the replaceable rules have the effect of a contract binding the company, its officers and members (Bill s 140). The provision is intended to have the same effect as current subsection 180(1), notwithstanding the absence of a reference to the contract being 'under seal'. This reference is generally thought to be necessary to ensure that the statutory contract is enforceable in the absence of consideration. However, at common law a contract does

not exist in the absence of consideration. In stating that the constitution and the replaceable rules have effect as a contract, it is intended that both of these will be enforceable.

8.20 An advantage of the replaceable rules will be that, unlike the provisions of Table A, they will apply to companies as amended from time to time. As a result, companies choosing not to replace them will not have to incur expenses in keeping their constitutions up to date with the Law.

8.21 Another advantage of the replaceable rules is that they will also be located in the relevant place in the Law, rather than in a schedule to the Law. For instance, the replaceable rules on meetings will be located with the statutory provisions on meetings. A table listing all the replaceable rules will be included in the Law to assist companies and their advisers on the extent to which they need to modify or adopt a constitution (Bill s 141).

8.22 A company with a single member who is also the sole director has no need for a formal set of rules governing its internal relationships, whether those rules are in the constitution or in the replaceable rules. A company of this kind needs rules which allow the company to conduct its business and which deals with contingencies such as the appointment of additional directors. The replaceable rules will therefore not apply to these companies (Bill s 135(1)). Rather, the Bill includes a provision containing several basic rules applying specifically to these companies, under which:

(a) a director may appoint another director by recording their decision and signing the record

(b) subject to the Law, the director can exercise all the powers of the company and is responsible for the management of the company's business

(c) the director may execute negotiable instruments of the company

(d) the company may determine the director's remuneration by resolution (Bill Schedule 2 Item 85).

8.23 If an additional director is appointed or an additional person takes up shares in a single member/single director company, the replaceable rules will apply, except to the extent that they are displaced by a constitution adopted by the company.

8.24 Companies will continue to have the power to entrench a provision in their constitution by providing additional requirements which must be satisfied before the provision can be amended or repealed, such as:

(a) that the relevant special resolution be passed by a majority consisting of a greater number of members than is required to constitute the resolution as a special resolution, or

(b) that the consent or approval of a particular person be obtained, or

(c) that a particular condition be fulfilled (Bill s 136).

8.25 Companies will be able to adopt a constitution or repeal or modify their constitution by passing a special resolution (Bill s 136). It is intended that this power, however, be read as one which must be exercised for a proper purpose: *Gambotto v WCP Ltd* (1994-95) 182 CLR 432. The special resolution will take effect on the date the

resolution is passed or on a later date specified in the resolution (Bill s 137). The 'date' could be a date calculated by reference to the occurrence of an event. Neither the requirement for a special resolution to amend a constitution nor other provisions in the Bill are intended to preclude a company from incorporating material into its constitution by reference on the basis that the material is as amended from time to time (independently of the constitution).

8.26 As at present, public companies will be required to lodge with the ASC a copy of their constitution and any modifications of their constitution (Bill s 136).

8.27 The ASC's power to request a consolidated copy of the constitution from a proprietary company limited by shares will be extended to cover all companies (Bill s 138). A member will be able to request the company to send them a copy of the company's constitution (Bill s 139).

Registered office and places of business

8.28 New Part 2B.5 will replace the provisions of current Part 3.1 dealing with registered offices.

8.29 Companies will continue to be required to have a registered office in Australia and to notify the ASC of any change of address of their registered office (Bill s 142).

8.30 Currently, only a company can notify the ASC of a change of address of its registered office. This has resulted in problems where a company ceases to use a particular office and fails to notify the ASC of its new office. This is especially a problem for some service providers, such as accountants, whose office is used as a registered office for client companies. Under the Bill, the ASC will be able to change the address of the company's registered office to the residential address of a director on the basis of an occupiers' notification that the consent has been withdrawn or that consent was never given to the particular company. The ASC must give the director the opportunity to notify it of a new address for the registered office before making such a change (Bill s 143).

8.31 Companies will also be required to notify the ASC within 14 days after the company changes the address of its principal place of business (Bill s 146). The purpose of this provision is to ensure that accurate details of this address are available on the ASC database to facilitate service of legal documents on the company and access to any registers and documents kept at that address.

8.32 Public companies will continue to be under an obligation to have their registered office open to the public during the standard hours specified in the legislation or for other permitted hours of which the company has notified the ASC. The standard opening hours will be specific times, unlike the current section 218 which permits a range of times (Bill s 145). Thus, persons seeking to serve documents on the company or visit the registered office for other purposes will be able to rely on the information on the ASC database for the exact opening hours.

8.33 Proprietary companies will not be required to have their registered office open to the public. This relaxation of the existing requirement recognises that little use is made of the registered offices of the majority of proprietary companies in the manner envisaged in the Law. In order to facilitate access to registers or documents by persons entitled to inspect them, proprietary companies will be required to make them available for inspection within 7 days of a written request being received by the company (Bill Schedule 2 Item 157). Existing requirements to provide copies on request will not be affected (current s 1300).

8.34 The removal of the requirement for proprietary companies to have their registered offices open for certain hours will not affect the statutory or common law rules enabling service of documents on a company by leaving them at the registered office of the company.

8.35 Proprietary companies will also no longer be required to display their name and the words 'registered office' outside their registered office. The requirement in relation to public companies will be modified so that they no longer need to display a sign outside their registered office. It will be sufficient if their name and the words 'registered office' are visible at their registered office (Bill s 144). This will overcome the current difficulties with displaying signs outside multistorey buildings.

8.36 The rules about service of documents on companies have been moved to a redrafted section 109X (Bill Schedule 2 Item 55). As at present, it will be possible to serve documents (including legal process) on companies by posting them to the registered office. To simplify service on companies where there is a difficulty in sending documents to the company's registered office, the Bill will allow service on a company by personal service on 1 director of the company rather than 2 (Bill Schedule 2 Item 55). The change is consistent with the degree of responsibility which individual directors have in relation to the affairs of their company.

Company names

8.37 By separating the names rules for companies and those for other bodies, the Bill will make them easier to follow and the process of registering a name simpler and more logical (current ss 99A, 120, 219, 358, 361, 362 and 366 - 383C, Corporations Regulations 4.2.01 and Schedules 6, 6A and 7, Bill Part 2B.6 and Part 5B.3). The rules for determining whether names are identical will be moved from the Law into the Corporations Regulations (current s 362(2), Bill s 147(1)). This will make the rules easier to update and will allow all the rules to be located in the same place.

8.38 The Ministerial Council for Corporations has agreed in principle that the use of the singular or plural form, the indefinite article, and words 'Corporation', 'Corp', 'Incorporated' and 'Inc' should be disregarded for the purposes of the identical names test. It is envisaged that this change will be taken up in the Corporations Regulations.

8.39 As at present, companies will be able to select a name that is available or choose to have their ACN as their name (Bill s 148). Companies will also be able to continue to use certain abbreviations for words in their name (Bill s 149).

8.40 The new rules will only allow companies limited by guarantee that pursue charitable purposes to omit the word 'Limited' from their name. 'Charitable' is to be given its ordinary meaning. Existing companies with licences to omit the word 'Limited' from their name will not be affected by this change (Bill ss 150 and 151). The ASC will be able to change a company's name to include the word 'limited' if the company is no longer exempted from doing so under sections 150 or 151 (Bill s 159).

8.41 A person will be able to reserve a name for a company for a period of 2 months, although reservation of a name will not be mandatory. The person can extend the reservation period by a further 2 months. There can be multiple extensions of the reservation period (Bill s 152).

8.42 The requirement in current subsection 219(2) that a company set out its name on documents has been redrafted without changing its effect (Bill s 153(1)). Although the express requirement for a name to be legible has been removed, to satisfy the requirement to set out the name, the name would have to be legible.

8.43 To facilitate document design and introduce flexibility in relation to company names, the Bill will allow a company to set out its name and ACN at any place on the page of a public document on which its name first appears (Bill s 153). This contrasts with the requirements in current section 362 under which the ACN must be set out after the first occurrence of the company name.

8.44 The current exemption in section 383B from the requirement to have a company's ACN on receipts has been retained (Bill s 154). The current power of the ASC under section 383C to grant exemptions from the requirement to have a company's ACN on transport documents has been replaced with a provision enabling the regulations to grant exemptions (Bill s 155). This approach will result in the existing exemptions being more accessible.

8.45 The current prohibition against a person carrying on business under a name that includes the words 'Limited', 'No liability' or 'Proprietary', unless allowed or required to do so by an Australian law, has been retained (current ss 369 - 370, Bill s 156). The exception in current section 370(2) for companies incorporated in Victoria before December 1896 (in particular, The Broken Hill Proprietary Company Limited) will be retained (Bill s 148(5)).

8.46 Companies will be able to change their name by passing a special resolution and lodging an application with the ASC (Bill s 157).

8.47 The ASC will be able to direct a company to change its name if the name should not have been registered or the company breaks a condition attached to the Minister's consent making the name available to the company. If the company does not comply with the direction, the ASC will be able to change the company's name to its ACN (Bill ss 158 and 159).

8.48 Where the ASC changes a company's name it must issue a new certificate of registration (Bill s 160). The change of name will not create a new legal entity or affect the company's existing property, rights or obligations (Bill s 161).

Changes of company type

8.49 To change company type, the company must pass a special resolution resolving to do so and lodge an application with the ASC (Bill ss 162 and 163). The ASC must give 1 month's notice on its database and in the *Commonwealth of Australia Gazette* before registering the change. This requirement will provide a reasonable opportunity for interested persons to challenge the change (Bill s 164).

8.50 After the month has passed the ASC must amend the details of the company's registration to reflect the change of status, unless the decision has been challenged in the Administrative Appeals Tribunal (the AAT) or a court. Once the ASC does this, the AAT cannot review the change and a court cannot make an order reversing the change (Bill s 164(7)). A court could grant other remedies to a person aggrieved by a change of company type (such as damages). This will facilitate commercial certainty for companies changing type (for example, a mutual company converting to a company limited by shares).

8.51 The company may also have to change its name and its constitution as part of a conversion process. If the company does not have a constitution, the effect of the change of type may be that different replaceable rules apply to the company (especially when changing from a public to a proprietary company). If a company has a constitution that has a provision inconsistent with a mandatory rule of the Law, then the rule automatically prevails.

8.52 The current rules regarding change of status (current ss 167(7) and 172) allow members of a company and its debenture holders to challenge any conversion of the company in the courts. The right applies only where the challenge is undertaken by applicants representing at least 10% of members or debenture holders. In some cases this could involve seeking the agreement of a very large number of members, which would be a difficult task within the 21 days available for making the application. The Bill removes this cumbersome mechanism, thus leaving the right to challenge to the existing oppression remedy which is available to all members. Persons aggrieved by the ASC's decision, in particular creditors (including debenture holders), will be able to seek merits review of a decision of the ASC to effect a change of type in the AAT or seek court review under the *Administrative Decisions (Judicial Review) Act 1977*.

8.53 At present, the Law does not enable companies limited by guarantee to convert into companies limited by shares. As a result, a company limited by guarantee can gain access to share capital only if it converts into a company limited both by shares and by guarantee. The Bill will allow companies limited by guarantee to convert directly into companies limited by shares (Bill ss 162 and 166).

8.54 The conversion mechanism involves the termination of the membership of the guarantor member and the extinguishing of their guarantee, coupled with the issue of shares to persons specified in the application for conversion. In order to allow for a range of post conversion corporate and ownership structures, these new shares may be issued to the existing members only, new members only or to existing and new members. The rights of existing members will be protected by the need for a special resolution and, if necessary, an oppression action. In addition, members will have to agree in writing to the issue of new shares prior to the application for change of type.

8.55 A company limited by guarantee changing to a company limited by shares will be able to issue shares in a holding company. Existing members will be taken to have agreed to become members provided the issue of shares is in accordance with the special resolution to change type, the shares are fully paid and the business, assets and liabilities of the issuing company are substantially the same as those of the company changing type (Bill s 167).

8.56 A change of a company limited by guarantee into a company limited by shares could disadvantage creditors in the liquidation of the company. Thus, for this change of type the ASC must be satisfied that the company's creditors are not likely to be materially prejudiced by the change before giving 1 month's notice. The ASC will be able to require the company to notify its creditors in writing of the proposed change of type and invite them to make submissions to the ASC (Bill s 164(2)). This will also be the case for a company limited both by shares and by guarantee seeking to convert into a company limited by shares or a company limited by guarantee (Bill s 1416).

8.57 The change of status from a company limited by guarantee into a company limited by shares necessarily involves the extinguishment of the rights of the guarantor members as guarantor members. The rights extinguished include those of the members who did not support the special resolution required to effect the change of status and thus may be seen to involve an element of expropriation of vested rights (even though these may but need not be replaced by new rights arising from the issue of shares upon the change of status). An expropriation will occur by virtue of section 164 of the Bill upon the registration of the change of status.

8.58 The purpose of the change of status and any associated expropriation of rights does not affect the validity of the change or the expropriation. Accordingly, the principles set out in *Gambotto v WCP Ltd* (1994-95) 182 CLR 432 do not apply to this mechanism.

8.59 The Bill will enable, but not require, existing companies limited both by shares and guarantee to convert into either companies limited by shares or companies limited by guarantee (Bill s 1416).

8.60 The effect of a change of type will not create a new legal entity or affect the company's existing property, rights or obligations (Bill s 166).

Chapter 2C: Registers

The provisions in current Part 2.5 will be renumbered and become new Chapter 2C (Bill Schedule 3 Items 31 and 32).

Chapter 2D: Officers

The provisions in current Part 3.2 will become new Chapter 2D (Bill Schedule 3 Item 47).

Chapter 2E: Financial benefits to related parties

The provisions in current Part 3.2A will become new Chapter 2E (Bill Schedule 3 Item 48).

9

Chapter 2F: Members' rights and remedies

9.1 New Chapter 2F will replace Part 3.4, section 256 and Division 3 of Part 2.4. It will also deal with the rights of members to inspect certain documents. The oppression remedy in current section 260 will be moved to this Chapter and renumbered as section 246AA (Bill Schedule 3 Item 85). The Bill will set out who the members of a company are (Bill s 246A).

Class rights

9.2 The Bill substantially redrafts current sections 197 to 199 which deal with variations of class rights and removes technical deficiencies which have been identified in those sections. In particular, the new provisions will make it clear that, unless the company's constitution provides otherwise, any variation has to be approved by special resolution of the company and special resolution (or written consent of 75%) of the class (Bill s 246B).

9.3 The provisions contain several policy changes. First, unless the variation receives unanimous consent of the affected class members (Bill s 246E), it will have no effect until:

(a) the expiration of 1 month from the variation without an application being lodged with a court to set the variation aside, or

(b) if an application is made, it is withdrawn or finally determined (Bill s 246D).

9.4 Secondly, a notice will have to be given to any affected class member within 7 days of the variation (Bill s 246B(3)). This new requirement will ensure that members who are affected by a variation will be informed of the variation and thus able to exercise their right to challenge it in court.

9.5 Thirdly, where the rights of only some members of a class are proposed to be varied, those members will be treated as a separate class for the purposes of the new provisions (Bill s 246C). As a result, members representing at least 75% of a class will no longer be able to vary rights of the remaining members.

9.6 Issues of shares with rights not set out in the company's constitution or a document lodged under the Law (or the previous legislation) will continue to be regarded as variations of the rights attached to the existing shares (Bill s 246C(5)). Similarly, issues of additional preference shares which rank equally with the existing preference shares will continue to be regarded as variations, unless authorised by the terms of the original issue or by the company's constitution (Bill s 246C(6)). An issue of new preference shares that rank ahead of existing preference shares would be treated as varying the rights attached to the existing shares.

9.7 As at present, members entitled to at least 10% of the votes in the class will be able to challenge in the court any variation of the rights in that class (Bill s 246D).

9.8 The capacity of members of companies to access documents concerning their rights will be enhanced under the Bill (Bill ss 246F and 246G).

9.9 A redraft of current section 196 requires companies to notify the ASC of any division or conversion of shares. All documents and resolutions dealing with rights attached to shares in a public company will be required to be lodged. The time period for these lodgments will be 14 days (Bill s 246F).

9.10 The right of members to obtain from the company copies of documents dealing with rights attached to shares will be extended to members of all companies (Bills 246G). This will assist members of public companies by entitling them to obtain a copy of the document from the company, as well as from the ASC.

Inspection of books

9.11 As recommended in the November 1991 report of the House of Representatives Standing Committee on Legal and Constitutional Affairs (*Corporate Practices and the Rights of Shareholders*) the provisions dealing with the rights of members to inspect books will be altered to allow a Court to authorise any person (and not only a registered company auditor or legal practitioner) to inspect the books on behalf of a member. These access arrangements will also apply to members of registered managed investment schemes seeking access to the books of the scheme (Bill s 247A).

9.12 As at present, the Court will have wide discretionary powers in relation to its orders, including the power to restrict the use the person may make of the information obtained during the inspection (Bill s 247B). Similarly, the current prohibition on disclosing the information to persons other than the ASC or the member on whose behalf the inspection is carried out will continue to apply (Bill s 247C).

9.13 In addition to the statutory rights, a replaceable rule will enable the directors or the company in general meeting to authorise a member to inspect the books of the company (Bill s 247D). This rule is based on regulation 85 of Table A.

10

Chapter 2G: Meetings

10.1 Company meeting rules are now located primarily in Part 3.3 of the Law and Table A. Parts 2G.1 to 2G.3 of Chapter 2G replace these rules and bring together all of the provisions on meetings to make them more accessible and easier to follow. Where necessary, the rules have been updated to make them consistent with current practices. The consolidation of the rules has also removed duplication between Part 3.3 and Table A.

10.2 A company may currently rely on the meetings rules in Table A or determine its own rules through its constitution. The Bill retains this flexibility by including replaceable rules which deal with meetings in Parts 2G.1 and 2G.2. A company may remove or substitute these rules, which are identified in the provision's heading (Bill s 135). The rules are binding in the same way as a contract.

10.3 Although the Bill will repeal Table A, the articles of existing companies will not be affected, even where they consist of the old Table A rules (Bill s 1415). However, an existing company will be able to repeal its constitution to adopt the Chapter 2G rules (Bill s 135(1)(a)(ii)).

10.4 Rules for meetings of members of collective investment schemes are set out in Part 2G.4 of Chapter 2G. To the maximum extent appropriate, the provisions are based on those for public companies.

Directors' meetings

10.5 Division 2 of Part 2G.1 will set out the core rules necessary to hold a directors' meeting (Bill ss 248C - 248G).

10.6 There will be a replaceable rule that any director can call a directors' meeting (Bill s 248C).

10.7 Each director will need to be given reasonable notice of a directors' meeting to make sure that they are aware of the meeting (Bill s 248C). This rule is more flexible than that for company meetings, in that it is replaceable and does not require written notice. This is because the number of directors is usually smaller and the potential

detriment of less onerous rules is unlikely to be significant. An accidental omission to give notice will not usually invalidate the meeting (current ss 1322 (3) and (6)).

10.8 The Bill will allow a directors' meeting to be called or held using any technology consented to by all the directors (Bill s 248D). A meeting held using technology allows directors to conduct business, pass resolutions and agree on management directions in the same way as a normal meeting. It will no longer be necessary for a company's constitution to specify that a technology can be used for a directors' meeting. Directors will be able to veto the use of a particular technology by withdrawing their consent within a reasonable time before the meeting. This ensures directors have agreed to use a particular technology but prevents directors threatening to withdraw their consent during the meeting. If the company wishes, it will be able to have a constitution restricting the use of technology to hold meetings or specifying acceptable technologies.

10.9 A quorum of 2 directors will be required to be present throughout the meeting. This rule will be replaceable and will also be able to be modified by the directors (Bill s 248F).

10.10 There will be a replaceable rule governing the appointment and termination of alternate directors and the rights and powers of alternate directors (Bill Schedule 2 Item 171). The Bill refers to the appointment of an alternate for a specified period. The 'period' could be calculated by reference to the duration or occurrence of an event (for example, "while I am on holidays").

Meetings of members of companies

Members' decisions without meetings

10.11 The *First Corporate Law Simplification Act 1995* extended the circulating resolution procedure to all proprietary companies. The Bill will build on this by extending the circulating resolution procedure to all special and ordinary resolutions passed by proprietary companies, except a resolution to remove an auditor under section 329 (Bill s 249A(1)). This exception is designed to ensure that auditors are given an opportunity to present their case personally to the members (current s 329(4)). The circulating resolution procedure will have particular relevance in the share capital provisions of the Bill, for example to enable circulating resolutions to be used for shareholder resolutions in relation to share buy-backs, approval of employee share schemes for the purposes of the provisions on self-acquisition of shares, and financial assistance.

10.12 A circulating resolution will be able to be distributed using any means that allows a person to sign the resolution and receive any accompanying documents (Bill ss 249A(2) and 249A(3)). The resolution will be passed when the last person signs the document, regardless of whether the document is circulated by fax or other means (Bill ss 248A(3) and 249A(4)).

10.13 Any document that would otherwise have been given to members if the resolution were being proposed at a general meeting will need to be circulated with the circulating minute (Bill s 249A(5)(a)). This is intended to ensure that members will not be disadvantaged by the circulating minute procedure. Requirements in the Law to lodge

notices of meeting or documents to accompany the notice will be satisfied by lodging with the ASC the document to be signed by members or the accompanying documents (Bill ss 249A(5)(b) and (c)). This will ensure that the ASC receives the information, which will then be available to interested parties through the ASC Alert system.

10.14 Given that 1 person cannot conduct a meeting, companies with 1 member will be able to pass a resolution by the member recording the resolution and signing the record (Bill s 249B(1)). This procedure will allow 1 member companies to do things for which a meeting would otherwise be required.

10.15 The Bill will make it clear that this procedure may be used to pass a special resolution by deleting the current definition of 'resolution' which excludes special resolutions (Bill Schedule 2 Item 166). This will mean that 'resolution' will have its ordinary meaning and include both ordinary and special resolutions.

10.16 To ensure that the relevant information will be publicly available, a requirement in the Law to lodge with the ASC information or a document relating to the resolution will be satisfied by lodging the information or document with the resolution that is passed (Bill s 249B(2)).

Who may call meetings of members

10.17 The Bill will repeal the existing rule allowing 100 members who have each paid up an average of $200 on their shares to request a general meeting (current s 246(1)(a)). The current higher threshold of 200 members for companies without share capital will also be removed (current s 246(1)(b)). Instead, directors will be required to call a general meeting if requested to do so by at least 100 members entitled to vote (Bill s 249D(1)(b)).

10.18 As at present, a member or members holding at least 5% of the votes that may be cast at the meeting will be able to require the directors to call a general meeting (Bill s 249D(1)(a)). Although the provision refers to members, it is intended that a single member who holds 5% of the votes will be able to request a general meeting.

10.19 The percentage of votes will be calculated as at the midnight before the request is given to the company, providing greater certainty for members in determining whether they have sufficient numbers (Bill s 249D(4)).

10.20 Currently, the directors must convene the general meeting as soon as practicable, but no later than 2 months after receiving the request. The Bill will require the directors to call the meeting within 21 days after the request is given to the company and to hold the meeting within 2 months, ensuring that the meeting is called and held within a reasonable time (Bill s 249D(5)). The current procedural requirements for the request will be retained (Bill ss 249D(2) and (3)).

10.21 If the meeting is not called within 21 days of the members' request, the Bill will retain the existing right of the requesting members to themselves call and hold the meeting (Bill s 249E).

10.22 Members of a company will have an independent power to call members' meetings. A company will no longer be able to displace its members' right to call a

general meeting themselves by adopting a contrary provision in the constitution (Bill s 249F). This could also be useful if there are no directors to call meetings or if a company's constitution does not allow a director to call a meeting (Bill s 249C), as the alternative court procedure is relatively costly and time consuming (Bill s 249G).

10.23 The company generally pays the cost of calling and holding meetings. However, as at present, where the directors fail to call a meeting, the members can recover the costs of calling and arranging the meeting from the company, which is entitled to be reimbursed by the directors (Bill s 249E(5)). A director will not be liable to reimburse the company if they prove they took all reasonable steps to cause the directors to call the meeting as requested by members. The Bill makes it clear that if the members call a meeting themselves, they will be required to pay the expense of calling and holding the meeting (Bill s 249F(1)).

10.24 The Bill includes a requirement that members' meetings be held at a reasonable time and place (Bill s 249R) and for a proper purpose (Bill s 249Q). These rules are designed to protect shareholders and directors by preventing general meetings being called at times and places that are unreasonably inconvenient for them and by preventing meetings being called for improper purposes.

10.25 As a transitional measure, meetings called before the Bill commences will generally be required to be called and held in accordance with the new meetings rules, except for the notice period (Bill s 1424).

Amount of notice of meetings

10.26 A company will be required to give at least 21 days notice of all members' meetings (Bill s 249H(1)). This will give members and persons holding shares on behalf of the beneficial owners more time to prepare for a meeting. The current law requires at least 21 days notice of a meeting to consider a special resolution, and at least 14 days notice for other meetings or longer periods if required in a company's constitution (current ss 247(2) and 253(1)(a)). It has been suggested by shareholder and investor bodies that 14 days is insufficient notice of a meeting, particularly where the company has institutional or overseas shareholders.

10.27 For general meetings other than AGMs, members holding at least 95% of the votes will be able to agree to shorter notice (Bill s 249H(2)(b)). The requirement for short notice to be agreed to by a majority of the members will be repealed, to provide greater flexibility for those members holding the vast majority of votes (current s 247(3)(b)). As at present, an AGM will only be able to be held on shorter notice if all the members entitled to vote agree (Bill s 249H(2)(a)). Members will be able to consent to short notice immediately before a meeting commences.

10.28 Shorter notice will not be available for meetings involving resolutions to remove an auditor and public company resolutions to remove or replace a director, ensuring that the auditor or director has sufficient time to respond to the resolution (Bill ss 249H(3) and (4)). Members will be required to give the company notice of their intention to move the resolution before the meeting to consider the resolution is called (Bill Schedule 2 Items 172 and 181). As at present, the directors will be required to call the meeting within 2 months after the members' request (Bill s 249D(5)).

10.29 If a meeting is not specifically called, a resolution to remove an auditor or a public company resolution to remove or replace a director will be considered at the next general meeting that occurs more than 2 months after the members give notice of the resolution to the company (Bill Schedule 2 Items 172 and 181).

Notice to members and directors

10.30 Notice of a members' meeting will be required to be given individually to every member entitled to vote and to every director (Bill s 249J(1)). This change recognises the importance of members receiving direct notice of meetings in order to be able to exercise their rights. The rule will not be able to be displaced by a company's constitution, unlike under the current law (current s 247(4)).

10.31 To avoid unnecessary duplication, a company need only send 1 notice to joint shareholders (Bill s 249J(1)). Under the replaceable rules, notices must be sent to the joint member named first in the members' register, unless a company's constitution provides otherwise (Bill s 249J(2)). An accidental omission to give notice to a member will not usually invalidate the meeting (current ss 1322 (3) and (6)).

10.32 The Bill will allow companies to give members notice of a meeting personally or by post as is currently allowed in Table A (Bill s 249J(3)(a) and (b)). It will also allow companies to send notice of a meeting by fax or electronically if a member nominates a fax number or electronic address (Bill s 249J(3)(c)). The company will also be able to use any other means of giving notice permitted in its constitution (Bill s 249J(3)(d)).

10.33 A replaceable rule provides that notices sent by post will be taken to be given 3 days after they are sent and that notices sent by fax or electronically will be taken to be given on the business day after they are sent (Bill s 249J(4)). These time periods are consistent with those generally adopted in current practice. However, a company will be able to replace them if they wish to adopt different time periods.

Contents of notice

10.34 Under the Bill, a notice of a members' meeting must include certain minimum information such as when, where and how the meeting is to be held, the general nature of the business to be considered at the meeting and, if the member is entitled to appoint a proxy, certain details concerning the appointment of proxies (Bill s 249L). The Bill differs from the current position in that this information is mandatory and will ensure that the notice gives members the essential information they need to allow them to participate in the meeting (current s 250(5) and Table A r 41(1)). This provision does not affect the disclosures that must be made to members under common law principles.

10.35 Currently, if it is proposed to pass a special resolution, the notice of the meeting must specify that it is intended to pass the resolution as a special resolution (current s 253(1)(a)). The Bill reflects the current practice that the notice also state the resolution to ensure that members are fully informed before being asked to vote (Bill s 249L(c) and Schedule 2 Item 166).

Members' rights to put resolutions etc. at general meetings

10.36 Members can currently require the company to put a resolution on the agenda for the next AGM, or circulate a statement about a matter to be considered at the meeting

(current s 252). The Bill extends this right to all general meetings (Bill ss 249N - 249P). As in the case of the thresholds for members requesting meetings under section 249D of the Bill, the threshold for members seeking to take advantage of this procedure will be 100 members or members who hold 5% of the votes (Bill ss 249N(1) and 249P(2)). Similarly, the percentage of votes will be calculated as at the midnight before the request, providing greater certainty for members in determining whether they have sufficient numbers (Bill ss 249N(4) and 249P(5)). The procedural requirements for the request will be based on those for members requesting meetings (Bill ss 249D(2) - (4), 249N(2) - (4) and 249P(3) - (5)).

10.37 Currently, the request for a members' resolution must be given to the company at least 6 weeks before the meeting (current s 252(5)(a)). The Bill will require the resolution to be considered at the first general meeting held at least 2 months after the members' request is served (Bill s 249O(1)). This will give the company more time to comply with its obligations, particularly given the requirement for at least 21 days notice of the meeting.

10.38 The company will be required to pay for the distribution of a resolution or statement if it is received in time to send it out with the notice of the general meeting (Bill ss 249O(3) and 249P(7)). Otherwise, the requesting members will be jointly and individually liable to pay the expenses reasonably incurred in giving notice of the resolution or distributing the statement (Bill ss 249O(4) and 249P(8)). The use of 'individually' in the expression 'jointly and individually liable' reflects modern usage and it is intended that the expression have the same effect as joint and several liability.

10.39 Where the resolution or statement can be included with the notice of meeting, there should be little incremental expense to the company in complying with the request. If these costs were borne by a member, they could be a significant disincentive for members wishing to propose a resolution or distribute a statement. On the other hand, if the company were not otherwise sending out notices of a meeting, it is considered appropriate that the relevant members bear the cost.

10.40 A resolution or statement does not have to be circulated if it is more than 1,000 words long, defamatory or, if the requesting members are to bear the expenses, not accompanied by a payment reasonably sufficient to meet the expense of circulating the resolution or statement (Bill ss 249O(5) and 249P(9)). Under the new rules, a statement may be provided for each matter to be considered at the meeting and for any other matter that may be properly considered. If the meeting is an AGM, the statement may relate to the management of the company or the conduct of the audit and the preparation of the auditor's report.

Holding meetings using technology

10.41 The Bill will allow a company to hold its meetings using technology, such as video-links, without the need for specific rules in a constitution (Bill s 249S).

10.42 The existing case law is uncertain concerning the extent to which technology can be used to conduct meetings when all those attending are not at the same place and there is no specific authorisation in the company's constitution. Based on the current Table A subregulation 69(1) provision that 'directors may meet together for the dispatch of business', some courts have held that directors must physically meet together to conduct

business unless the company's articles authorise other means of holding the meeting, such as telephone conferences: *Magnacrete Ltd v Douglas-Hill* (1989) 48 SASR 565; *Southern Resources Ltd v Residues Treatment and Trading Co Ltd* (1990) 8 ACLC 1,151. More recently, courts have held that a meeting does not require all participants to be in the same place: *Bell v Burton* (1993) 12 ACSR 325; *Wagner v International Health Promotions* (1994) 15 ACSR 419; *Re Giga Investments Pty Ltd* (1995) 13 ACLC 1,047. However, it has been considered that the technology must allow all the participants to take part in the meeting: *Byng v London Life Association Ltd* (1990) Ch 170; *Re Giga Investments Pty Ltd* (1995) 13 ACLC 1,047.

10.43 The Bill will make it clear that companies will be able to take advantage of technology in holding members' meetings at different places so long as the members as a whole have a reasonable opportunity to participate in the meeting (Bill s 249S). This does not require that each individual member have an opportunity to participate. For most companies, a reasonable opportunity to participate would mean that each member is able to communicate with the chairman and be heard by other members attending the meeting, including those at the other venues. However, whether there has been a 'reasonable opportunity' will depend upon the circumstances of the meeting. Companies may also choose to have a constitution restricting the use of technology to hold meetings or specifying acceptable technologies.

10.44 If a company uses technology to hold its meetings in more than 1 place, it will need to take into account factors such as:

(a) the ability of the chairman to conduct and control the proceedings

(b) the number of persons attending the meeting

(c) the nature of the business of the meeting (for example, it may include a visual presentation)

(d) the voting processes available (for example, it will be necessary to have procedures in place to count members' votes from all venues)

(e) whether persons at the meeting can communicate with the chairman and follow the proceedings.

10.45 If the technology fails part way through the meeting, the meeting or that part of the meeting affected by the technology failure will be valid unless:

(a) a member does not have a reasonable opportunity to participate, and

(b) the Court declares the meeting invalid on the grounds that a substantial injustice has or may be caused which cannot be remedied by another order (Bill Schedule 2 Item 191).

Quorum

10.46 The Bill includes a replaceable rule that the quorum for a members' meeting will be 2 for both proprietary and public companies (Bill s 249T(1)). This differs from the current law, which requires a quorum of 3 members for a public company unless its constitution provides otherwise (current s 249(1)(a)). The replaceable rule reflects the reduction of the minimum number of public company members from 5 to 1 (Bill s 114), and that 1 member companies cannot hold meetings.

10.47 Table A currently provides that the quorum must be present when the meeting commences its business (current Table A r 42(1)). Under the replaceable rule, the quorum will need to be present during the whole of the meeting to ensure that any decisions are made by at least 2 members (Bill s 249T(1)).

10.48 Where the meeting is being held at more than 1 venue using technology, persons present at each of those venues may be counted towards the quorum. As at present, there will be a replaceable rule that persons attending as proxies or body corporate representatives will count towards the quorum. This rule will be qualified to avoid double counting of proxies or body corporate representatives. Each individual will be counted only once towards the quorum, even if they are there in more than 1 capacity. In addition, a member will not be able to constitute a meeting by sending more than 1 proxy or representative (Bill s 249T(2)).

10.49 A members' meeting, including a meeting requested by members, will be adjourned if a quorum is not present within 30 minutes of the time specified in the notice for the start of the meeting. Where the directors do not specify the date, time or place for the resumption of the meeting, the default provisions in the Bill will provide certainty (Bill s 249T(3)). However, the meeting will be dissolved if there is no quorum within 30 minutes after the meeting is set to resume (Bill s 249T(4)).

Chairman

10.50 The current Table A rule is that the chairman of a members' meeting is the chairman of directors' meetings. If no such person is elected or the person is not present within 15 minutes, the chairman may be elected by the members (current Table A r 44).

10.51 Under the replaceable rules in the Bill, the directors will have the opportunity to elect any individual to chair meetings (Bill s 249U(1)). This will give the directors the opportunity to appoint an independent person to be the chairman of members' meetings. If they do not elect someone beforehand, or the elected person is not available for the whole or a part of the meeting, the directors will be required to elect an individual present at the meeting (Bill s 249U(2)). The members will only need to elect the chairman if the directors have not elected someone or the elected person is not available for the whole or a part of the meeting (Bill s 249U(3)).

Who can appoint a proxy

10.52 The proxy provisions will be streamlined to make it easier to appoint a proxy and less likely that the appointment will be invalid.

10.53 As under the current law, a member of a public company will be able to appoint a proxy. Members of a proprietary company will also be able to appoint a proxy. However, proprietary companies will be able to displace the rule, because closely-held proprietary companies may wish to allow only members to be present at meetings and vote in person (Bill s 249X(1)).

Apportioning votes between 1 or 2 proxies

10.54 Members who are able to appoint proxies will have greater flexibility in the way they apportion their votes. Members with 2 or more votes will be able to appoint 2 proxies, irrespective of whether the company has a share capital, to make it easier for

members to exercise their votes differently (Bill s 249X(3)). Under the current law, members of companies without share capital are restricted to 1 proxy (current s 250(1)(a)).

10.55 For all appointments, members will be able to specify either the number or the proportion of their votes that the proxy may exercise. Currently, an appointment of 2 proxies is effective if each proxy is appointed to exercise a specified proportion of the member's voting rights (current s 250(3)). The Bill will avoid a member being disenfranchised where they do not specify the proportion of votes that the 2 proxies are to exercise, by allowing both proxies to exercise half of the votes. It will be made clear that fractions of votes cannot be exercised (Bill ss 249X(2) - (4)).

Rights of proxies

10.56 A proxy will have the same rights as the member to speak, vote and join in the demand for a poll at the meeting, subject to the appointment (Bill s 249Y(1)). A proxy will also be able to vote on a show of hands unless the constitution provides otherwise (Bill s 249Y(2)). This differs from the current law which requires the company's constitution to specifically give the proxy that right (current s 250(2)). The proxy's appointment will be able to direct the proxy how to vote or impose restrictions on the exercise of the vote.

10.57 Unless the company's constitution provides otherwise, when a member who has given a proxy attends a meeting, the proxy's right to speak and vote at the meeting will be temporarily suspended while the member is present. This could be useful where the member has made a standing appointment or an appointment that applies to a number of meetings, and subsequently decides to personally attend and vote during part or all of some of those meetings. Alternatively, the company constitution can establish a different rule for when a member is present such as allowing the member to vote and the proxy to speak on behalf of the member.

10.58 If a member cannot vote on a resolution in their own capacity, for example due to a conflict of interest, they will nevertheless be able to vote as a proxy for another member if the appointment requires them to vote in a certain way and they vote that way on the resolution (Bill s 250C(1)).

Lists of proxies and proxy appointment forms

10.59 If a company sends a list of persons willing to act as proxies or a proxy appointment form to a member on its own initiative, the list or form will be required to be sent to all members entitled to appoint a proxy. Similarly, a company will be able to provide such a list or form to a member on request if it makes the list or form available to any other member who requests it (Bill s 249Z). This prevents 1 or more members being disadvantaged by not having the same access to proxies and appointment forms as the other members.

How to appoint a proxy

10.60 A proxy appointment will be valid if it is signed by the member and contains certain minimum information (Bill s 250A(1)). Under the usual principles of agency, a member will be able to arrange for a proxy to be signed on their behalf by an agent or by a person acting under a power of attorney (Bill Schedule 2 Item 169).

10.61 A company will continue to be able to provide a proxy form which suits their needs, for example, by using a bar code to facilitate the sorting of forms. However, an appointment will be valid if the minimum information is provided, whether or not the appointment is made using a form provided by the company.

10.62 The new proxy rules will also make it clear that:

(a) proxies may be given standing appointments or be appointed for more than 1 meeting (Bill s 250A(1))

(b) appointments where the signature has not been dated or witnessed are valid (Bill ss 250A(3) and (6)).

10.63 If a member appoints a proxy after already appointing one, a later appointment will revoke the earlier appointment if both appointments could not be validly exercised at the meeting (Bill s 250A(7)). This will make it clear that members can appoint a second proxy at any time after the first appointment, so long as the subsequent appointment does not effectively replace the first one.

10.64 Currently, if a proxy votes, they would be required to follow any directions in the appointment (current Table A r 54(2)). Any failure to exercise a vote would be a contractual issue. Under the Bill, if a proxy votes contrary to directions in their appointment, they will commit an offence if they were held out by the company to be a person who could act as a proxy (Bill s 250A(5)).

10.65 Under the Bill, if the chairman is a proxy and is directed to vote in a specific way, they will be required to vote as directed on a poll (Bill s 250A(4)(c)). This reflects the significant influence that a chairman has over procedural matters in a meeting and, as they often hold many proxies on behalf of members, their capacity to affect substantive resolutions. Other proxies will not be required to vote on a poll, but if they do, they must vote as directed (Bill s 250A(4)(d)). If a member is appointed to vote a particular way as a proxy it will not affect their right to vote as a member (Bill s 250A(4)).

10.66 The Bill does not require a proxy to vote on a show of hands (Bill s 250A(4)(a)). They will be unable to vote on a show of hands if they have been directed to vote in 2 different ways (Bill s 250A(4)(b)). As the chairman often holds proxies for and against a resolution, this will prevent them from voting on a show of hands given that each person generally has only 1 vote.

Giving proxy documents to company

10.67 A member will be able to give or fax a proxy to the company's registered office or any other place specified in the notice of meeting. A member will also be able to lodge proxy documents electronically if the company specifies an electronic address in the notice of meeting (Bill s 250B(3)).

10.68 Given the nature of electronic transmission, it will not be necessary for the appointment to be signed. However, in the notice of meeting a company may specify that transmission by fax or to an electronic address must be verified and that the proxy must produce the original proxy documents at the meeting. The appointment of the proxy will be ineffective where these requirements exist and have not been satisfied (Bill s 250B(4)).

10.69 As at present, members will be required to give the proxy documents to the company at least 48 hours before the meeting or the adjourned part of the meeting (Bill ss 250B(1) and (2)). This time period facilitates the use of proxies by members. Although the 48 hours does not exclude weekends or holidays, meetings are almost always called by the directors and they will be able to select a convenient meeting day in light of this requirement. A company will be able to give its members more time to give it the proxy documents, by reducing the time period in its constitution or the notice of meeting (Bill s 250B(5)). This change will give companies additional flexibility in the way they handle proxy appointments.

Body corporate representatives

10.70 A company will have greater flexibility in appointing representatives (Bill s 250D). A company will be able to identify its representative by reference to an office, avoiding the cost of making another appointment if a specified person is not available (Bill s 250D(2)). In addition, it will be clear that a company will be able to make a standing appointment for all meetings which it could attend as a member (Bill s 250D(1)). The appointment will be able to restrict the representative's powers, such as preventing them from voting on a resolution without a meeting (Bill s 250D(2)). Otherwise, the representative will have all the powers that the body corporate has as a member (Bill s 250D(4)). All appointments will be revocable (current s 109ZB(8)).

Voting at meetings of members

10.71 There are currently rules on demanding a poll in both the Law and Table A (current s 248(1)(b) and Table A r 46(1)). The Bill removes this overlap (Bill s 250L).

10.72 To be valid, a special resolution will need to be set out in the notice of meeting (Bill s 249L). Special resolutions will usually be lodged with the ASC within 14 days after they are passed, instead of a month as at present (Bill Schedule 2 Items 179, 184, 186, 187 and 188). Due to their significant impact on the rights of members or creditors, special resolutions to vary or cancel class rights will need to be lodged within 7 days (Bill s 246B(3)).

Powers of attorney

10.73 The Table A rules currently accommodate the exercise of voting rights by an attorney (for example, current Table A regulations 49 and 50). As powers of attorney are used for many purposes in addition to meetings, it is more appropriate that the rules relating to them be left to the common law. However, where a member's attorney appoints a proxy, the power of attorney will need to be lodged with the proxy so that the company can be certain that the appointment is valid (Bill s 250B(1)(b)).

Annual general meetings of public companies

10.74 The current requirements for a public company to hold an AGM will be retained (Bill ss 250N and 250P). These rules are designed to give companies flexibility as to when to hold their AGM and when to end their financial year. For a newly formed company there is a separate requirement for the company to hold its first AGM as well as the normal requirement to hold regular AGM's. However, one meeting may be held at a time which will satisfy both requirements (Bill s 250N(1) and (2)). It will be made clear that a 1 member public company cannot hold an AGM (Bill s 250N(4)). Due to their recurrent nature, certain matters may be included in the business of an AGM without being referred to in the notice of meeting (Bill s 250R).

Asking questions at an AGM

10.75 As a matter of common practice, members are given an opportunity to ask questions at the AGM about the management of their company. The Bill recognises the importance of this practice by requiring the chairman to allow members as a whole a reasonable opportunity to ask questions about, or comment on, the company's management (Bill s 250S). This amendment is based on similar provisions in the companies legislation in Ontario and New Zealand.

10.76 The Bill will also give the members as a whole a reasonable opportunity to ask the auditor or their representative, if present at the AGM, questions relevant to the audit report (Bill s 250T). The Bill makes it clear that this does not require the auditor (or a representative) to be present at the meeting. The right of the auditor or their representative to attend and speak at general meetings will not be affected (Bill s 249V). If answering questions in relation to the audit report an auditor will be protected by qualified privilege as they are acting in the course of their duties (current s 1289).

10.77 Sections 250S and 250T only place an obligation on the chairman to provide a reasonable opportunity for members to ask questions. There is no corresponding legal obligation on the directors or auditor to answer questions. Such an obligation would be both inappropriate and impractical.

10.78 What is a 'reasonable opportunity' will depend upon the circumstances of the meeting. These provisions will not affect the chairperson's power under the common law to run an orderly meeting. In particular, the chairman will not necessarily be required to allow each member who wishes to do so an opportunity to ask questions. The Bill includes the words 'as a whole' to confirm that each individual does not have the right to ask a question. The chairman will be able to move on to the next item on the agenda when they consider that there has been a reasonable time for questions, taking into account all the circumstances of the meeting.

Statutory meeting

10.79 The Law will no longer require a company to hold a statutory meeting or send its members a statutory report following the issue of shares under its first prospectus. This requirement has been overtaken by the continuous disclosure obligations, which are designed to protect the interests of shareholders by making available, either through the Australian Stock Exchange or the ASC, information which would be expected to materially affect the value of their shares.

Other meetings rules

10.80 The remaining rules have been rewritten without material change (Bill ss 248B, 249K, 249W(2), 250H, 250K. Similarly, a number of the Table A rules have been brought into the Law as replaceable rules without material change (Bill ss 248A, 248E, 248G, 249M, 249W(1), 250E, 250F, 250G, 250J, 250K and 250M).

Minutes and members' access to minutes

Minutes

10.81 As at present, all proceedings of members' and directors' meetings will be required to be recorded in the company's minute books within 1 month (Bill ss 251A(1)(a) and (b)). Resolutions passed without a meeting (including those passed by the only member or director of a company) and declarations of the only director of a proprietary company will also be subject to this requirement, making the minute obligations consistent for all resolutions (Bill ss 251A(1)(c) - (e)). The current rules on where the minute books must be kept will be retained (Bill s 251A(5)).

10.82 All minutes will be required to be signed within a reasonable time to ensure that a verified record is available as soon as practicable (Bill ss 251A(2) - (4)). Minutes of meetings will be able to be signed by the chairman of the meeting or the chairman of the next meeting (Bill s 251A(2)). Minutes of resolutions without meetings, and declarations of single director proprietary companies, will have to be signed by a director (Bill ss 251A(3) and (4)). Unless the contrary is proved, a minute that is recorded and signed as required is evidence of the relevant proceeding, resolution or declaration (Bill s 251A(6)).

Members' access

10.83 Members will have access without charge to minutes of resolutions passed at a general meeting, including resolutions passed using the circulating resolution procedure (Bill ss 251B(1)). A copy of these minutes, or an extract from the minutes of a meeting, will also be available on written request (Bill ss 251B(2) - (4)).

Meetings of members of registered managed investment schemes

10.84 The provisions in Part 2G.4 of Chapter 2G are designed to clarify and enhance the rights of investors in managed investment schemes. Most of the provisions are based on those applicable to meetings of public companies. The existing provisions in Part 7.12 Division 5 and 5A and the related regulations will be repealed.

10.85 The proposed provisions will regulate important aspects of managed investment meetings. It is envisaged that the provisions in the Law be able to be supplemented by provisions in the scheme constitution to the extent that they are not inconsistent with the Law.

10.86 Unlike the rules applying to public companies, managed investment schemes will not be required to hold annual general meetings. This is consistent with the usual character of collective investment schemes as passive investment vehicles.

Meetings initiated by the responsible entity

10.87 The Bill will enable the responsible entity to call meetings of scheme members (Bill s 252A). The Law does not limit the purpose for which these meetings may be called. The responsible entity may call meetings for a purpose envisaged by the Law or set out in the scheme's constitution or for any other matter.

Meetings initiated by members

10.88 Members of registered schemes will be able to request the responsible entity to call meetings for the purpose of considering proposed special or extraordinary resolutions (Bill s 252B). Provisions in the Managed Investments Bill 1997 provide that resolutions of this kind are necessary for certain important purposes. In particular:

(a) a special resolution will be required to amend the scheme constitution

(b) an extraordinary resolution will be required to either:

- replace the responsible entity, or
- terminate the scheme.

10.89 Consistent with the approach taken in relation to members' requests for company meetings, a request will need to be made by the holders of at least 5% of the votes or at least 100 members (Bill s 252B(1)).

10.90 When members request a meeting, they will be required to set out the heading of the proposed resolution (Bill s 252B). Members will also be able to provide a supporting statement, not exceeding 1,000 words (Bill ss 252B(3) and (8)). The responsible entity will be required to circulate the resolution and statement with the notice of meeting, or as soon as practicable afterwards (Bill s 252B(7)). The cost of calling and holding such meetings will be borne by the scheme (Bill s 252B(9)).

10.91 If the responsible entity fails to comply with a request to call a meeting, the members will be able to call and hold the meeting themselves (Bill s 252C). In these circumstances, the responsible entity will be liable for the reasonable cost of calling and holding the members' meeting (Bill s 252C(4)).

10.92 Members holding at least 5% of the votes will also be able to call and hold a meeting to consider and vote on a proposed special or extraordinary resolution at their own cost (Bill s 252D).

Meetings called by the Court

10.93 The Court will be empowered to call a meeting where it is impractical for the meeting to otherwise be called (Bill s 252E).

Calling and holding meetings of members

10.94 Unless a scheme's constitution increases the period, at least 21 days notice of members' meetings will be required (Bill s 252F). Due to the usual number of members of a registered scheme, it will generally be impractical for members to be able to agree to shorter notice beforehand and this facility is therefore not provided.

10.95 Notice will be required to be given to all members, directors of the responsible entity and the auditor of the scheme and compliance plan (Bill s 252G(1)). The auditors will also be entitled to the same communications that a member is entitled to receive (Bill s 252H). Otherwise, the rules on giving notice and the contents of the notice are consistent with those for companies (Bill ss 252G(2) - (4), 252J and 252K).

10.96 The responsible entity will be able to appoint any individual as the chairman of a meeting it calls. If it does not, or the elected person is unavailable, the members present will be required to elect a member to chair the meeting (Bill ss 252S(1) and (2)). For a meeting called by members, the members will be required to elect the chairman. This will also be the rule for meetings called by the Court, unless the order determines the chairman (Bill s 252S(3)).

Members' rights to put resolutions etc. at meetings of members

10.97 Members of schemes will have a right to put special or extraordinary resolutions on the agenda of meetings that have been called (Bill ss 252L and 252M). They will also be able to circulate statements in relation to matters on agendas of meetings which have been called (Bill s 252N). These provisions are based on provisions applying to companies (Bill ss 249N - 249P). They differ in that the resolutions which may be put on the agenda are limited to special and extraordinary resolutions.

Voting at meetings of members

10.98 As with the current prescribed interest provisions (current Part 7.12 Divisions 5 and 5A), the weight attributed to the vote of a collective investment scheme member will depend on the value of their interests. This approach is necessary to avoid unfairness as there may be different classes of interests voting on the same resolution. On a poll, members of schemes will have 1 vote for every dollar of the value of their interests (Bill 253C(2)). The value of the interest is to be worked out under section 253F of the Bill. This provision is based on existing subsection 1069A(5).

10.99 Due to their importance, special and extraordinary resolutions will be required to be decided on a poll (Bill s 253J(1)). A special resolution will require the approval of 75% of the votes cast at a meeting, while an extraordinary resolution will require the approval of the holders of 50% of the votes in the scheme, other than the votes of the responsible entity and its associates (Bill s 253E and Schedule 2 Items 164 and 166). Other resolutions will be decided on a show of hands (with each member having 1 vote), unless a poll is demanded (Bill ss 253C(1) and 253J(2)). If a poll is demanded, the resolution will need to be passed by at least 50% of the votes cast by members entitled to vote on the resolution (Bill ss 253E and 253J(2)).

10.100 In effect, there will be a significant relaxation of the existing approach for amending the constitutions of collective investment schemes. It will no longer be necessary for 25% (by value) of those eligible to cast a vote in order for an amendment to be carried. Rather, it will be sufficient for 75% of the actual votes cast to be in favour of the resolution for it to be carried. This approach makes the requirement for amending scheme constitutions more consistent with that applying to companies. The voting requirements for removing the responsible entity will effectively remain unchanged from that applying under the existing prescribed covenant in paragraphs 7.12.15(6)(g) and 10(g) of the Corporations Regulations.

Other meetings rules

10.101 The remaining rules for meetings of members of collective investment schemes in the Law will mirror those applying to public companies (Bill ss 252P, 252Q, 252R, 252T-253B, 253D, 253G, 253H, and 253K-253N).

11

Chapter 2H: Shares

11.1 Chapter 2H-Shares will comprise the following Parts about:

(a) Issuing shares, and converting shares from one type to another (Part 2H.1)

(b) Redemption of redeemable preference shares (Part 2H.2)

(c) Partly-paid shares (Part 2H.3)

(d) Capitalisation of profits (Part 2H.4)

(e) Dividends (Part 2H.5)

(f) Notifying the ASC of the issue or cancellation of shares (Part 2H.6).

11.2 Some rules dealing with shares are currently found in Table A. Chapter 2H will replace these rules and bring all the rules together, to make them more accessible and easier to follow. Currently, a company may either rely on the rules in Table A, or determine its own rules through its constitution. This flexibility is retained by the Bill, because a company will be able to remove or substitute replaceable rules, which are identified as replaceable rules in the provision's heading (Bill s 135). Replaceable rules are binding on the company in the same way as a contract.

Part 2H.1 – Shares

Authorised share capital

11.3 Most companies are companies limited by shares. The company's members contribute capital to the company and, in return, are issued shares in the company. The company's memorandum of association must state the amount of share capital with which the company proposes to be registered and the division of that share capital into shares of a fixed amount.

11.4 The total amount of the company's share capital is referred to variously as its 'nominal share capital' (see, for example, current s 195(2), current s 1308(1)), 'authorised share capital' (see, for example, Corporate Regulations Schedule 5, cl 15(1)(a)), or its 'registered capital' (see, for example, *Attorney-General* v *Anglo-Argentine Railway* (1901) 1 KB 617).

11.5 The fixed amounts of the shares into which a company's share capital is divided are known as the par or nominal values of the shares. An issue of shares in excess of the company's authorised share capital is void: *Bank of Hindustan China & Japan Ltd* v *Alison* (1871) LR 6 CP 222.

11.6 However, the concept of authorised share capital no longer achieves its original goal of allowing a company's creditors to assess the size of the company's business undertaking. There are 3 reasons for this:

(a) a company does not have to issue shares up to the amount of its authorised share capital

(b) a company may finance its activities through debt

(c) a company may increase or decrease the amount of its authorised share capital by ordinary resolution, and without notice to its creditors.

11.7 In light of these considerations, the Law will no longer include the requirement in current s 117(1)(b) that a company limited by shares must include in its constitution a statement indicating the amount of its authorised share capital. Consequently, there will be no need for a process to increase or decrease authorised share capital and current s 193(1)(a) and (e) will be repealed.

11.8 Currently, a company's authorised share capital may be used to prevent the directors from diluting the shareholders' interest in the company or bringing new members into the company without the consent of existing shareholders. This facility may be particularly useful in the case of joint venture companies. However, the same effect can also be achieved by having a constitution which sets a numerical limit on the number of shares that the directors may issue.

11.9 A provision in a company's constitution which states the amount of the company's share capital, or divides the share capital into shares of a fixed amount, will be repealed on commencement of Schedule 2 of the Bill. As a transitional measure for existing companies, if 100 members, or members holding 5% of votes, serve a notice on the company before commencement, or within 3 months after commencement, stating that the members want the following transitional arrangements to apply, the Bill will amend the company's constitution by inserting a new provision preventing it from issuing more shares than it could have issued prior to commencement (Bill s 1427). A company will be able to amend this new provision in the same way as any other provision in its constitution.

Issuing and converting shares

11.10 A company's power to issue shares is currently dealt with in Table A regulation 2, which provides for shares in a company to be issued by the directors. The Bill will provide that a company has the power to issue shares (Bill s 124(1)(a)). In order to avoid doubt, it will also provide that a company's power to issue shares includes the power to issue:

(a) bonus shares

(b) preference shares (including redeemable preference shares)

(c) partly-paid shares (Bill s 254A(1)).

11.11 Bonus shares are shares for whose issue no consideration is payable to the company (Bill s 254A(1)(a)).

11.12 A preference share is a share that gives its holder some right or preference (for example, a guaranteed minimum dividend entitlement) not enjoyed by the holder of a share of another type. The rights attached to a preference share in respect of the following matters must either be approved by special resolution, or set out in the company's constitution (if any):

(a) repayment of capital

(b) participation in surplus assets and profits

(c) cumulative and non-cumulative dividends

(d) voting

(e) priority of payment of capital and dividends in relation to other shares or classes of preference shares (Bill s 254A(2)).

This will ensure that the interests of existing shareholders are protected, by requiring them to agree to the terms of the preference shares.

11.13 A preference share is a preference share, the terms of issue for which provide that it is liable to be redeemed. A redeemable preference share may be redeemed:

(a) at a fixed time, or on the happening of a particular event

(b) at the company's option

(c) at the shareholder's option (Bill s 254A(3)).

11.14 A company will be able to determine the terms on which its shares are issued, and the rights and restrictions attaching to the shares (Bill s 254B).

11.15 The Bill will remove the concept of stock from the Law (stock is a number of shares that have been grouped together). Companies will be prohibited from issuing stock or converting shares into stock (Bill s 254F), and will have to convert any existing stock into shares (Bill s 1428). The Bill will repeal the current requirement for the register of members to show details of stock holdings, although as a transitional measure the register must continue to show stock details until all stock has been converted into shares (Bill s 1428). The reference to 'stock' in current subsection 216B(5) will also be repealed (Bill Schedule 2 Item 211). However, the references to 'stock' in current paragraphs 655(1)(b) and (d) will be retained, because they are necessary to accommodate the structure of foreign corporations.

11.16 The current prohibition against a company issuing bearer shares (referred to as share warrants in current section 189) will be retained (Bill s 254F).

11.17 Table A regulation 38 currently provides that a company's existing members must be offered unissued shares before they are issued to non-members. This right will be rewritten in a replaceable rule requiring the directors of a proprietary company to offer shares of a particular class to the existing holders of shares of that class before issue (Bill s 254D). This will give the existing holders the opportunity to take up shares before they are offered to others. It will be possible for the members in general meeting to waive the benefit of this rule by resolving to authorise the directors to issue shares without first

giving the existing holders of shares an opportunity to take up the shares (Bill s 254D(4)).

11.18 Currently, the Court has a discretion to validate the issue or allotment of shares that have been invalidly issued, created or allotted (current s 194). The Bill will retain this discretion, and the class of persons who may apply to the Court will be broadened to include any persons whose interests have been or may be affected by the invalidity (Bill s 254E). After commencement, the Law as it stood immediately before commencement will continue to apply to a Court order made prior to commencement validating or confirming an issue or allotment of shares, or an application for such an order (Bill s 1430(b)).

11.19 If the Court exercises its discretion to make an order validating, or confirming the terms of, a purported issue of shares, then upon a copy of the order being lodged with the ASC, the order will have effect from the time of the purported issue (Bill s 254E(2)). For example, if shares are invalidly issued on 1 March, and the Court makes an order validating the issue, the shares are taken to have been validly issued on and from 1 March.

11.20 A company is currently able to divide its share capital into a smaller or larger amount. It may consolidate its shares and divide them into shares of a larger amount (current s 193(1)(b)), and subdivide its shares into shares of a smaller amount (current s 193(1)(d)). Under the Bill, companies will retain the ability to convert some or all of their shares into a larger or smaller number of shares (Bill s 254H, Schedule 5 Item 11 s 254H). As at present, the interests of minority shareholders will be protected against abuse of this power by the majority by:

(a) the procedures for varying or cancelling class rights (Bill Part 2F.3)

(b) the remedies available in cases of oppression or injustice (Bill Part 2F.1).

11.21 The Bill will expressly preserve the current right of companies to capitalise profits. At present, a company can only capitalise profits without issuing shares if it increases the par value of existing shares. With the abolition of par value this restriction will not apply to the capitalisation of profits (Bill s 254S).

No par value

11.22 A share is a proportionate interest in the net worth of a company's undertakings. A person trying to gauge the size of a shareholder's investment in a company would need to look beyond the par value of the shareholder's shares, because par value is simply an arbitrary monetary denomination attributed to the shares. Rather, a potential investor would be interested in the proportionate size of the shareholder's actual contribution to the capital of the company. For example, if a shareholder owns 10% of all issued shares in a company, a potential investor would be interested in the current value of those shares (that is, 10% of the current net value of the company's undertakings). The fact that the shares have a par value of, for example, $1 each would give no indication of the current value of the shares.

11.23 Par value may also be misleading to an unsophisticated investor. A share with a par value of $5 being offered for sale at $2 may appear to be a bargain. However, the share might in fact be worth less than $2.

11.24 In its November 1990 report, Shares of no par value and partly-paid shares (Report No 11), the Companies and Securities Law Review Committee canvassed the arguments about par value, and recommended that companies be given the option of issuing no par value shares. However, the Bill does not adopt this approach because a system that permitted both par value and no par value shares would unnecessarily complicate the Law and its administration.

11.25 The Bill will provide that shares no longer have par value (Bill Schedule 5 Item 10 s 254C). This will also apply to shares issued before commencement of Schedule 5 (Bill Schedule 5 Item 31 s 1444). These changes will have the effect of preventing companies from issuing par value shares. The Bill will preserve the effect of existing contracts and other instruments, executed before commencement, that refer to the par value of a share (Bill Schedule 5 Item 31 s 1445).

11.26 As a consequence of the removal of the concept of par value shares, the Law's requirements for minimum subscriptions on share allotments will be amended by removing the requirement for the calculation of the minimum subscription to include the nominal value, or nominal amount, of shares (Bill Schedule 2 Item 230). A company will still be able to specify a minimum amount payable on application for a share, by setting out that requirement in the offer document.

11.27 The Bill will enable shareholders to more directly ascertain the amount unpaid on their shares (if any), by requiring that amount to be indicated in the register of members and on share certificates (Bill Schedule 2 Item 208). To ascertain this under the current Law, shareholders must consult the register of members and calculate the difference between the par value of their shares and the amount paid or agreed to be paid on their shares.

11.28 The Bill will also make it possible to calculate after the commencement of Schedule 5 of the Bill the amounts paid and unpaid on a share issued before that commencement by treating:

(a) the amount paid on the share as the sum of all amounts (except any premium) paid to the company at any time for the share

(b) the amount unpaid on the share as the difference between the issue price (not including any premium) and the amount paid on the share (Bill Schedule 5 Item 31 s 1445).

11.29 Further, a shareholder's liability for calls in respect of amounts unpaid on a share issued before commencement of Schedule 5 of the Bill will continue after commencement and will not be affected by the share ceasing to have a par value (Bill Schedule 5 Item 31 s 1448).

11.30 The following amendments of the Law will be made to accommodate the move to no par value shares:

(a) references to the par or nominal value of a company's share capital (or a class of share capital) or the amount paid up on shares will be removed (Bill Schedule 2 Items 215, 217-220, 225, 227 and 237)

(b) paragraph (a) of the definition of 'prescribed occurrence' in current section 603 will be amended to refer to the conversion by a company of all or any of its shares into a larger or smaller number of shares (Bill Schedule 2 Item 223)

(c) provisions that refer to the amount of any share premium that may form part of the consideration on the issue of a share will be amended or omitted (Bill Schedule 2 Items 216, 221 and 224)

(d) the obligation for a company's register of members to show the amount unpaid on shares will not apply if all the company's shares were issued before commencement and the register shows the par value of shares as they were immediately before commencement (Bill Schedule 2 Item 210).

11.31 In order to reduce the transition costs associated with the abolition of par value for shares, these amendments will take place when Schedule 2 of the Bill commences, rather than when Schedule 5 of the Bill commences.

Redeemable preference shares

11.32 The Bill will repeal the requirement that the issue of redeemable preference shares be authorised by the company's articles (current s 192(1)). The Bill also will move the existing rules in Table A relating to redeemable preference shares into the Law (Bill ss 254J, 254K and 254L), including the rule that a redemption must be in accordance with the terms on which the shares are on issue (Bill s 254J(1)). However, redeemable preference shares will be able to be cancelled pursuant to a capital reduction or share buy-back on different terms (Bill s 254J(2)). If shares are redeemed in contravention of the Law, the Bill will validate both the redemption and any contract or connected with it (Bill s 254L(1)). This is intended to protect the interests of third parties not involved in the contravention, whose interests would be adversely affected by the transaction being invalidated. However, a person involved in the contravention will contravene the Law and may be subject to civil penalty orders and criminal consequences (Bill Schedule 2 Item 238).

11.33 The current prohibition on shares being converted into redeemable preference shares after their issue will be retained (Bill s 254G(3)).

11.34 Several changes will be made to the rules on redeemable preference shares, to accommodate the abolition of par value shares:

(a) Currently, the redemption of nominal share capital must be made out of profits or the proceeds of a fresh issue of shares, and any premium payable on redemption must be provided for out of profits or out of the share premium account (current s 192(3)(b) and 192(4)). The abolition of par values means that companies will no longer have a share premium account out of which to fund a redemption. Accordingly, redeemable preference shares issued after commencement will only be redeemable out of profits or the proceeds of a fresh issue of shares made for the purpose of the redemption (Bill Schedule 5 Item 12 new s 254K(b)).

(b) The current requirement for companies to establish a 'capital redemption reserve' when shares are redeemed out of profits (current s 192(5)) will be repealed. Upon a company's shares ceasing to have a par value, any amount standing to the credit of

the company's capital redemption reserve become part of the company's share capital (Bill Schedule 5 Item 31 s 1446).

(c) an amount standing to the credit of the company's share premium account will become part of the company's share capital (Bill Schedule 5 Item 31 s 1446).

11.35 Although companies will not be able to redeem redeemable preference shares issued after commencement out of their share premium account, they will be able to use the amount that stood to the credit of their share premium account immediately before commencement to:

(a) pay any premium on the redemption of redeemable preference shares or debentures issued before commencement; or

(b) write off preliminary expenses incurred or discounts allowed, on or before commencement, on the issue of shares or debentures (Bill Schedule 5 Item 31 s 1447).

11.36 The Law currently provides that an option granted by a public company that is exercisable 5 years after the date of grant is void (current s 216). However, retaining this provision is difficult to justify. Although it is intended to prevent public companies giving out options whose value is uncertain because their exercise date is so far away, share prices can fluctuate dramatically over periods much shorter than 5 years. The Bill therefore repeals s 216.

11.37 In order to protect the interests of shareholders and creditors, the Bill will require a company to be solvent immediately after the redemption of redeemable preference shares that are redeemable at its option; for other redeemable shares, the company will have to be solvent immediately after the shares are issued (Bill Schedule 2 Item 222). If a company is not solvent at the relevant time its directors may be subject to civil penalty orders and criminal consequences (Bill Schedule 2 Item 238) in the same way as they may be liable for insolvent trading under current sections 588G and 588H. For the purpose of shareholders and creditors obtaining an injunction under section 1324, a contravention of these provisions will be taken to affect the interests of a creditor or member of the company (Bill Schedule 2 Item 240).

Partly-paid shares

11.38 The Bill will expressly recognise a shareholder's obligation to pay calls on partly-paid shares (Bill s 254M). However, a company will be able to pass a special resolution restricting the company's right to make calls on unpaid share capital to situations where the company becomes externally administered (Bill s 254N). This preserves the effect of current subsection 188(2), except that the company's reserve capital will be able to be called up if the company becomes an externally-administered body corporate, rather than when the company is being wound up. This will make the company's unpaid share capital available in a range of circumstances involving insolvency, not just winding-up.

Dividends

11.39 Currently, dividends to shareholders can only be paid out of profits or by issuing shares from the share premium account (current s 201(1)). Where a dividend is to be paid out of profits, the profits must exist at the time the dividend is declared: Marra Developments Ltd v B W Rofe Pty Ltd (1977) 2 NSWLR 616. A shareholder may

recover from the company as a debt any final dividend that has been declared. The debt arises when the declaration is made or from a later date on which the dividend is to be paid in accordance with the declaration: Industrial Equity Limited v Blackburn (1977) 137 CLR 567 at 572. Interest on the debt is payable from the time the debt arises.

11.40 The Bill will allow companies to avoid the problems that would arise if profits that would have been sufficient to cover the dividend when it was declared have ceased to exist when the time comes to pay the dividend. Under the Bill, a debt will not arise until the time fixed for payment has arrived, unless the company has a constitution that provides for the declaration of a dividend. Directors will be able to revoke a decision to pay a dividend at any time before the time fixed for payment, and thus avoid a debt being incurred (Bill s 254V).

11.41 Currently, a company may only pay dividends in accordance with its constitution: Oakbank Oil Co v Crum (1882) 8 App Cas 65, at 71. The Bill will include a replaceable rule allowing directors to pay a dividend without the need for constitutional authorisation (Bill s 254R(1)).

11.42 A directors' resolution to pay an interim dividend does not create a debt and may be revoked or amended before the dividend is paid: Marra Developments Ltd, at 622; Brookton Co-operative Society Ltd v FCT (1981) 147 CLR 441. The effect of the Bill will be to extend this rule to all dividends, not just interim dividends. Under the replaceable rules interest will not be payable on a dividend (Bill s 254U(2)). Interest will be payable on a debt, but the debt will not arise until the time fixed for payment of the dividend (Bill s 254V).

11.43 By providing that dividends must be paid out of profits (Bill s 254T), the Bill will require that the profits exist at the time fixed for payment of the dividend. The directors will be able to determine that a dividend is payable and fix the amount, the time for payment and the method of payment (Bill s 254U (1)), so it will not be necessary for them to declare a final dividend before the date for payment. Nor will the declaration of a final dividend be required for liability to pay the dividend to arise: that will happen if the time fixed for paying the dividend arrives without the decision to pay the dividend being revoked (Bill s 254V).

11.44 If a company issuing partly-paid shares anticipates that dividends might be set off against outstanding calls to the company, it should ensure that this is authorised by its constitution or the terms on which the shares are on issue.

11.45 A company may not pay a dividend if to do so would leave it unable to pay its debts as they fall due: Peter Buchanan Ltd v McVey [1955] AC 516; QBE Insurance Group Ltd v ASC (1992) 8 ACSR 631 at 649. If the company does pay a dividend in those circumstances, the directors who authorised the payment of the dividend may be liable to pay the amount of the dividend to the company: Hilton International Ltd v Hilton (1989) 1 NZLR 442; Ammonia Soda Co v Chamberlain (1918)1 Ch 266, per Warrington LJ at 292.

11.46 Similarly, under the amendments to be made to current section 588G, directors may be liable to compensate the company in relation to dividends that render the company insolvent, in much the same way that they may currently be liable for insolvent trading by the company (Bill Schedule 2 Item 222). For the purpose of obtaining an

injunction under current section 1324, a contravention by directors of this provision will be taken to affect the interests of a creditor or member (Bill Schedule 2 Item 240).

11.47 If dividends are paid otherwise than out of profits, the directors may be liable for a reduction of capital in contravention of the capital reduction provisions (Bill s 256F(3), Schedule 5 Item 18 s 256D(3)). However, the Bill will validate a dividend that is not paid out of profits (Bill s 256F(2)(a), Schedule 5 Item 18 s 256D(2)(a).

11.48 In the case of a public company, every share will have the same rights in relation to dividends, unless the company's constitution provides otherwise, or different dividend rights are provided for by special resolution (Bill s 254W(1)). For proprietary companies, the Bill will insert a replaceable rule authorising the directors to pay dividends as they see fit, subject to the terms on which the shares are on issue (Bill s 254W(2)).

Notice requirements

11.49 Companies will be required to notify the ASC within 1 month of the issue or cancellation of shares (Bill ss 254X and 254Y). Section 254X of the Bill differs from current section 187 in that:

(a) it refers to issuing shares, which incorporates the current concept of making an allotment of shares (this change in terminology is also reflected in a consequential change to current section 1037 (Bill Schedule 2 Item 232)

(b) there will no longer be any obligation to lodge the shareholders' name and address

(c) where shares are issued for non-cash consideration under a written contract, there will no longer be an obligation for the contract to be lodged - companies will have the option of lodging prescribed particulars about the issue of the shares.

11.50 The notification must set out the amount paid or agreed to be considered as paid on each share. However, this is not intended to permit the directors to deem an amount to have been paid which exceeds the value of the cash and non-cash consideration actually received for the share.

11.51 Currently, details of the person to whom shares are allotted are generally required to be included in the return of allotment (current s 187(1)(d)). However, this information is not required to be updated and therefore becomes inaccurate as soon as the person sells the shares. The Bill therefore does not require the notice to include this information.

11.52 It will not be necessary for companies to lodge a separate notice for every issued or cancelled share in order to comply with these provisions. For example, it would be possible for companies to lodge regular notices with the ASC that note all of the shares issued or cancelled during the period (of up to 1 month) covered by the notice.

12

Chapter 2J: Transactions affecting share capital

12.1 The Bill will insert a new Chapter 2J - Transactions affecting share capital, comprising:

(a) Part 2J.1 - Share capital reductions and share buy-backs

(b) Part 2J.2 - Self-acquisition and control of shares

(c) Part 2J.3 - Financial assistance

(d) Part 2J.4 - Interaction with general directors' duties.

12.2 Chapter 2J sets out various procedures and requirements that will have to be complied with when companies undertake share capital transactions. However, compliance by a company with these procedures and requirements will not relieve the company's directors of their duties under the Law or at common law (Bill s 260E). In particular, a director who is involved in a share capital reduction may be in breach of their duty to act honestly in the exercise of their powers and the discharge of their duties (current s 232), even though the reduction is authorised by Part 2J.1.

12.3 Schedule 5 of the Bill will establish new streamlined procedures for share capital reductions: these procedures are designed to remove unnecessary restrictions on capital reductions, and to protect the interests of shareholders and creditors. The current buy-back provisions will be re-enacted and placed with the share capital provisions in Part 2J.1 and, where relevant, will be amended to bring them into line with the share capital provisions.

Capital reductions

12.4 Under the doctrine of capital maintenance the creditors of a company limited by shares 'are entitled to assume that no part of the capital which has been paid into the coffers of the company has been subsequently paid out, except in the legitimate course of its business': *Trevor* v *Whitworth* (1887) 12 App. Cas. 409, at 423-424.

12.5 Under the existing statutory procedure for capital reductions at section 195, a company may reduce its share capital in any way if:

(a) the reduction of capital is authorised by the company's articles, and

(b) the reduction of capital is approved by a special resolution of the company, and

(c) the reduction of capital is confirmed by the Court.

12.6 The procedure may also apply when a company appliers amounts that have been paid into its share premium account (current s 191(1)) or capital redemption reserve (current s 192(5)).

12.7 Schedule 2 of the Bill will rewrite existing section 195 of the Law in plain English (Bill ss 256A(2), 256B, 256C, 256D, 256E, and 256F).

12.8 Schedule 5 Item 18 of the Bill will repeal these rewritten provisions and replace them with a new procedure, which will allow a company limited by shares to reduce its share capital in ways in addition to those specifically authorised by law. The new procedures are described below. Other provisions of the Law that may be relevant to share capital reductions are listed in the table in Schedule 5 Item 18 section 256E of the Bill. After the commencement of Schedule 5, a company will not be able to make a capital reduction unless it complies with Bill Schedule 5 Item 18 section 256B(1) (Bill Schedule 5 Item 18 s 256D(1)).

12.9 When Schedules 2 or 5 of the Bill commence, a company may have already begun the current statutory procedure by calling a meeting for the purpose of existing section 195 or Bill section 256A(1)(b)(i). In these cases, the provisions of the Law as they stood before the relevant commencement will continue to apply to that reduction (Bill s 1429 and Bill Schedule 5 Item 31 s 1450).

No need for authorisation by constitution

12.10 The Law currently provides that a company may reduce its share capital only if it is authorised to do so by its constitution (current s 195(1)). However, the constitutions of most companies include, as a matter of course, a provision authorising capital reductions (Table A regulation 39 is an example of such a provision). This means that the Law's requirement for constitutional authorisation is not, in practice, an effective brake on capital reductions.

12.11 The Bill therefore omits from the Law with the commencement of Schedule 2 of the Bill the requirement that a capital reduction be authorised by the company's constitution. Companies that have a constitution will be able to include a provision restricting or prohibiting the exercise of their power to reduce their share capital. This will, in effect, give members the same power to prevent a reduction of share capital that they currently have through the requirement that the reduction be authorised by the company's constitution.

No need for Court confirmation

12.12 The Law currently requires that capital reductions be confirmed by the Court (current s 195(1), Bill s 256A(1)(b)(ii)). Court decisions have interpreted section 195 as providing the following safeguards for shareholders and creditors:

(a) relevant information must be provided to shareholders before voting on a resolution to approve a reduction of capital

(b) the impact of the reduction on the company's assets must not be such as to prejudice the company's creditors

(c) the reduction must be fair and reasonable to all of the company's shareholders

(d) shareholders and creditors must be given notice of the reduction of capital, and an opportunity to stop an improper reduction of capital.

12.13 However, it is not appropriate for every capital reduction to be subject to the time and expense that Court confirmation involves, particularly as the safeguards that this brings can be provided in different ways. Currently, even a reduction that in fact offers no threat to the interests of members or creditors must nevertheless be confirmed by the court. Schedule 5 Item 18 of the Bill therefore omits the requirement that reductions of capital be subject to court confirmation. The interests of shareholders and creditors will be protected by other safeguards, described below.

Shareholder approval

12.14 Under the Bill, reductions of share capital will continue to require shareholder approval (Bill Schedule 5 Item 18 s 256B(1)(c)). An equal reduction will have to be approved by a resolution passed at a general meeting of the company (Bill Schedule 5 Item 18 s 256C(1)). This is consistent with the approach taken in section 257C of the Bill in relation to shareholder approval for equal access share buy-backs over the 10/12 limit. The following requirements will apply to an equal reduction:

(a) the reduction must relate only to ordinary shares

(b) it must apply to each holder of ordinary shares in proportion to the number of shares they hold

(c) it must be on terms that are the same for each holder of ordinary shares (Bill Schedule 5 Item 18 s 256B(2)).

12.15 The terms of the reduction may differ from 1 shareholder to the next because the shares have different accrued dividend entitlements or different amounts unpaid on them. The terms may also differ between shareholders to ensure that, when the reduction is complete, shareholders are left with a whole number of shares. These differences would not result in any inequity in the treatment of shareholders, and the Bill therefore allows them to be ignored in working out whether the terms of the reduction are the same for each holder of ordinary shares (Bill Schedule 5 Item 18 s 256B(3)).

12.16 A reduction of capital that is not an equal reduction is a selective reduction (Bill Schedule 5 Item 18 s 256B(2)), and must be approved by either:

(a) a special resolution passed at a general meeting of the company, or

(b) a resolution agreed at a general meeting to by all ordinary shareholders (Bill Schedule 5 Item 18 s 256C(2)).

12.17 Selective reductions require a special resolution, or unanimous shareholder agreement at a general meeting, because they have the capacity to advantage some shareholders over others. Where a selective reduction is approved by a special resolution, a vote may not be cast in favour of the resolution by a person who is to receive consideration as part of the reduction, or whose liability in respect of amounts unpaid on shares is to be reduced (Bill Schedule 5 Item 18 s 256C(2)(a)). This is intended to ensure that the resolution's approval reflects the wishes of the company's disinterested shareholders and corresponds to the approach taken in section 257D of the Bill in relation to shareholder approval for a selective share buy-back.

12.18 The Bill also includes a procedure to protect minority shareholders against their shares being cancelled under the guise of a capital reduction. In addition to the other shareholder approval requirements, a reduction of capital that involves the cancellation of shares will require approval by a special resolution passed at a meeting of the shareholders whose shares are to be cancelled (Bill Schedule 5 Item 18 s 256C(2)).

12.19 The Bill also inserts a new section into the Bill designed to ensure that the Corporations Law does not contravene section 51(xxxi) of the Constitution (Bill s 1362BA).

Information for shareholders

12.20 The current statutory procedure for capital reductions has been interpreted as requiring companies to ensure that when shareholders approve a capital reduction, they are properly informed of the effects of the reduction on themselves and other shareholders*: Re Campaign Holdings Pty Ltd* (1989) 15 ACLR 762; 8 ACLC 64. The Bill incorporates this obligation by requiring companies to include, with the notice of meeting at which shareholder approval for a capital reduction will be sought, a statement setting out all information known to the company that is material in deciding how to vote on the resolution (Bill Schedule 5 Item 18 s 256C(4)). The company will not be required to disclose information if that would be unreasonable having regard to previous disclosures made by the company.

12.21 Determining whether it would be 'unreasonable' to require disclosure will involve consideration of the circumstances and context of the previous disclosure. For example, a company that had previously disclosed material information in its last annual report may need to include the information in its disclosure statement if its relevance to the capital reduction would not be apparent to shareholders. These rules about shareholder information correspond to those required for shareholder approval of share buy-backs (Bill s 257D(2)).

Creditor and shareholder protection

12.22 Creditors' interests will be protected by the requirement that a company will only able to reduce its share capital if the reduction does not materially prejudice the company's ability to pay its creditors (Bill Schedule 5 Item 17 s 256B(1)(b)).

12.23 Whether prejudice is 'material' will be a question of judgment to be determined in light of all relevant circumstances, including the particular characteristics of the company and the situation of the company's creditors.

12.24 In addition to shareholder approval, the Bill will also require that a capital reduction be fair and reasonable to the company's shareholders as a whole (Bill Schedule 5 Item 17 s 256B(1)(a)). 'Fair and reasonable' is intended to be a composite requirement. Factors that might be relevant to determining whether a capital reduction is fair and reasonable to shareholders as a whole include the following:

(a) the adequacy of any consideration paid to shareholders

(b) whether the reduction would have the practical effect of depriving some shareholders of their rights (for example, by stripping the company of funds that would otherwise be available for distribution to preference shareholders)

(c) whether the reduction is being used to effect a takeover and avoid the takeover provisions

(d) whether the reduction involves an arrangement that should more properly proceed as a scheme of arrangement.

12.25 The mechanism for approving a selective capital reduction by special resolution potentially gives rise to the expropriation of vested property rights, in that the shares of persons who did not vote for the resolution to approve the reduction may nonetheless be cancelled. This expropriation may only be challenged on the basis that the capital reduction was not fair and reasonable to shareholders as a whole. The statutory test may be satisfied even though the reduction is not fair and reasonable for every individual member. The appropriation may also be challenged as oppressive conduct under current section 260. However, the 'fair and reasonable' test focuses on the effect and not the purpose of the reduction. Accordingly, the principles set out in *Gambotto* v *WCP Ltd* (1994-95) 182 CLR 432 do not apply to the expropriation of rights under this mechanism.

12.26 In any Court challenge to a reduction the company will have the onus of proving that the reduction is fair and reasonable to the company's shareholders as a whole and does not materially prejudice the company's ability to pay its creditors (Bill Schedule 5 Items 28-30).

Notice of the reduction of capital

12.27 It is important that a company's creditors are able to receive advance notice of a proposed capital reduction, so that they can exercise their rights (for example, to seek an injunction under current section 1324). The Law currently envisages that creditors will receive notice of capital reductions by requiring the company either to discharge or secure its debts, or obtain its creditor's consent to the reduction (current s 195(3), Bill s 256C(4)). However, the Court has a discretion to make an order dispensing with the need for this notice (current s 195(4), Bill s 256C(6)), and will usually do so if the company is able to show that all of its secured and major trading creditors have consented to the reduction, and demonstrate that after the reduction its assets will exceed its liabilities.

12.28 For a selective reduction of capital, the requirement to lodge the notice of the meeting and the accompanying disclosure statement with the ASC before sending them to shareholders (Bill Schedule 5 Item 18 s 256C(5)) and the requirement to give the ASC at least 14 days notice of shareholder approval before making the reduction (Bill Schedule 5 Item 18 s 256C(3)) will mean that a company will usually be required to give at least 35 days notice to the ASC of a proposed reduction of capital. Creditors and other interested persons will therefore be able to receive advance notice of a proposed reduction through the ASC's Alert system. (This service gives a subscriber notice of a specified type of document lodged with the ASC in relation to a specified company.) For companies to which the short notice rules are available, the ASC will be given at least 14 days notice of a proposed reduction of capital through the requirement to lodge a copy of the shareholder-approval resolution within 14 days after it is passed, and to not make the reduction until 14 days after lodgment (Bill Schedule 5 Item 18 s 256C(3)).

12.29 If a company reduces its share capital on terms involving the cancellation of a share, it will be required to lodge a notice with the ASC setting out particulars relating to

the cancellation (Bill s 254Y). For large proprietary companies and public companies, the impact of the capital reduction will also be reflected in the financial statements they lodge with the ASC (Bill s 319).

12.30 The Bill will set out the consequences of a company making a capital reduction that does not comply with Bill Schedule 5 Item 18 subsection 256B(1) (Bill Schedule 5 Item 18 s 256D). In order to promote commercial certainty, the Law currently denies a right to challenge a capital reduction once the ASC has issued a compliance certificate (current s 195(6) - (8)). The Bill will ensure that this certainty is achieved more directly, providing that the validity of a capital reduction is not affected by the fact that it is undertaken in contravention of the capital reduction procedures (Bill s256F(2)(a), Schedule 5 Item 18 s 256D(2)(a)). Further, a company that makes a reduction of capital that does not comply with Bill section 256A(1) or Schedule 5 Item 18 section 256B(1) will not be guilty of an offence (Bill s256F(2)(b), Schedule 5 Item 18 s 256D(2)(b)). However, any person who is involved in the contravention will contravene the Law, and may be subject to civil penalty orders and criminal consequences under current Part 9.4B (Bill s 256F(3), Schedule 5 Item 18 s 256D(3) and Item 27).

Stopping an improper capital reduction

12.31 The Law currently enables a person whose interests would be affected by a contravention of the Law to seek an injunction to prevent the contravention (current s 1324(1)). The Bill facilitates shareholders and creditors taking action to stop an improper capital reduction by treating:

(a) a company's contravention of the fair and reasonable test as affecting the interests of a shareholder; and

(b) a capital reduction that would prejudice the company's ability to pay its creditors as affecting the interests of a creditor or member of the company (Bill Schedule 5 Item s 28-30).

12.32 Consistent with the present approach of the courts, in an application for an injunction the onus of proof will be on the company to show that the reduction is fair and reasonable, or that it would not prejudice the company's ability to pay its creditors (current s 588G; Bill Schedule 5 Item 30).

12.33 Companies will be required to lodge the following documents with the ASC in connection with a capital reduction:

(a) the notice of the shareholder approval meeting, together with any shareholder information statement - to be lodged before the notice is sent to shareholders (Bill Schedule 5 Item 18 s 256C(5))

(b) a copy of the resolution approving the transaction - to be lodged within 14 days after it is passed (Bill Schedule 5 Item 18 s 256C(3))

12.34 These documents will give shareholders and creditors access (through the ASC's Alert system) to sufficient information to decide whether they should seek an injunction.

12.35 In line with the approach taken in relation to share buy-backs, the ASC will be able to refer to the Corporations and Securities Panel a reduction of capital that is unreasonable having regard to its effect on the control of the company or another company (Bill Schedule 2 Item 226). If the Panel declares that a person's conduct in

relation to shares was unacceptable, it may make a wide variety of orders, including an order cancelling agreements or directing a company not to make payments of amounts due by the company in respect of the shares.

Capital reductions and par value

12.36 The Law currently requires the nominal value of a company's issued share capital to be a multiple of the number of shares it has on issue (current s 117 (1)(b), Bill s 117(2)(k)). Therefore, when a company reduces its share capital under current section 195 it must either cancel, or reduce the par value of, some of its issued shares.

12.37 The introduction of no par value breaks the nexus between the nominal value of a company's share capital and the number of shares it has on issue (Bill Schedule 5 Item 1). No par value will make it possible for a company to cancel a share without making a corresponding reduction of its share capital account.

12.38 As the cancellation of a share for no consideration will not affect the company's financial position or its ability to pay its creditors, modified rules will apply to these reductions. In particular, there is no need to require that the reduction not materially prejudice the company's ability to pay its creditors (Bill Schedule 5 Item 18 s 256B(1)). Further, a selective reduction involving the cancellation of shares will require the approval by special resolution of the shareholders whose shares are to be cancelled (Bill Schedule 5 Item 18 s 256C(2)). This is intended to ensure that selective share cancellations for no consideration will be approved by the requisite majority of those shareholders whose shares are being cancelled.

Other reductions of capital

12.39 Division 3 of Part 2J.1 (Bill s 258A - 258D) sets out capital reductions that are authorised by law, and which therefore do not need to comply with Bill section 256A(1)(b) or Schedule 5 Item 18 section 256B(1) of the Bill:

(a) The common-law prohibition on companies reducing their share capital does not apply to unlimited companies. The Bill will preserve the existing statutory exemption from the share capital reduction rules for these companies (Bill s 258A).

(b) The Law currently contains an exemption from the capital reduction provisions to cover the situation where, under a company-title home unit scheme, the company grants a lease or right of occupancy or use in relation to the unit (current s 195(13) - (14)). This exemption is preserved and, to avoid doubt, expressly covers rights in the nature of contractual rights that are granted under such schemes (Bill s 258B). The Bill will also incorporate the effect of Part 14 of the existing State covering clauses, by authorising the transfer by a company of an estate or interest in land to a person in exchange for their rights under a company title home unit scheme (Bill s 258B).

(c) In order to remove any doubt about the validity of brokerage or commission paid to the underwriter of a share issue, the Bill will preserve and streamline current sections 203 and 204. A company will be able to pay brokerage or commission to a person in respect of their agreeing to take up schemes, without any need to comply with the share capital procedures (Bill s 258C). A particular advantage will be the removal of the existing restriction on the amount of any brokerage or commission that may be paid.

(d) The Law currently authorises a company to cancel shares that have been forfeited and reduce its share capital by the amount of shares cancelled (current s 193(1)(e)). The Bill preserves this exemption by authorising companies to cancel shares that have been forfeited under the terms on which they are on issue (Bill s 258D). The cancellation will have to be authorised by resolution passed at a general meeting. Companies that want a power to forfeit shares will no longer need to include the power to forfeit shares in their constitutions.

(e) The effect of the existing exemption from the share capital reduction procedures for share cancellations made in the context of a takeover (current section 195(15)) will be continued. Any share capital reduction involved in the cancellation of a share as a result of a takeover offeree returning share certificates under current section 667(3) will be authorised (Bill s 258E, Schedule 5 Item 22 s 258E). The Bill will also authorise a share capital reduction involved in the cancellation of shares issued on an out-of-date prospectus application form and returned to the company under current section 1024E(7) (Bill s 258E, Schedule 5 Item 22 s 258E).

(f) Currently, a capital reduction that involves the cancellation of paid-up share capital that is lost or not represented by available assets is subject to the requirements of current section 195, which include court confirmation. Under the Bill, a cancellation of paid-up share capital that is lost or not represented by available assets will be authorised (and therefore exempt from the procedures in Bill Schedule 5 Item 18 subsection 256B(1)) unless the cancellation also involves cancelling shares (Bill Schedule 5 Item 18 s 258F). As with existing section 195(1)(b), this section will not apply in the case of trading losses incurred in the ordinary course of business, but is intended to apply in cases where company assets disappear (for example, are stolen, or destroyed by fire).

12.40 A redemption of redeemable preference shares that is funded out of the proceeds of a new issue of shares made for the purpose of the redemption is a reduction in share capital, and would ordinarily need to comply with the capital reduction procedures. However, it will be taken to be authorised for the purpose of Bill section 256A and Bill Schedule 5 Item 18 section 256B, and will not need to comply with the capital reduction procedures established by Part 2J.1 (Bill s 258E(1)(a) and Schedule 5 Item 22 s 258E(a)). This is intended to preserve the practical effect of current subsection 192(2).

12.41 Currently, a company is prohibited from paying interest (dividends) on share capital in respect of shares that are issued to finance capital works, unless the company complies with specific approval procedures and statutory conditions (current s 202). The Bill will repeal that prohibition and allow these payments to be made as selective capital reductions. After commencement of Schedule 2 of the Bill, the Law as it stood immediately before commencement of Schedule 2 will continue to apply to a court order made prior to that commencement approving a scheme under section 202, or an application for such an order (Bill s 1430).

Share buy-backs

12.42 The Law's share buy-back rules were inserted by the *First Corporate Law Simplification Act 1995* in Division 4B of Chapter 2 of the Law. The Bill will re-enact the rules in Division 2 of Part 2J.1 (Bill s 257AA, 257A, 257B, 257C, 257D, 257E, 257F,257G, 257H, 257J).

12.43 The definition of 'employee share scheme buy-back' has also been amended by incorporating reference to persons who currently fall within the definition of 'participating employee', avoiding the need to refer to 2 separate definitions (Bill Schedule 2 Item 196). The definition of 'participating employee' will be repealed (Bill Schedule 2 Item 203).

12.44 The following consequential amendments will make the share buy-back rules consistent with the new capital reduction rules:

(a) a company will be permitted to buy back redeemable preference shares on terms different from the terms of redemption on which the shares are on issue (Bill s 254J(2))

(b) a new requirement will be introduced that a buy-back not materially prejudice the company's ability to pay its creditors (Bill s 257A(a))

(c) the company will be required to give 14 days notice to the ASC before making a buy-back approved by shareholders (Bill s 257F).

12.45 Also, the purpose section will be relocated and apply generally to Part 2J.1 (Bill Schedule 5 Items 17 and 19).

12.46 The ASX Business Rules previously required trading of a 'marketable parcel' of shares, defined as a minimum number of securities trading at a particular price (for example, 200 shares where the price did not exceed 25 cents). However, a number of exceptions permitted dealings in smaller parcels known as 'odd lots'. Consistent with the introduction of the electronic trading system (CHESS), the concept of dealing in odd lots has been abolished, and the rules amended to permit trading in units of 1 security. Although the requirement for trading marketable parcels has been abolished, the concept of marketable parcel has been retained because of its relevance to the Securities Clearing House Business Rules (in particular, the prohibition on creating new holdings of less than a marketable parcel).

12.47 The Bill will bring the Law into line with these changes by replacing the term 'odd lot buy-back' with 'minimum holding buy-back' (Bill s 257B(1), Schedule 2 Items 200, 201, 206). The concept of 'minimum holding buy-back' (which will be defined by reference to the listing rules concept of marketable parcel) has been used because, for persons unfamiliar with the ASX rules, it describes the content of the rule more accurately than 'marketable parcel'. The Law's definition of 'marketable parcel' will be repealed (Bill Schedule 2 Item 199).

12.48 Currently it is possible for an odd lot buy-back to involve the buy-back of only some of a shareholder's shares. Under the Bill, a minimum holding buy-back will have to involve buying back all of the shareholder's shares in a listed corporation, and those shares must be fewer in number than a marketable parcel.

12.49 The Bill will also expand the concept of 'on market' buy-back to include a buy-back undertaken by a company on a securities market outside Australia that has been declared by the ASC for the purposes of the section (s 257B(7)).

Part 2J.2 - Self-acquisition and control of shares

Direct self-acquisitions

12.50 The Law currently prohibits a company from acquiring its shares or units of its shares, or lending money on the security of those shares (current s 205(1)). The Bill maintains this prohibition (Bill s 259A and 259B). Section 259A of the Bill also provides for the prohibition to be subject to the following 2 exceptions, which are based on exceptions in the current provisions:

(a) the acquisition of a share under a court order (current s 205(8)(f))

(b) the acquisition of an interest (other than a legal interest) in fully-paid shares in the company if no consideration is given for the acquisition (current s 205(8)(e)) - this exception reflects the common law principle in *Kirby v Wilkins* [1929] 2 Ch 444.)

12.51 Further, a company will not infringe the prohibition if it acquires its own shares following the share buy-back procedures in Division 2 of Part 2J.1 (Bill s 259A). Under those procedures, a share is cancelled immediately after the registration of the transfer to the company (Bill s 257H(3)).

12.52 To facilitate employee share schemes, companies will be able to take a security over shares issued under a member approved employee share scheme (Bill s 259B(2)). The employee share scheme will have to be approved by resolution at a general meeting of the company. If the company is a subsidiary, the scheme will also have to be approved by resolution at a general meeting of the company's listed holding company in Australia or, if it doesn't have one, by any holding company that does not itself have a holding company incorporated in Australia (Bill s 259B(2)).

12.53 The term 'domestic corporation', which is used in the provision, will be defined to mean a corporation incorporated or formed in Australia or an external Territory (Bill Schedule 2 Item 194). This is intended to avoid the unnecessary time and expense that would be involved where the company's listed holding company is a foreign corporation.

12.54 The Bill will insert a definition of 'employee share scheme' (Bill Schedule 2 Item 195), which will include schemes for the acquisition of shares by a corporation. However, the corporation's membership must be entirely comprised of employees or salaried executive directors of the company or a related body corporate. This will enable the beneficiaries of a scheme greater flexibility in organising their affairs.

12.55 There will also be an exemption in the case of a security taken over shares in a company whose ordinary business includes providing finance (current s 205(8)(d); Bill s 259B(3)). "Providing finance" will be defined in section 9, to mean lending money, giving guarantees or security for loans, and drawing, accepting, negotiating or discounting a bill of exchange, cheque, payment order or promissory note so that someone can obtain funds (Bill Schedule 2 Item 204).

12.56 A company that acquires a legal interest in its shares through exercising the security must cease to hold those shares within 12 months of the acquisition (Bill s 259B(4)), and voting rights attaching shares cannot be exercised while the company holds the shares (Bill s 259B(5)).

12.57 The Bill will set out the consequences of a company's contravention of the prohibitions in sections 259A and 259B. To promote certainty and protect the interests of third parties, the contravention will not affect the validity of the acquisition or security, or of any contract or transaction connected with it (Bill s 259F(1)). While the company will not be guilty of an offence, any person who is involved in the contravention will contravene the Law (Bill s 259F(2)) and may be subject to civil penalty orders and criminal consequences (Bill Schedule 2 Item 238).

Indirect self-acquisitions

12.58 The Bill will make 3 changes to the rules on indirect self-acquisitions in current section 185 and paragraph 205(1)(b). First, the Bill will extend the prohibition on indirect self-acquisitions to situations where a company is able to control another entity that holds an interest in the company (Bill s 259B(1)). For example, the prohibition will apply where a partnership controlled by the company holds an interest in the company.

12.59 Secondly, the existing application of the prohibition to cases where the holding company is a company limited by guarantee or an unlimited company (current s 185(10)) will not be continued under the Bill.

12.60 Thirdly, the prohibition will be extended to cover cases of actual control, rather than merely legal control as under the present subsidiary/holding company definition. The definition of control in section 259E of the Bill is based on the current accounting standards definition (AASB 1024). A company will control an entity where it has the capacity to determine the outcome of decisions about the entity's financial and operating policies (Bill s 259E(1)).

12.61 Control will not need to be actively exercised: what is relevant is the practical influence that the company can assert (Bill s 259E(2)(a)). Therefore, the mere fact that an entity acts in a manner consistent with the interests of a 'controlling' company may be sufficient to indicate control. While control may also be indicated by economic dependence of an entity on the company (for example, where a company is a major creditor of an entity), control of voting power will usually be more important. A short-lived (for example, for a number of hours only) ability to control the outcome of decisions taken by the company would be unlikely to satisfy the control test. This is because such a short-term ability is unlikely in practice to give a company the ability to determine the outcome of decisions about the company's policies. Any practice or pattern of behaviour must be taken into account in assessing a company's capacity (Bill s 259E(2)(b)).

12.62 To make the test as closely aligned as possible with the definition of control in the accounting standards:

(a) the fact that the company and another unrelated entity have an equal interest in the entity (as may occur, for example, under a joint venture agreement) will not of itself mean that the company controls the entity (Bill s 259E(3))

(b) where a company is under a legal obligation to exercise its capacity to control an entity for the benefit of someone other than its own shareholders (for example, a trustee whose relationship with a trust does not extend beyond the normal responsibilities of a trustee) it will not be taken to control the entity merely because of that obligation (Bill s 259E(4)).

12.63 The Bill also incorporates a number of measures intended to allow companies to take some steps preparatory to the unwinding of a 'controlled member' relationship. For example, a company that controls an entity at commencement will be able to increase the capacity that gives it that control, and entities that are wholly-owned subsidiaries will be able to transfer the shares to another wholly-owned subsidiary. However, in each case, the entity must within 12 months either cease to hold the shares or cease to be controlled by the company that has issued them (Bill s 259D(1)).

12.64 In line with the current paragraph 185(8)(a), the Bill prohibits a controlled entity voting at meetings of its controlling company (Bill s 259D(3)). However, if this prohibition is contravened, the relevant meeting or resolution will only be invalid if the court considers both that substantial injustice has been caused or may be caused and that the injustice cannot be remedied by any other order of the court, and the court declares the meeting or resolution to be invalid (Bill Schedule 2 Item 239).

12.65 As at present, the entity will cease to be a member of the controlling company if the shares held by it are cancelled under a reduction of capital or share buy-back. If at the end of the 12 months the entity retains an interest in the controlling company and is still controlled by the controlling company, the controlling company will be guilty of an offence for each day that the situation continues (Bill s 259D(4)).

12.66 Currently, the Court may extend the 12 month period (current s 185(8)(b)). The Bill confers the power to extend the 12 month period on the ASC instead of the Court, as it does not involve a dispute between the parties and is analogous to the ASC's power to modify the Law in relation to takeovers (Bill s 259D(1)). To avoid uncertainty, and to promote compliance with the Law, the period may only be extended if the company applies for the extension before the end of the initial 12 month period.

Issue or transfer of shares to a controlled entity

12.67 The acquisition by a company of shares or units of shares in a holding company is currently regulated by sections 185 and 205(1)(b)(ii). Under the Bill, the issue or transfer of shares or units of shares by a company to an entity controlled by that company will generally be void (Bill s 259C(1)), although the ASC will have a discretion to exempt a company from the operation of this rule (Bill s 259C(2)). It is envisaged that the ASC would exercise this discretion to exempt investments by the statutory fund of a life insurance company in its holding company on conditions designed to provide appropriate safeguards including ensuring that the holding company is not able to inappropriately exercise control over its own shares.

12.68 The Bill will establish new exceptions for the issue or transfer of shares:

(a) by a company to its existing members in a non-discriminatory manner (Bill s 259C(1)(c))

(b) by a wholly-owned subsidiary of a body corporate to another wholly-owned subsidiary of that body corporate (Bill s 259C(1)(d)).

12.69 In each case the acquiring entity will be obliged to dispose of the shares within 12 months of the acquisition (Bill s 259D(1)).

Controlling an entity that holds shares in the company

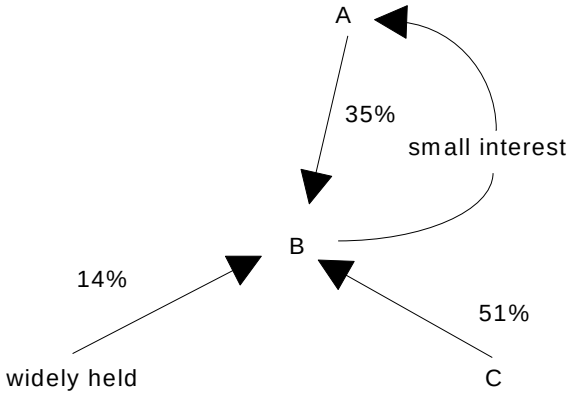
12.70 A company can acquire control of an entity that holds shares in the company without itself having taken any active steps to acquire a new interest in the entity. For example:

(a) company A holds 35% of company B

(b) company B holds a small interest in company A

(c) company C holds 51% of company B (and therefore controls company B)

(d) the remaining 14% of company B is widely held.



12.71 If C divests itself entirely of its 51% interest to unassociated small shareholders, A will be left with a controlling 35% interest in B, which holds shares A has on issue. In these circumstances, A will have obtained control of an entity (B) that holds shares in A, and A will be required to end its control of B, or B to dispose of these shares (Bill s 259D(1)(a)).

12.72 The Law currently prevents a body corporate that is a subsidiary of a holding company from voting at meetings of the holding company, and in some circumstances requires the subsidiary to dispose of its shares in the holding company. These requirements will continue to apply (Bill s 1434).

12.73 The rules in section 259D of the Bill apply only to obtaining control, increasing control and other transactions occurring after commencement. For example, if A obtained control of B prior to commencement, A would not be required to end its control of B, nor B to dispose of its shares in A. However, if A were to increase its control in B after commencement, then within 12 months either A must end its control of B, or B must cease to hold the shares (Bill s 259D(1)).

Unacceptable self acquisition schemes

12.74 Division 4A of Part 2.4 of the Law (Unacceptable self-acquisition schemes) will be repealed. Instead, the ASC will be able to apply to the Corporations and Securities Panel for a declaration where a company acquires a relevant interest in at least 5% of its voting shares (the substantial shareholder threshold) and that acquisition has an unreasonable effect on the control of the company or another company (Bill Schedule 2 Item 226).

Part 2J.3 - Financial assistance

12.75 The giving of financial assistance by a company for the purchase of its own shares is prohibited by current paragraph 205(1)(a), unless the company complies with an expensive shareholder-approval procedure. The prohibition performs a useful function in deterring a range of undesirable transactions having the potential to prejudice a company's financial position. However, it impedes many normal commercial transactions.

12.76 The Bill therefore prevents a company giving financial assistance to a person to acquire shares, or units of shares, in the company or a holding company if the transaction would materially prejudice the interests of the company or its shareholders, or materially prejudice the company's ability to pay its creditors (Bill s 260A(1)(a)). This is subject to the exception that a company will be able to give financial assistance if the transaction has been approved by the company's shareholders in the manner set out in section 260B (Bill s 260A(1)(b)). This approach is intended to minimise the difficulties the rule currently causes for ordinary commercial transactions. In particular, for transactions which do not involve material prejudice, the new rules will make it unnecessary to decide whether the transaction involves the giving of financial assistance. The new rules will bring the requirements for financial assistance more closely into line with those proposed for capital reductions.

12.77 Whether a particular transaction involves a material prejudice, and therefore requires shareholder approval, will be a question of fact to be answered in light of the circumstances of each case. For example, material prejudice to the company, its shareholders, and the company's ability to pay its creditors may occur if a company withdraws a large amount of money from its bank and lends it to a company that is bordering on insolvency, or if it guarantees a loan to a company that is likely to default. In particular, it will not be possible to determine whether the transaction involves material prejudice merely by reference to arbitrary rules, such as the percentage impact the transaction will have on the company's profit.

12.78 Shareholder approval of a financial assistance transaction may be given by:

(a) a special resolution passed at a general meeting of the company, with no vote being cast in favour of the resolution by the person acquiring the shares or units of shares, or their associates, or

(b) a resolution agreed to by all ordinary shareholders (Bill s 260B(1)).

12.79 The restriction on persons acquiring shares from voting in favour of the resolution is intended to avoid the vote on a special resolution being controlled by those who will directly benefit from the financial assistance. The procedure for approval by resolution agreed to by all ordinary shareholders has been added, to avoid a situation where all shareholders are prohibited from voting in favour of a resolution to approve the financial assistance.

12.80 When a company giving financial assistance will have a different holding company before and after the acquisition to which the financial assistance relates, shareholder approval by special resolution will be required from the company that will be its holding company after the acquisition occurs (Bill s 260B(2) and (3)). This is

designed to ensure that the transaction is approved by the shareholders who will have to bear any burden associated with the transaction once it is completed.

12.81 A copy of any required special resolution will need to be lodged with the ASC within 14 days after it is passed (Bill s 260B(7)).

12.82 Currently, if shareholder approval is sought for a subsidiary giving financial assistance, the transaction must be approved by any listed corporation that is its holding company or, if there is no listed holding company, any ultimate holding company that is incorporated in Australia (current s 205(10)). However, in practice this leads to unnecessary expense where the listed corporation is a foreign company. Further, if there is no listed holding company and the ultimate holding company is incorporated outside Australia, there is no requirement for shareholder approval by any holding company of the company.

12.83 The Bill will therefore confine the need to seek shareholder approval to listed corporations which are formed in Australia and, if there is no Australian listed holding company, require shareholder approval by any Australian holding company that does not itself have a holding company incorporated in Australia (Bill ss 260B(2) and (3)).

12.84 Where shareholder approval is required, the notice of meeting must be accompanied by a statement setting out all known information that is material to the decision how to vote on the resolution (Bill s 260B(4)). This requirement is intended to ensure the members make an informed decision how to vote on the resolution. A copy of the notice of meeting, and documents that will accompany the notice, must be lodged with the ASC before the notice of meeting is sent to members (Bill s 260B(5)), and the company must lodge with the ASC, at least 14 days in advance of giving the financial assistance, a notice stating that the giving of financial assistance has been approved under section 260B (Bill s 260B(6)). This will enable creditors and the other interested persons to receive notice of a proposed financial assistance transaction through the ASC's Alert system.

12.85 The Law currently contains a range of exceptions to the prohibition that relate to financial assistance given in the ordinary course of commercial dealing, and financial assistance given in the ordinary course of a moneylending business (current s 205(8) and (9)). These exceptions will be preserved (Bill s 260C).

12.86 In order to promote certainty and protect the interests of third parties, the fact that financial assistance is provided in contravention of section 260A will not affect the validity of the assistance, or of any contract or transaction connected with it (Bill s 260D(1)). While the company will not be guilty of an offence, any person who is involved in the contravention will contravene the Law (Bill s 260D(2)), and may be subject to civil penalty orders and criminal consequences (Bill Schedule 2 Item 238).

Employee share schemes

12.87 The Bill includes a number of provisions designed to facilitate employee share schemes. In particular, a company will be able to:

(a) follow a simpler procedure for buying back shares issued under an employee share scheme (Bill s 257B)

(b) take a security over shares issued under an approved employee share scheme (Bill s 259B(2))

(c) give financial assistance for the acquisition of its shares under an approved employee share scheme (Bill s 260C(4)).

12.88 The concept of employee share scheme is currently limited to schemes that have as their purpose the acquisition of shares in a company by, or on behalf of participating employees. In the case of the Law's financial assistance provisions, the concept is further limited to schemes for the acquisition of fully-paid shares. Under the Bill, 'employee share scheme' will be defined to mean a scheme for the acquisition of shares:

(a) by employees of the company or a related body corporate, or directors of the company, or of a related body corporate, who hold salaried employment or office in the company or body corporate

(b) for the benefit of those employees and directors (for example, whose shares are issued to a trustee to be held on trust for the employees or directors)

(c) by a corporation, all of whose members are employees or executive directors (Bill Schedule 2 Item 195).

12.89 This will give companies increased flexibility in structuring their share schemes.

Transfer and transmission of shares

12.90 The Bill will move to Part 7.13 of the Law the following rules dealing with transfer and transmission of shares: section 208, section 213, Table A regulation 6, 19 - 25 (Bill Schedule 2 Items 234, 236, Schedule 3 Items 29, 30). The sections inserted by Bill Schedule 2 Items 234 and 236 will be replaceable rules. Schedule 3 Items 29 and 30 of the Bill will commence operation before the items in the other Schedules (Bill clause 2). The Bill will make consequential amendments to take account of the renumbering of current section 208 as section 1096A of the Bill (Bill Schedule 2 Items 212 - 214) and current section 213 as section 1091C (Bill Schedule 2 Item 209).

12.91 The Bill will also add a new replaceable rule dealing with the transmission of shares on mental incapacity (Bill Schedule 2, Item 235), based on the provision concerning transmission of shares on bankruptcy (Bill Schedule 2 Item 234 s 1091AB).

12.92 Table A subregulations 19(1) and (2) have been omitted because the absolute discretion to be vested in the directors of a proprietary company should be sufficient to enable them to control the transfer of the company's shares (Bill Schedule 2 Item 236 s 1091E). This provision will also allow proprietary companies to protect their closely-held status without needing to rely on a provision to similar effect in a constitution.

Schedule 3 penalties

12.93 Schedule 3 of the Law will be amended to insert penalties for contraventions of provisions inserted by the Bill, and to omit references to sections that will be repealed by the Bill (Bill Schedule 2 Item 241).

Chapter 2K: Charges

The provisions in current Part 3.5 will be renumbered and become new Chapter 2K (Bill Schedule 3 Item 145).

13

Chapter 2M: Financial reports and audit

13.1 The changes to the Corporations Law contained in Chapter 2M and the related consequential amendments in Schedule 2 of the Bill will replace existing Parts 3.6, 4.4 and 4.5 and Divisions 2 and 3 of Part 3.7 of the Law.

13.2 The Bill brings together into a single chapter provisions dealing with financial statements and audit requirements which are currently dispersed throughout the Law and the Corporations Regulations.

13.3 The new provisions require certain companies, managed investment schemes and disclosing entities to prepare financial reports and have them audited. For these entities, the financial report and auditor's report, as well as the directors' report to members, will, in most cases, have to be sent to members and lodged with the ASC.

Accounting standards and the Law

13.4 The Law currently contains specific rules dealing with accounting methodology. The inclusion of these rules in the Law burdens it with material more appropriately dealt with in accounting standards.

13.5 The Bill will therefore reduce the overlap between the Law and the standards by removing detailed accounting rules from the Law and leaving them to be dealt with in accounting standards. A number of consequential amendments in the Bill reflect the removal of technical accounting rules from the Law.

13.6 Under the approach taken in the Bill, specific procedures for the preparation and lodgment of consolidated financial statements are not set out in the Law. Instead, the Bill merely refers, within the context of the rules dealing with financial statements, to the obligation to prepare consolidated financial statements as required by the accounting standards (Bill ss 296 and 304). Consistent with this approach, Chapter 2M adopts the definitions of 'control' and 'economic entity' used in Accounting Standard AASB 1024: Consolidated Accounts.

Application of Chapter 2M to managed investment schemes

13.7 The *Managed Investments Bill 1997* sets out a regulatory regime for registered managed investment schemes. Chapter 2M complements the *Managed Investments Bill* and imposes financial record keeping and reporting obligations on registered managed investment schemes. For the most part, these schemes are treated similarly to public companies throughout the Chapter.

13.8 The new rules replace the accounting requirements for prescribed interest schemes. These are presently set out in Division 11 of Part 3.6, Division 5 of Part 7.12 and in the special rules applying to property trusts contained in paragraphs 7.12.15(5)(o) and (p) of the Corporations Regulations.

13.9 The Bill recognises that managed investment schemes are not separate legal entities and adopts special rules to apply Chapter 2M to these schemes (Bill s 285(3)). In particular, the responsible entity of a scheme is responsible for the obligations in respect of the scheme and the directors and officers of the responsible entity are treated as the directors and officers of the scheme (Bill s 285(3)(a) and (b)).

Financial records

13.10 The Bill requires bodies to keep written financial records (Bill s 286). The reference to the term 'written' does not preclude bodies keeping their records in electronic form, as the definition of 'writing' in section 9 of the Law extends to computerised records.

13.11 The Bill inserts into section 9 a definition of 'financial records' (Bill Schedule 2 Items 244 and 266). The documents referred to in this definition are those documents necessary to correctly record and explain the transactions and financial position and performance of the company, scheme or entity and enable true and fair financial statements to be prepared and audited as required by subsection 286(1) of the Bill. These documents include invoices, receipts, orders for the payment of money, bills of exchange, cheques, promissory notes, documents of prime entry, working papers and other documents necessary to explain the methods by which financial statements are made up and adjustments are made in preparing financial statements. The change in description from 'accounting records' to 'financial records' follows from the changed references to the names of accounting documents required by the Law to 'financial statements' and 'financial report'.

13.12 The Bill does not retain the current requirement that sufficient records be kept to allow them to be reviewed (current s 289(1)(b)(ii)). If sufficient records are kept to enable an audit to be conducted, a review of the documents will also be possible (Bill s 286(1)(b)).

13.13 The obligation to keep financial records for 7 years after the transactions covered by the records are completed has been retained (Bill s 286(2)).

13.14 Financial records may be kept in any language as long as an English translation of the records is available for inspection within a reasonable time (Bill s 287). Similarly, records may be kept in electronic form, provided they are convertible into hard copy and

made available for inspection within a reasonable time (Bill s 288). Records kept in a language other than English or in electronic form need only be made available under these provisions to a person who is entitled to inspect them (Bill s 287).

13.15 The Bill retains the current distinction in the Law between records kept in Australia and records kept overseas (Bill s 289). Companies keeping records outside Australia must currently keep sufficient records in Australia to allow true and fair accounts to be prepared and must notify the ASC of the location of the duplicate records in Australia, if they are kept at a place other than the company's registered office (current s 289).

13.16 The Bill extends this notification requirement for companies, registered schemes or disclosing entities which keep their records overseas. Financial records may be kept at a place determined by the company, responsible entity of a registered scheme or disclosing entity (Bill s 289(1)). If records are kept overseas, the ASC needs to be notified of the location of the 'duplicate' set kept in Australia, even if they are kept at the registered office (Bill s 289(2)). This requirement is designed to ensure that the ASC is notified if a company, scheme or entity keeps its financial records overseas. The ASC will retain its power to require the production of financial records kept outside Australia (Bill s 289(3)).

13.17 Director access provisions and signposts to the provisions that give members, auditors, controllers and the ASC access to financial records are contained in sections 290 and 291 of the Bill. The Bill allows a court to authorise a person to inspect financial records on behalf of a director (Bill s 290(2)). Where this authorisation is given, the court can make a further order limiting the use of information obtained during the inspection.

Obligation to prepare annual reports

13.18 Disclosing entities, public companies, large proprietary companies and registered collective investment schemes will be required to prepare annual financial reports and directors' reports (Bill s 292). The obligation continues to apply to all disclosing entities incorporated or formed in an Australian jurisdiction, whether or not they are companies or registered schemes (Bill s 285(2)).

13.19 The Bill reenacts the distinction between small and large proprietary companies introduced by the *First Corporate Law Simplification Act 1995*. As at present, small proprietary companies will not have to prepare and lodge annual financial reports or directors' reports, unless directed to do so by at least 5% of members or the ASC or, in some cases, if they are controlled by a foreign company (Bill ss 292(2), 293 and 294).

13.20 A foreign controlled small proprietary company must prepare an individual financial report and obtain an auditor's report, as well as preparing a directors' report, if:

(a) it was controlled by a foreign company for all or part of the year (according to the test for 'control' set out in *AASB 1O24: Consolidated Accounts*); and

(b) during the period when it was controlled, it was not consolidated in financial statements for that year lodged with the ASC by a registered foreign company or by an Australian company, registered scheme or disclosing entity (Bill s 292(2)(b)).

13.21 The Bill proceeds on the basis that financial reporting by small proprietary companies which are foreign controlled should, as far as possible, equate with the reporting requirements of small proprietary companies which are controlled by Australian companies. Accordingly, a small proprietary company will be required to prepare a financial report if the controlling registered foreign company does not prepare and lodge financial statements with the ASC which consolidate the affairs of the small proprietary company for the period in which it was controlled.

13.22 An Australian company which controls a small proprietary company is required to consolidate the small proprietary company in its consolidated financial report if it comes within the scope of *AASB 1024: Consolidated Accounts*. While it would not be appropriate for the Corporations Law to generally require a registered foreign company to prepare consolidated financial statements, that company may consolidate the small proprietary company in financial statements prepared under the law of its jurisdiction of incorporation. If consolidated accounts of this kind are lodged with the ASC in accordance with the requirements in current section 349, the remainder of Chapter 2M will not apply to the small proprietary company.

13.23 In some cases, a small proprietary company which is ultimately foreign controlled will be directly controlled by an Australian company, registered scheme or disclosing entity. If the interposed company, scheme or entity lodges financial statements and reports which consolidate the small proprietary company, the remainder of Chapter 2M will also not apply to the small proprietary company.

13.24 Under proposed paragraph 292(2)(b), circumstances will arise where parity of treatment between foreign controlled small proprietary companies and other small proprietary companies will not occur. The Bill allows for the ASC to issue specific exemption orders (Bill s 340) and also class exemption orders (Bill s 341). The criteria for these exemptions are set out in Bill s 342 and relate to whether compliance with 2M.2 and 2M.3 would make the financial report or other reports misleading, be inappropriate in the circumstances or would impose unreasonable burdens.

Content of the annual financial report

13.25 The Bill specifies the contents of the annual financial report (Bill s 295). To differences between the accounting terminology in the Corporations Law and that used by preparers and users of accounts, the Law will refer to ‘financial statements’, rather than ‘accounts’ and the financial statements, notes and directors’ declaration will be collectively labelled the ‘financial report’. The documents comprising the financial statements will be the profit and loss statement, balance sheet and statement of cash flows and, if required by the accounting standards, consolidations of these documents. This change ensures that the Bill is consistent with the common usage of these terms and their use in AASB instruments.

13.26 The current requirement to prepare a statement of cash flows contained in *AASB 1026: Statement of Cash Flows* only applies to reporting entities. A statement of cash flows will be useful for monitoring the cash inflow and outflow during the year, and has therefore been added to the basic documents required by the Corporations Law for financial reporting to members. It is envisaged that companies without a cash flow would comply with this requirement by including a statement that it had no cash receipts

or payments. The obligation to prepare a cash flow statement will also extend to registered foreign companies (Bill Schedule 2 Items 296, 298, 299, 301 and 302). The ASC's capacity to provide relief from accounting obligations is retained (Bill Part 2M.6).

13.27 As part of the annual financial report, the Bill requires directors to make a declaration about several matters, including the company's solvency (Bill s 295(4)). This obligation also applies to the directors of the responsible entity for a collective investment scheme. Because a scheme is not a separate legal entity, the responsible entity incurs debts on behalf of the scheme. The directors' declaration of solvency required by paragraph 295(4)(c) of the Bill therefore relates to the debts of the scheme (Bill s 285(3)(c)).

13.28 Directors are currently required to sign off on the directors' statements and directors' report for an accounting period (current ss 303 and 310). The Law currently prevents the statement and report from being made more than 42 days before the deadline for an accounting period. The requirement ensures that members receive up-to-date information about the directors' view of the position of the company. These rules cause some inconvenience to companies which would otherwise sign off on the statement and report before 3 months after the end of the financial year, and they have therefore been modified by ASC CO96/277 and 96/278. The Bill removes the complex 42 day rule and requires the directors' declaration and directors' report to be prepared and signed off in time to comply with the obligation to report to members and be lodged with the ASC (Bill ss 295(5), 301, 316 and 320). Under the Bill, companies, schemes or entities are therefore able to sign off on the declaration and report before 3 months after the end of the financial year, should they wish to do so and members are provided with the directors' declaration and report within a similar time frame as under the existing Law.

13.29 The Bill also removes the 42 day sign off requirement for half-year financial reports and replaces it with a rule equivalent to that for annual financial reports (Bill s 303(5)). There is no requirement for directors to sign off on the half-year directors' report.

13.30 A financial report will be required to comply with accounting standards and any further requirements in the Corporations Regulations (Bill s 296). This requirement does not repeat the existing reference in section 298 to 'applicable accounting standards' because each standard describes the companies and entities to which it applies.

13.31 The Bill requires that the financial statements and notes for a financial year give a true and fair view of the financial position and performance of the company, registered scheme or disclosing entity (Bill s 297). This ensures that the financial statements and notes give a true and fair view of the company's whole operations including profit and loss and cash flows, and not just matters relating to the balance sheet. This approach is consistent with the *AASB's Statement of Accounting Concepts SAC2: Objectives of General Purpose Financial Reporting*, which requires that information that is relevant to the assessment of performance, financial position and financing and investing be included in general purpose financial reports.

13.32 The obligation for the financial statements and notes to present a true and fair view will not affect the primary obligation to comply with the accounting standards. If compliance with the accounting standards would not produce financial statements which

give a 'true and fair view', additional information necessary to give the true and fair view must be included in the notes to the financial statements. An equivalent rule will apply to the financial statements and notes for half-year financial reporting (Bill s 305).

Directors' reporting responsibilities

13.33 The Bill requires directors to prepare an annual directors' report containing the existing general disclosure obligations to report to members (Bill ss 298 and 299). The exemption of dormant entities from the directors' statement requirements no longer operates.

Specific disclosures

13.34 The Bill also contains specific disclosure requirements for the annual directors' report (Bill s 300). A number of these disclosures restate requirements currently contained in Division 6 of Part 3.6 of the Law. The others have either been revised and simplified, or repealed where the disclosure is unnecessary.

13.35 The Law currently requires a directors' report to include information about each option that a company or body corporate has granted (current s 308). The Law and the accounting standards require the disclosure of directors' executive officers' remuneration. However, it is unclear the extent to which these provisions require the disclosure of options granted as part of directors' and executive officers' remuneration. The Bill clarifies the position and requires the disclosure of all options granted as part of remuneration over unissued shares or interests in relation to the directors and the 5 most highly remunerated officers of an entity (Bill s 300(1)(d)). This approach takes into account the widespread use of employee share schemes, the operation of existing ASC class orders and the need to provide information to shareholders about the most significant employees of an entity.

13.36 Some specific disclosure requirements (for example, the basis on which the option may be exercised in current paragraphs 308 (3)(c) and 216C(1)(f)) have been removed to take into account the disclosure requirements in relation to the enhanced register of options introduced by the *First Corporate Law Simplification Act 1995*.

13.37 Additional disclosures that were required in directors' reports for certain public companies have now been rationalised (current s 307). Disclosures of directors' shares or interests in contracts or proposed contracts with related parties have been omitted from the Law as these are adequately covered in Accounting Standard AASB 1017: Related Party Disclosures.

13.38 Directors of listed companies will be obliged by the Bill to disclose details of directors' interests (Bill s 300(11)). These interests must also be notified to the relevant securities exchange under current paragraph 235(1)(a). In light of the Managed Investments Bill, a parallel provision extending to the directors of responsible entities for listed schemes has also been inserted (Bill s 300(12)). These provisions ensure that the annual directors' report contains information of directors' interests as at the date of the report, enabling members to gauge the extent of the directors' interests in the enterprise.

13.39 The annual directors' report for a registered managed investment scheme is required to include a number of basic details specific to these schemes (Bill s 300(13)). The report must state the amount of fees paid to the responsible entity out of scheme property during the year and the value of the scheme's assets at the end of the year. This requirement provides members of the scheme with meaningful information regarding the level of management fees.

13.40 Members may not relieve companies, schemes or entities from their obligation to provide the specific details required by section 300 of the Bill. The information to be provided under this section may be relevant to persons other than company members, in particular, company creditors. However, wholly-owned subsidiaries which have the benefit of the ASC class order exempting them from preparing financial reports and directors' reports would continue to be exempted from the specific reporting requirements contained in Bill section 300 (Bill s 1434).

13.41 The specific information required by Bill section 300 does not have to be included in the directors' report if it is included in the financial statements for the financial year (Bill s 300(2)).

13.42 The financial report for a financial year must be audited (Bill s 301).

Half-year reporting for disclosing entities

13.43 The Bill sets out half-year reporting responsibilities in Division 2 of Part 2M.3 (Bill ss 302-306 and 319). These are based on a number of the requirements in the annual financial reporting provisions.

13.44 The half-year reporting requirements for disclosing entities, which were introduced by the *Corporate Law Reform Act 1994* and have been in operation since September 1994, are unchanged in substance from the current Law.

13.45 The true and fair view requirement in the context of half-year financial reporting must take into account the more limited scope of half-year financial reporting in comparison with full-year financial reporting.

Audit and audit report

13.46 Division 3 of Part 2M.3 brings together the statutory duties of the auditor when conducting an audit of financial statements (Bill ss 307-313). The Bill sets out the matters about which the auditor is required to form an opinion when conducting an audit (Bill s 307).

13.47 The choice of a full audit or a review of half-year financial statements, also introduced by the *Corporate Law Reform Act 1994*, is preserved. The Bill sets out the information which an auditor is required to report to members in an audit or review of financial statements (Bill ss 308 and 309).

13.48 When conducting an audit, the auditor must report on whether the financial report is in accordance with the Law, including compliance with the accounting standards and the true and fair view. If the auditor is of the opinion that the financial report does not

meet these requirements, the report must say why (Bill ss 308(1) and 309(1)). The auditor is also required to give details of defects or irregularities in the financial report and of deficiencies, failures or shortcomings in respect of a number of specified matters on which the auditor is required to form an opinion when carrying out the audit (Bill ss 308(3) and 309(3)).

13.49 In reviewing the half-year financial report, the auditor must report to members on whether they became aware of any matter in the course of the review which makes them believe the report does not comply with the half-year reporting requirements (Bill ss 309(4) and (5)).

13.50 The auditor's current rights of access to books and ability to request assistance from any officer for the purpose of the audit or review are preserved (Bill s 310). The Bill will require that a request for assistance be reasonable.

13.51 The position of auditors has been strengthened by converting the current negative obligation on company officers not to obstruct the auditor without lawful excuse (current s 333) into a positive obligation to assist the auditor in the conduct of an audit or review (Bill s 312).

13.52 Under the current Law, an auditor must report to the ASC if the auditor is satisfied that there has been a contravention of the Law (current s 332(10)). The words 'is satisfied' in section 332 were considered by the House of Representatives Standing Committee on Legal and Constitutional Affairs in its November 1991 report, *Corporate Practices and the Rights of Shareholders*. The Committee concluded that those words were undesirable as they require too high a degree of satisfaction before an auditor must report a contravention of the Law. To alleviate this concern, and in accordance with the recommendations of the Committee, the Bill requires an auditor to report to the ASC if they have 'reasonable grounds to suspect' that a contravention of the Law has occurred (Bill s 311(a)). This reduces the level of satisfaction required before an auditor must report and introduces an objective element into the test.

13.53 The Law currently requires an auditor to notify the AASB if they are not satisfied that the company's accounts comply with the accounting standards (current s 332A). Under the Bill, suspected contraventions of the Law must be reported directly to the ASC if the auditor believes they cannot be adequately dealt with by commenting in the audit report or by bringing the matter to the attention of the directors (Bill s 311). The Bill requires financial reports to comply with the accounting standards and therefore a failure to comply with the standards is a contravention of the Law (Bill s 296). The requirement for the auditor to report to the ASC in these circumstances, rather than the AASB, is consistent with the role of the ASC as the enforcement agency in relation to breaches of the Corporations Law.

13.54 The qualified privilege of auditors and other persons is retained (current section 1289).

Annual financial reporting to members

13.55 The Bill specifies the requirements for annual financial reporting to members and establishes the timing requirements for reporting (Bill s 314).

13.56 Public companies, and disclosing entities which are not companies or collective investment schemes, must report to members by the earlier of 4 months after the end of the financial year or 21 days before the AGM (Bill s 315(1)). Large proprietary companies must report to members within 4 months after the end of the financial year (Bill s 315(4)).

13.57 Public companies are currently required to send financial statements and reports to members at least 14 days before the AGM, which must be held within 5 months after the end of the financial year (current ss 245 and 315). As a result, these companies have a maximum of 4 and a half months to report to members.

13.58 The new rule will require public companies to report to members within 4 months after the end of the financial year. This shorter time frame is in line with that introduced for large proprietary companies in the *First Corporate Law Simplification Act 1995*. It also provides adequate opportunity for members to examine the financial report before the company's AGM, which, under the Bill, must be held within 5 months after the end of the financial year (Bill s 250N). The 21 day period specified in paragraph 315(1)(a) of the Bill operates where a company holds its AGM earlier than is required by section 250N.

13.59 Currently, the financial statements of prescribed interest schemes must be sent to interest holders within 90 days after the end of the financial year (current s 1069(1)(f) and r 7.12.14A). This position has been retained, in effect, for collective investment schemes under the Bill (Bill s 315(3)).

13.60 Public company directors will remain under an obligation to lay the financial report, directors' report and auditor's report before the AGM (Bill s 317). If a company's first AGM is held before the completion of the company's first financial year, the financial report is to be presented at the AGM for the following year. The first AGM will still have to be held as required under section 250N of the Bill.

13.61 Collective investment schemes will not be required to hold an AGM.

13.62 As at present, borrowing corporations will be required to give a copy of the annual financial report, directors' report and auditor's report to the trustee for debenture holders by the section 315 deadline (Bill Schedule 2 Item 336).

13.63 Individual debenture holders are entitled to ask for a copy of the last reports sent to members or the full financial report and the directors' report and auditor's report for the last financial year. These reports will be sent as soon as practicable after the request and will be free of charge (Bill s 318).

Concise financial reports for members

13.64 Currently, the Law does not provide for concise financial reporting. The Bill will allow companies, registered schemes or disclosing entities can choose to send a concise financial report to members instead of the full annual financial report (Bill s 314(1)).

13.65 A concise financial report is intended to provide members with information relevant to evaluating the performance and prospects of the business, without giving them fully detailed accounting disclosures. The concise report should be easier to read

than the full financial statements and will provide a useful summary of the company, registered scheme or disclosing entity's financial position.

13.66 A concise financial report will comprise:

(a) concise financial statements drawn up in accordance with accounting standards made for the purposes of concise financial reporting

(b) the annual directors' report

(c) an auditor's statement:

(i) that the full financial statements or consolidated financial statements have been audited, and

(ii) whether, in the auditor's opinion, the concise financial report complies with the accounting standards made for the purposes of concise financial reporting

(d) a copy of any qualification or emphasis of matter in the auditor's report on the financial report

(e) a statement informing members that the full financial statements and reports will be sent to them free of charge, on request (Bill s 314(2)).

13.67 The full annual directors' report will be included in a concise financial report, in view of its importance in communicating significant information to members.

13.68 The concise financial report will contain a copy of any qualification in and of any statements contained in the emphasis of matter section of the full financial report. Members receiving the concise financial report will therefore be informed of any deficiencies in the full report or of any matter which, while not affecting the audit opinion, is important to draw attention to or emphasise, as it is considered relevant to the users of the audit report.

13.69 Members will be able to request that the company, registered scheme or disclosing entity not send any annual material to them if they do not want to receive it (Bill s 316). The provision also enables members to require that the full financial report and directors' and auditor's reports be sent to them. This facility allows members to obtain copies of the full reports if the company, registered scheme or disclosing entity has elected to send only a concise financial report to members.

Lodging financial statements and reports with the ASC

13.70 Financial statements and reports prepared under Chapter 2M must be lodged with the ASC within the specified time period.

13.71 Disclosing entities and registered schemes must lodge their annual financial report within 3 months after the end of the financial year. Non-disclosing entities have 4 months to do so (Bill s 319(3)). The 4 month period reflects the timing requirement for reporting to members, under subsection 315(1) of the Bill and ensures that financial information on the ASC's database is more up to date.

13.72 These rules reflect the current Law, except in relation to public companies. Public companies which are not disclosing entities are currently required to lodge their financial statements with their annual return (current ss 245, 316 and 335 and regulation 3.8.02).

The annual return is required to be lodged within 6 months after the end of the financial year (current ss 245 and 335). The Bill breaks this nexus and sets out a separate lodgment regime for the financial report.

13.73 The Bill contains a transitional provision for public companies which are not disclosing entities at the end of the last financial year to which the current Law applies. These companies are required to lodge the documents specified in subsection 1432(2) of the Bill either within 1 month after the day on which the company's next AGM is held or within 1 month of the last day on which the company should have held its next AGM (Bill s 1432).

13.74 Unless the ASC requires it under section 321 of the Bill the following reports do not have to be lodged with the ASC:

(a) the financial report, directors' report or auditor's report of a small proprietary company prepared on shareholder direction (Bill s 293)

(b) the financial report, directors' report or auditor's report of a small proprietary company prepared on direction by the ASC (Bill s 294)

(c) the financial report, directors' report or auditor's report of a large proprietary company that is covered by subsection 319(4) of the Bill (Bill s 319). This subsection requires that certain conditions be met so that a large proprietary company can take advantage of this exemption. If the company was a large proprietary company at the end of the financial year that ended after 9 December 1995, but falls below that threshold in subsequent financial years, it may still take advantage of the exemption provided in subsection 319(4) of the Bill if it has continued to have its financial statements and reports audited before the deadline in each financial year from the financial year ending during 1993.

13.75 As the obligation to keep financial records lasts for 7 years, the ASC is only able to direct a company to lodge reports up to 6 years after the end of the financial year or half-year (Bill ss 321(2)(c) and (d)).

13.76 If financial reports or directors' reports are amended after lodgment with the ASC, they must be re-lodged within 14 days of amendment (Bill s 322). If the amendment is material, the company, registered scheme or disclosing entity must notify members of the amendment and of their right to obtain a copy of the amended report as soon as practicable (Bill s 322(2)). This will ensure that members are fully informed of the financial position of the company, registered scheme or disclosing entity.

13.77 By setting out 2 separate timing requirements for reporting to members and lodging financial reports with the ASC, the Bill remove the need for the existing complex concept of 'financial deadline' (Bill ss 315 and 319). This change has necessitated the repeal of the definition of 'deadline' contained in section 9 (Bill Schedule 2 Item 261).

13.78 However, the existing concept of 'deadline' has a residual use in paragraph 319(4)(d) of the Bill, which deals with the exemption of some large proprietary companies from the obligation to lodge financial information with the ASC. This is because the existing exemption is carried forward into Chapter 2M. In order for these companies to benefit from the exemption, they must comply with certain requirements by the 'deadline', as that term is currently defined in section 283D of the Law.

Consolidated financial statements

13.79 The Bill deals with the rights and obligations of company directors, officers and auditors in the preparation and audit of consolidated financial statements (Bill ss 323C). When requested by the company, registered scheme or disclosing entity, a director or officer of a controlled entity must provide all the information necessary for the preparation of consolidated financial statements and the notes to those statements (Bill s 323).

13.80 An auditor who audits or reviews a financial report that includes consolidated financial statements has a right of access, at all reasonable times, to the books of controlled entities and can require officers of controlled entities to give all necessary information, explanations or assistance for the purposes of the audit or review. The controlling entity whose financial report is being audited must meet the expenses of providing the information, explanations or assistance to the auditor (Bill s 323A). Officers or auditors of controlled entities must allow the auditor of the controlling entity access to the books of the entity and give that auditor any information, explanations or assistance required under section 323A of the Bill (Bill s 323B).

13.81 Where control over an entity has changed during the financial year, the rights and obligations set out in sections 323-323B of the Bill still apply to the preparation and audit or review of the controlling company, registered scheme or disclosing entity's financial report (Bill s 323C). This requirement was inserted into the Bill to ensure that a change of control does not prevent an auditor from obtaining information or assistance necessary to conduct their audit or review.

Financial years and half-years

13.82 Chapter 2M and associated amendments made by the Bill apply to financial years and half-years ending after these rules commenced. Parts 3.6, 3.7, 4.4 and 4.5 of the current Law continue to apply where a financial year or half-year ended on or before the commencement (Bill s 1431).

13.83 The first financial year of a company, incorporated body or registered scheme can be a period of up to 18 months. An ASC exemption will be needed to vary the 12 month period for subsequent financial years to make it more than 7 days shorter or longer (Bill s 323D). Seven days grace allows a necessary degree of flexibility to retailers and similar businesses - in particular, those who use calendar years to calculate their balancing date. In addition, they are able to vary a financial year to deal with fluctuations in trading conditions which may arise, making it more convenient to close off the accounts within a week of the financial year.

13.84 Similar rules apply to the half-years of disclosing entities (Bill s 323D(5)).

13.85 The Bill removes the ASC exemption power in current subsections 290(4) to 290(14) relating to synchronisation and combines it with the general ASC exemption power (Bill ss 340 and 341).

13.86 The Bill makes financial years and half years predictable. To assist in achieving this objective, it is envisaged that ASC relief will only be provided in exceptional

circumstances where, for example, commercial reasons require that variations be made to a financial year or half-year. This would include changes to take account of seasonal fluctuations which may affect a business.

13.87 A company, registered scheme or disclosing entity that has to prepare consolidated financial statements must do whatever is necessary to ensure that the financial years of the consolidated entities are synchronised with its own financial years. It must achieve this synchronisation by the end of the 12 months after the situation that calls for consolidation arises. In order to achieve this a controlled entity (but not the controlling entity) is able to shorten its financial year or extend it to be up to 18 months long to achieve synchronisation with the controlling entity (Bill ss 323D(3) and (4)).

Auditor

13.88 The provisions contained in Division 1 of Part 3.7 have been moved into Part 2M.4 of the Bill. These provisions deal with the appointment, supervision and disciplining of auditors in relation to their functions under the Corporations Law.

Accounting standards

13.89 The Bill describes the operation and application of accounting standards (Bill s 334).

13.90 The distinction adopted in the Bill between the Law and the accounting standards provides greater flexibility for making detailed accounting rules. By allowing the accounting standards to set out the rules for consolidating financial statements, the Law does not prevent accounting standards from incorporating equity accounting principles, which were arguably incompatible with previous legislative provisions (Bill s 335). The Bill permits the accounting standards to require the inclusion in financial statements of comparative amounts for earlier periods (Bill s 336).

13.91 The Bill preserves the current Law's position on the interpretation of accounting standards (Bill s 337). This provision attributes the same meaning to terms in the accounting standards as they have in Chapter 2M of the Bill or Part 1.2 of the Law and allows accounting standards to use these terms without the need to repeat the definitions.

13.92 The Bill deals with the validity and text of accounting standards by preserving the contents of current sections 286A and 286B (Bill ss 338 and 339). It continues to be possible to read down particular parts of an accounting standard which may be inconsistent with the Law, so that the parts of the standard which are not inconsistent will still be valid (Bill s 338).

13.93 The Bill provides that the text of an accounting standard, when published by the AASB or ASC, is the correct text of the standard (Bill s 339). Unless there is evidence to the contrary, a standard published by the AASB or ASC will continue to be proof in proceedings that the specified standard was in force at a particular time and that the text set out in the document is the text of the specified standard.

13.94 Accounting standards in force immediately before commencement of Bill Schedule 2 continue to apply and have effect with any necessary modifications as if they were standards made for the purposes of Chapter 2M (Bill s 1433).

Exemptions and modifications

13.95 The ASC's exemption power is located in Part 2M.6 of the Bill and replaces existing section 313.

13.96 A distinction is made in the Bill between the ASC's power to make specific exemption orders (Bill s 340) and its power to make class orders (Bill s 341). The Bill sets out the criteria which the ASC must take into account in making an order under section 340 or 341 (Bill s 342). The ASC must consider whether complying with the requirements of Parts 2M.2 and 2M.3 would make the financial report or other report misleading, be inappropriate in the circumstances or impose unreasonable burdens. The Bill specifies further criteria to assist in determining whether complying with the audit requirements impose unreasonable burdens (Bill ss 342(2) and (3)). These criteria reflect amendments made to current section 313 by the *First Corporate Law Simplification Act 1995* relating to the audit of large proprietary companies.

13.97 The Bill provides for the continued operation of existing ASC exemption orders. Where an order under current sections 290, 291, 311 or 312 was in force immediately before the new rules commence, it will continue to have effect after commencement with any necessary modifications as if it were an order made under section 340 of the Bill (Bill s 1434).

13.98 The regulations may modify the operation of the Chapter (Bill s 343). This, for example, enables the financial reporting and audit provisions to be modified in their application to particular bodies or classes of bodies where appropriate.

Sanctions for non-compliance

13.99 As under the Bill, the civil penalty regime in Part 9.4B of the Law applies to breaches of the financial record keeping and the financial reporting requirements (Bill s 344). Under the current Law, the civil penalty regime applies only to financial statement and reporting obligations and does not extend to record keeping obligations (current ss 318 and 591).

13.100 However, sections 312 and 323B of the Bill are offences, rather than subject to the civil penalty regime. These provisions, which deal with the obligations to assist in the preparation of financial statements and auditor's reports, are dealt with by means of penalties imposed under Schedule 3 to the Corporations Law.

13.101 Directors are liable to civil penalties if they fail to take all reasonable steps to comply with, or to secure compliance with Parts 2M.2 or 2M.3 (Bill s 344).

Special rules and exemptions

13.102 The Bill removes the special accounting rules and exemptions currently applying to investment companies, property trusts and other prescribed interest schemes, banks and life insurance bodies. These rules were developed piecemeal and make it difficult for users to draw comparisons between the financial status of different types of entities.

13.103 Part 4.4 currently contains detailed requirements for companies that have been declared by the ASC to be investment companies. No company has been declared an investment company since 1986 and these provisions are repealed by the Bill (Bill Schedule 1 Item 8).

13.104 In relation to banks and life insurance corporations, current Part 4.5 will be repealed (Bill Schedule 1 Item 8). An accounting standard will be developed to replace it and govern the preparation of financial statements by these bodies. This adopts the recommendation of a Working Party established by the then Commonwealth Attorney-General and Treasurer in 1992 to examine Part 4.5. If necessary, it is envisaged that the Regulation made under Bill s 343 will give a temporary exemption to these bodies, pending the adoption of the new standards.

14

Chapter 2N: Annual returns and lodgments with the ASC

14.1 The new rules contained in Chapter 2N omit over half of the items currently required to be included in the company annual return. These matters are either not relevant for corporate law regulatory purposes or can be ascertained readily by a search of the ASC database. Their removal will make the annual return easier for businesses.

14.2 The provisions in Chapter 2N replace the parts of the Corporations Law and Corporations Regulations which currently deal with the annual returns of companies and prescribed interest schemes. They also cover the lodgment of documents with the ASC, including electronic lodgment.

Lodgment of annual returns

14.3 The Bill requires a company to lodge an annual return with the ASC by 31 January each year, unless the ASC and the company agree to a different lodgment date (Bill s 345(1)). The annual return of a proprietary company currently relates to a calendar year and the return for a public company is linked to its financial year (current ss 335(1) and (1A)).

14.4 The new rule imposes an obligation on all companies to lodge a return once in every 12 month period beginning on 1 February. The rule reflects the current lodgment date for proprietary companies. However, the reference to 'calendar year' has been removed because the nature of the lodgment obligation has changed. Under the Bill, the return focuses on brief summary information about the company on the day on which the return is completed, such as its status as a public or proprietary company or its principal activities, rather than on aspects of the company which relate to a full year. There is therefore no need for the obligation to be linked to a calendar year. The rule simply requires the lodgment of a return in every 12 month period and by 31 January.

14.5 Similarly, the annual return of a public company will no longer be linked to its financial year. Financial information will be lodged under a separate regime set out in Chapter 2M (Bill s 319). The Bill deals with transitional arrangements for the lodgment of public company accounts for the last financial year in which the current Law applies (Bill s 1431).

14.6 The annual return obligation for a collective investment scheme is co-located with the obligation for companies (Bill s 345(2)). The annual return lodgment date for a collective investment scheme will continue to be linked to its financial year.

14.7 The Bill also makes provision for the ASC and the company or responsible entity for a collective investment scheme to agree to a different lodgment date (Bill s 345(3)). This facility will enable the ASC to establish a staggered lodgment timetable by agreeing upon dates other than 31 January for the lodgment of annual returns.

14.8 The Bill replaces current sections 338 and 1353 (Bill s 345(4)). Section 338 does not require the separate lodgment of certain information if the information is lodged in the annual return. The Bill operates in the same way, by providing that lodgment of details of a change of registered office, principal place of business, company director or secretary or of details of the issue of shares in the annual return will exempt a company from the obligation to notify these events separately to the ASC. However, if the company is liable for a late fee for a failure to notify the ASC of these events within the required time, lodging the information in the annual return will not remove the liability.

14.9 A company will be required to notify the ASC of a change in the address of its registered office or principal place of business within 14 days of the change (Bill ss 142 and 146). The prompt updating of this information is important for people dealing with the company, particularly creditors. The Bill repeals and replaces existing section 242, which deals with the obligation to notify the ASC of a change in company officeholders. The Bill also requires this important information to be notified within 14 days. The requirement to notify the ASC of an issue of shares will continue to allow 1 month for lodgment of the notice (Bill s 254X). This difference reflects the different nature of the information required to be lodged. An issue of shares does not have the potentially immediate impact which a change of registered office, principal place of business or directors may have, particularly for company creditors.

14.10 The directors' solvency resolution is retained as it is a useful discipline for directors and requires them to focus on the question of company solvency (Bill s 346). However, Chapter 2N modifies the requirements for the resolution.

14.11 If a company has not lodged a financial report with the ASC in the previous 12 months, its directors must pass a solvency resolution (Bill s 346(1)). The annual return must state whether or not the resolution has been passed (Bill s 348 Item 9).

14.12 Because Item 9 in section 348 requires a statement of whether or not the solvency resolution has been passed, rather than a statement that the resolution has been passed, the return will be able to be lodged even if it has not been passed. This avoids a problem currently faced by company secretaries who are deemed by current subsection 83(2) to be knowingly concerned in a failure to lodge an annual return, even though they cannot compel a company's board of directors to resolve to adopt the contents of the annual return, as required by Corporations Regulation 3.8.01(zb)(iv). Under the Bill, the directors of the company will be separately liable to a fine of up to $500 if they do not pass the solvency resolution (Bill s 346(1)).

14.13 Companies required to lodge financial reports are already under an obligation to include a solvency declaration in the directors' declaration about the financial statements (current s 301(5)). To avoid repetition of obligations, the solvency resolution will not

have to be included in the annual return if the company has lodged accounts with the ASC during the 12 months before the lodgment of that return (Bill ss 346, 348 Item 9 and 1435).

Content of company annual returns

14.14 The Bill sets out the requirements for the contents of annual returns for companies (Bill s 348). This information is located in the Law, rather than in the regulations as at present, making the rules easier to find. The annual return must, however, contain any information required by the regulations.

14.16 The content of the annual return covers the basic features of the company, including its ACN and name, details of the registered office and principal place of business and of each director and secretary (Bill s 348 Items 1 - 5). The number of issued shares and options granted must also be stated (Bill s 348 Items 6 and 7).

14.17 The Bill simplifies the current rules on including lists of members in the annual return. Rather than requiring the annual lodgment of a list of members, the new rules focus on members who hold significant proportions of a company's share capital (Bill s 348 Item 8).

14.18 A company which has 20 or fewer members will be required to include a full list of members with the annual return. A company which has more than 20 shareholders will only have to supply details of the top 20 shareholders in each class of share.

14.19 If there are more than 20 people whose interests could be listed in the largest 20 shareholdings, the return will be required to include the details of each of those shareholders. For example, if 15 people each hold 5% of the shares in a particular class, and 20 people each hold 1%, the details of all of those 35 shareholders must be included in the annual return. If a person is seeking information about who holds the remaining 5% of the shares, they can obtain it from the company's register of members.

Contents of collective investment schemes annual returns

14.20 The table in section 349 of the Bill specifies the information that is required to be included in the annual return of a registered collective investment scheme.

14.21 The matters required to be disclosed in annual returns for collective investment schemes have been rationalised. The specific disclosure requirements which have been omitted include:

(a) the summary of all purchases and sales of lands and marketable securities

(b) brokerage and other benefits charged by the management company

(c) lists of investments (current s 1071).

14.22 Information of this character will be required to be disclosed in the financial report and directors' report for the scheme under Chapter 2M. These details will be available on the ASC database and must be sent to members (Bill s 314).

14.23 The proposed rules for annual returns for registered collective investment schemes largely parallel those for companies. However, some differences take into account the particular characteristics and diversity of such schemes.

14.24 In regard to the content of the return, a distinction is made between schemes which are unit trusts and other schemes. The disclosure required in relation to units of unit trusts will be similar to that for companies limited by shares (with units in the trust treated in the same way as shares in a company). The approach taken in the Bill in relation to interests in other schemes is based on that presently taken in the Corporations Regulations (Form 723) in relation to returns for prescribed interests schemes. The new requirements are set out in the table in section 349 of the Bill.

Lodgment

14.25 Chapter 2N simplifies the rules on lodging information with the ASC.

14.26 If a document must be lodged in the prescribed form and the regulations prescribe a form for that document, the prescribed form will be required. If a form is not prescribed in the regulations and the ASC has approved a form for the document, the ASC's approved form will be required (Bill s 350).

14.27 Annual returns and other documents will be able to be lodged electronically if agreed by the company or responsible entity and the ASC. This provides a framework to enable companies or responsible entities that lodge documents electronically with the ASC and those seeking access to information contained in those documents to benefit from more efficient and timely dealings with the ASC (Bill ss 347 and 352).

14.28 The rules for signing documents lodged with the ASC in writing will be located in the Law, rather than in the regulations as at present (Bill s 351). Documents lodged electronically with the ASC will be required to be authenticated in the manner agreed in the electronic lodgment agreement between the ASC and the person (acting either on their own behalf or as an agent) seeking to lodge the document (Bill s 352).

14.29 The Law requires that applications to the ASC must be in writing (current s 102). The Bill will add a note to section 102, referring readers to section 352 of the Bill on electronic lodgment (Bill Schedule 2 Item 373).

15

Chapter 5A: Deregistration of companies

15.1 The rules on the deregistration and reinstatement of companies in Chapter 5A of the Bill replace Division 8 of Part 5.6 of the Law (current ss 571 - 579).

Terminology and concepts in Bill

15.2 The Bill removes various terms used in the Corporations Law to describe a company's ceasing to exist, including 'dissolving' and 'cancelling'. The Law does not need to continue to use these different terms and they are inconsistent with the use in Chapter 2A of the Bill of the concept of the 'registration' of companies, rather than their 'incorporation' or 'formation'. The new provisions in Chapter 5A of the Bill use the term 'deregistration'.

15.3 The concept of 'dissolution' is retained in relation to entities other than companies, for example, bodies corporate. This is necessary as the Law must take into account the possibility of a range of processes by which bodies corporate cease to exist under the law relevant to their incorporation. That process may not necessarily be appropriately referred to as 'deregistration'.

Voluntary deregistration

15.4 Under the Bill, the following persons are able to apply for voluntary deregistration (Bill s 601AA(1)):

(a) the company; or

(b) a director or member of the company. This recognises that it is the officers of the company who customarily lodge applications with the ASC; or

(c) a liquidator of the company. (This option will be relevant if a formal liquidation process is not necessary. It will not be available to avoid normal liquidation procedures, as it is a precondition for voluntary deregistration that the company has no outstanding liabilities.).

15.5 Under the Bill, an application for voluntary deregistration can only be made if the following conditions are satisfied:

(a) all the members of the company agree

(b) the company is not carrying on business

(c) the company's assets are worth less than $1,000

(d) the company has no outstanding liabilities and has paid all outstanding fees and penalties

(e) the company is not a party to any legal proceedings (Bill s 601AA(2)).

15.6 The ASC is required to give 2 months notice of an intended deregistration on its national database and by publication in the *Gazette* (Bill s 601AA(4)). In addition, the ASC Alert system enables subscribers to receive timely notice of the deregistration of a company in which they may have an interest.

15.7 The Bill includes a transitional provision dealing with deregistrations initiated before the new rules commence (Bill s 1437). Arrangements under current section 574A relating to the deregistration of companies dissolved under the *State Bank (Corporatisation) Act 1994* of South Australia are preserved in the Bill (Bill s 1440).

ASC initiated deregistration

15.8 The Bill sets out the circumstances in which the ASC may deregister a company (Bill s 601AB). ASC deregistrations may occur where a company is at least 6 months late in lodging its annual return, has not lodged any documents for at least 18 months and the ASC has no reason to believe that the company is carrying on business (Bill s 601AB(1)). The Bill also lists other, less common, situations in which the ASC may act to deregister a company (Bill s 601AB(2)).

15.9 The Bill requires the ASC to give notice of the intended deregistration to all of the company's directors, to the company itself and to any liquidator of the company. As is the case for voluntary deregistrations, the ASC is also required to give notice in the *Gazette* and on its ASC database (Bill s 601AB(3)).

15.10 The Bill sets out the circumstances in which the ASC is required to deregister a company on the basis of a Court order or after a liquidation (Bill s 601AC).

Effect of deregistration

15.11 The Bill clarifies the effect of deregistration in 3 ways. First, it provides that a company ceases to exist on deregistration (Bill s 601AD(1)). The separate concept of dissolution is abolished. This does not affect the liabilities of individuals or entities associated with the deregistered company prior to deregistration.

15.12 Secondly, upon deregistration, the property of the deregistered company vests in the ASC, subject to any existing security or other interest (Bill Schedule 2 Item 398). The ASC then has all the powers of an owner over the property vested in it (Bill ss 601AD(2) - (4)).

15.13 Thirdly, directors of a company immediately before deregistration have a statutory obligation to keep the company books for 3 years after deregistration (Bill s 601AD(5)).

Powers of the ASC

15.14 Under the current Law, the ASC's power to deal with the assets of a deregistered company is unclear in a number of situations. The Bill resolves these ambiguities by distinguishing between circumstances when property which was held by the company on trust vests in the ASC and circumstances when property which was not held on trust vests in the ASC (Bill ss 601AE(1) and (2)).

15.15 The Bill allows the ASC to choose to continue to act as trustee when dealing with trust property. This will enable the ASC to carry out any action permitted by law under the trust deed (Bill s 601AE(1)(a)).

15.16 Alternatively, the ASC will be able to apply to a court for the appointment of a new trustee (Bill s 601AE(1)(b)). This provision makes it clear that the ASC has the power to apply to the court. It does not alter the court's powers in relation to the appointment of new or additional trustees.

15.17 When dealing with property of a deregistered company which is not held on trust, the ASC is able to dispose of or deal with the property as it sees fit, defray any expenses incurred by it in exercising its powers in relation to the company, discharge obligations attaching to the property (to the extent that the proceeds are available to satisfy those obligations) and deal with any remaining funds under the unclaimed property provisions in Part 9.7 of the Law (Bill ss 601AE(2) and (4)).

15.18 The property of a deregistered company vested in the ASC will remain subject to all liabilities imposed on the property under a law, without the benefit of any exemption the property might otherwise have because of being vested in the ASC (Bill s 601AE(3)).

15.19 The ASC is required to keep a record of any property of a deregistered company that the ASC knows has been vested in it under Chapter 5A. This obligation will include keeping a record of the ASC's dealings with any property, keeping accounts of all money received from those dealings and keeping all receipts relating to that property (Bill s 601AE(5)).

15.20 The Bill enables the ASC to fulfil the outstanding obligations of a deregistered company or its liquidator without limiting this power to situations where property of a deregistered company has vested in the ASC (Bill s 601AF).

15.21 The Bill provides transitional arrangements for situations where property has vested in the ASC under current Division 8 of Part 5.6 before the new rules commence (Bill s 1438).

Third party rights against insured deregistered companies

15.22 At present, a person wishing to make a claim against a deregistered company may need to apply to a court for reinstatement of the company in order to bring an action against it. The Bill enables a person to proceed directly against the insurer of a company that is deregistered, without seeking the company's reinstatement (Bill s 601AG). Comparable rights have previously been provided in other legislation, for example, section 6 of the *Law Reform (Miscellaneous Provisions) Act 1946* (NSW).

15.23 The Bill enables a third party to recover directly from the insurer of the deregistered company an amount payable under their contract of insurance if 2 preconditions are met:

(a) the deregistered company had a liability to the third party;

(b) the insurance contract covered that liability (Bill s 601AG).

Reinstatement

15.24 Currently, the ASC may only reinstate a deregistered company if it was deregistered as the result of an error on the part of the ASC. Other applications for reinstatement must proceed by application to the Court (current s 574).

15.25 The Bill provides the ASC with clear powers to reinstate a company which has been deregistered when it should not have been, for example, in a situation where the company is still carrying on business. This avoids the cost of a court application for reinstatement (Bill s 601AH(1)). The ASC's power to reinstate companies extends to the reinstatement of the registration of a body corporate which was deregistered before the new rules commence (Bill s 1362CH). The Bill also enables reinstatement of companies where an application has been made under current section 571 or subsection 574(3) and that application had not been determined before the commencement (Bill s 1443).

15.26 It is envisaged that the ASC will only exercise its reinstatement power where no dealings with the property of a deregistered company which give rise to third party rights have been carried out during the intervening period. If third parties have become involved, it is expected that reinstatement will generally need to proceed through the Court.

15.27 The Court's reinstatement power is preserved under the Bill (Bill s 601AH(2)). If the Court exercises its reinstatement power under subsection 601AH(2) of the Bill, it may also validate anything done between the deregistration of the company and its reinstatement and make any order that it considers just in the circumstances (Bill s 601AH(3)). The 15 year time limit on reinstatement applications is abolished. In relation to a body corporate that has been dissolved or deregistered for 15 years or more, the ASC may destroy or dispose of any document a transparency of which has been incorporated with a register kept by the Commission (Bill Schedule 2 Item 406).

15.28 The Bill requires the ASC to give notice of any reinstatement in the *Gazette*, and in cases of reinstatement by the ASC, to the applicant for reinstatement (Bill s 601AH(4)).

15.29 Under the Bill, a reinstated company is taken to have continued in existence as if it had not been deregistered. Any third party rights which may have accrued during the period of deregistration will therefore be enforceable. The provision also suspends directors' liability during the period of deregistration until reinstatement. The property of a deregistered company that has vested in the ASC will revest in the company upon reinstatement, subject to any existing security or other interest (Bill s 601AH(5)).

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