

1999

THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

SENATE

**CORPORATE LAW ECONOMIC REFORM PROGRAM BILL 1998**

SUPPLEMENTARY EXPLANATORY MEMORANDUM

Amendments to be Moved on Behalf of the Government

(Circulated by authority of the Minister for Financial Services and Regulation,  
the Honourable J.B. Hockey, MP)

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**1****Outline**

1.1. These Government amendments amend the Corporate Law Economic Reform Program Bill 1998 (CLERP Bill).

1.2. These amendments continue the legislation to implement key elements of the Government's Corporate Law Economic Reform Program (CLERP) in the areas of fundraising, directors' duties and corporate governance, accounting standards and takeovers.

1.3. These amendments are necessary in order to implement recommendations made by the Parliamentary Joint Committee on Corporations and Securities following its inquiry into the CLERP Bill. In addition, the amendments amend the provisions of the CLERP Bill which relate to the Corporations and Securities Panel. These amendments will ensure the Panel is the primary forum for the resolution of disputes relating to takeovers and will contribute to the effective operation of the Panel. A number of minor technical amendments to the CLERP Bill will also be made.

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**Financial impact statement**

2.1. This amendment will not have a financial impact on the operations of Government. The Office of Regulation Review has advised that a Regulation Impact Statement is not required for these amendments.

**3****Proposed amendments***Items 1, 2 and 3 Commencement provisions*

3.1. The proposed amendments will alter the commencement provisions of the CLERP Bill consequential on the other amendments to the CLERP Bill. In particular, subsection 2(2) will be amended to refer to “day *or days* to be fixed by proclamation”. This will enable the Schedules to the CLERP Bill to be commenced on different days.

3.2. In addition, the commencement provisions will be amended to refer to new Schedules 10, 11 and 12. The amendments in Schedules 11 and 12 will alter references in Commonwealth legislation to 'ASC Law' and 'ASC Regulations' to 'ASIC Law' and 'ASIC Regulations'. Complementary amendments need to be made to the Corporations ([Name of State]) Acts and then all the relevant amendments can commence at the one time. This is the reason for allowing 12 months before the automatic commencement of Schedule 11 and Schedule 12.

*Item 4 Related parties — coverage of rules — section 212*

3.3. This minor amendment is of a technical nature — to ensure that both the making of the payment and the agreement to make the payment is covered by the exception to related party transaction requirements, in relation to payments made for legal costs.

*Item 5 Panel provisions — section 602*

3.4. The proposed amendment is designed to ensure that there is no inconsistency between the takeover provisions of Chapter 6 and section 602.

3.5. Section 602 sets out the purposes of the takeover provisions of Chapter 6. It has been argued that some of the specific takeover provisions of Chapter 6, such as the mandatory bid rule may be inconsistent with the purposes set out in section 602 and may therefore give rise to the possibility of a declaration of unacceptable circumstances by the Panel.

3.6. For example, section 611 expressly contemplates that a person may make an acquisition that leads to a mandatory bid. The making of the acquisition should not by itself constitute unacceptable circumstances even though it might be seen as running contrary to section 602(1)(b)(i) by allowing a person to acquire a substantial interest in a company without shareholders knowing the identity of the acquirer beforehand. The proposed amendment will clarify that conduct which is expressly permitted or required by the specific provisions of Chapter 6 does not by itself breach the purposes of the Chapter and thus would not by itself give rise to unacceptable circumstances.

*Items 6 and 7 Foreign nominees — sections 615 and 619*

3.7. The proposed amendments will implement recommendation 2 of the report into the CLERP Bill by the Parliamentary Joint Committee on Corporations and Securities. The Committee recommended that sections 615 and 619 be amended to require the nominee to be approved in all cases by the Australian Securities and Investments Commission (ASIC).

*Items 8 to 13 Minimum consideration — section 621*

3.8. The Companies and Securities Advisory Committee (CASAC) recently provided the Government with a paper, *Recommendations for reform of ss 621(4) and 623(2) & (3) of the CLERP Bill 1998*, which considered two recent takeovers and recommended amending the CLERP Bill to address the issues arising in those takeovers.

3.9. One of CASAC's recommendations was to amend subsection 621(4) of the CLERP Bill to apply to *all* takeover bids, so that the minimum consideration offered under a bid is at least equal in value to the maximum paid during the 4 months before the date of the bid. Currently this provision only applies to bids where cash is offered as consideration.

3.10. The Parliamentary Joint Committee considered the recommendations made by CASAC. The majority report concluded that the Government may care to implement the recommendations or instead refer them to the Committee for further consideration. The Australian Democrats recommended implementing CASAC's recommendations.

3.11. In light of the Committee's recommendations, the proposed amendment will implement CASAC's recommendation to amend subsection 621(4) of the CLERP Bill so that it applies to all takeover bids. In addition, consequential amendments have been made to subsection 621(5) of the CLERP Bill so that it applies to the valuation of non-cash consideration offered under the bid.

*Item 14 Collateral benefits — section 623*

3.12. The CASAC paper, *Recommendations for reform of ss 621(4) and 623(2) & (3) of the CLERP Bill 1998*, considered two recent takeovers and recommended amending the CLERP Bill to address the issues arising in those takeovers.

3.13. One of CASAC's recommendations was to remove sections 623(2) and (3) from the CLERP Bill. These sections prohibit an intending bidder, in the 4 months preceding its bid, from giving some target company shareholders any benefit that the bidder is not proposing to provide under the takeover bid. CASAC considered that the courts have interpreted the meaning of 'benefit' in such a broad manner, that there were now legitimate concerns about the extensive application of the provisions.

3.14. In its report into the CLERP Bill, the Parliamentary Joint Committee on Corporations and Securities considered the recommendations made by CASAC. The majority report concluded that the Government may care to implement the recommendations or instead refer them to the Committee for further consideration. The Australian Democrats recommended implementing CASAC's recommendations.

3.15. In light of the Committee's recommendations, the proposed amendment will implement CASAC's recommendation to remove sections 623(2) and (3) of the CLERP Bill.

*Item 15 Panel provisions — section 657A*

3.16. The proposed amendment will enable the Panel to make a declaration of unacceptable circumstances based upon a contravention of the provisions of Chapters 6 (Takeovers), 6A (Compulsory acquisitions and buy-outs), 6B (Rights and liabilities in relation to Chapter 6 and 6A matters) or 6C (Information about ownership of listed companies and managed investment schemes). As the courts will be precluded from intervening in a takeover bid during the bid period, except in limited circumstances, the proposed amendment will ensure that the Panel will have the

capacity to make appropriate declarations and orders where a person has contravened a provision in relevant Chapters during the bid period.

3.17. In addition, the proposed amendment will refine the public interest test in CLERP Bill subsection 657A(2) to ensure that the Panel is only able to make a declaration where it considers that it is *not against* the public interest after taking into account any policy considerations that the Panel considers relevant. The proposed amendment also clarifies that the Panel is only able to decline to make a declaration where it is not against the public interest.

*Item 16 Panel provisions — section 657A*

3.18. The proposed amendment is consequential on other amendments. The proposed amendment at item 15 will enable the Panel to make a declaration of unacceptable circumstances based upon a contravention of the takeover provisions of Chapters 6. Proposed amendment 22 will provide the Panel with a rule making power.

3.19. As a result, paragraph 657A(3)(a) of the CLERP Bill will be amended to ensure that where the Panel is exercising its power to make a declaration of unacceptable circumstances, it must consider the takeover provisions and any rules made by the Panel. This will also ensure that compliance with the rules made by the Panel will be considered when the Panel makes a declaration of unacceptable conduct. For completeness, reference is also made to section 195 of the *Australian Securities and Investments Commission Act 1989*, which authorises the making of regulations setting out matters the Panel is to take into account when making a decision.

*Item 17 Panel provisions — section 657A*

3.20. The proposed amendment corrects a section reference, consequential on the amendment made by item 5.

*Item 18 Panel provisions — section 657A*

3.21. The proposed amendment clarifies that when considering the actions of the directors of the company or body or the responsible entity for a scheme, the Panel must take into account actions that contributed to or caused an acquisition not to proceed as well as actions that contributed to or caused a proposed acquisition not to proceed.

*Item 19 Panel provisions — new sections 657EA and 657EB*

3.22. The proposed amendment will provide a mechanism for the internal review of decisions of the Panel. ASIC or any party to the proceedings in which the decision was made will be able to apply to the Panel for a review of the decision. Where the decision is not a decision to make a declaration or order (such as a decision not to make a declaration or order) a person may only apply with the consent of the President of the Panel. The time limits within which the application must be made will be prescribed in the regulations.

3.23. When reviewing a Panel decision, the Panel will have the ability to vary or set aside the decision reviewed or to make a new decision. In particular, the Panel reviewing a decision can make a declaration or an order and those orders will have the same effect as any other declaration or order of the Panel. For example, they will be enforceable under section 657G and if contravened, will constitute an offence under section 657F. When reviewing a decision, the Panel will be able to deal with frivolous or vexatious applications under section 658A.



3.24. As with other Panel proceedings, the procedures and composition of the Panel for the purposes of a review of a Panel decision will be set out in the regulations. Consequential amendments to the *Australian Securities and Investments Commission Act* will facilitate the making of these regulations (see items 52 and 53).

3.25. In addition, proposed section 657B will enable the Court to refer a matter to the Panel for review. It is anticipated that this will occur in circumstances where a takeover matter comes before the Court, after being considered by the Panel, and the Court considers that it is more appropriate for the Panel to review its earlier decision or order rather than for the Court to intervene in the area of takeover dispute resolution.

#### *Item 20 Panel provisions — section 657G*

3.26. The proposed amendments will implement a recommendation of the Australian Democrats in the report into the CLERP Bill by the Parliamentary Joint Committee on Corporations and Securities. The recommendation was to amend section 657G(2) to allow a wider range of persons to make an application for enforcement of a Panel order.

3.27. The proposed amendment will allow, in addition to ASIC, any person to whom a Panel order relates and each party to the proceedings to apply to enforce a Panel order. In addition, the President of the Panel will also be able to apply to the Court to enforce a Panel order. As the Panel itself is not a legal person, it was appropriate that the ability to apply to the Court be vested in the President of the Panel.

3.28. In addition, the proposed amendments will ensure that the Court can make an enforcement order if a person threatens to contravene a Panel order. This will strengthen the Court's enforcement powers by allowing it to order a person to comply with a Panel order where they threaten not to comply with it. This power is consistent with other Court powers in the Corporations Law, such as current section 1324 on injunctions.

#### *Item 21 Panel provisions — section 657H*

3.1. The proposed amendment is consequential on an the amendment at item 19 to provide the Panel with an internal review mechanism. The amendment will ensure that where ASIC applies to the Panel for the review of a decision, ASIC can publish a report in relation to its application. This is consistent with ASIC's ability to publish a report about other applications made to the Panel by ASIC.

#### *Item 22 Panel provisions — new section 658C*

3.2. The proposed provision will enable the Panel to make rules to supplement or clarify the operation of the takeover provisions in Chapter 6. As the Panel is not a legal entity, the rules will be made by the President of the Panel, following consultation with other members of the Panel.

3.3. The Panel may only make rules which are not inconsistent with the provisions of the Corporations Law and the Corporations Regulations. When making rule, the Panel must consider the purposes of the takeover provisions as set out in CLERP Bill section 602.

3.4. The rules made by the Panel must be published in the *Gazette* and will be disallowable by the Minister, within 28 days after the Minister receives a copy of the rules.

3.5. Providing the Panel with a rule making power will enable the Panel to deal with emerging takeover issues expeditiously and will provide greater flexibility in the area of takeover regulation.

As this power is to be in addition to ASIC's exemption and modification power, it is anticipated that the Panel will liaise with ASIC before making any rules.

*Item 23 Panel provisions — new section 659AA*

3.6. The proposed amendment is designed to make it clear on the face of the legislation the policy intention that the Panel be the main forum for resolving takeover disputes until after the takeover bid period.

*Item 24 Compulsory acquisition provisions — section 661B*

3.7. The proposed amendment will implement recommendation 4 of the report into the CLERP Bill by the Parliamentary Joint Committee on Corporations and Securities. The Committee recommended that the compulsory acquisition notice required by section 661B be required to draw the readers' attention to their rights to obtain the names and addresses of other holders (section 661D) and the right to apply to court to stop an acquisition (section 661E).

*Item 25 Compulsory acquisition provisions — section 663C*

3.8. The proposed amendment will implement recommendation 6 of the report into the CLERP Bill by the Parliamentary Joint Committee on Corporations and Securities. The Committee recommended that section 663C be amended so that any court order made under that section applies to all securities of the same class.

3.9. The proposed amendment will provide that, where a court makes an order under section 663C in relation to the terms of a buy-out, the order applies to all holders who have applied to the court for an order. This is consistent with a similar provision in section 661E(3).

*Item 26 Compulsory acquisition provisions — section 664AA*

3.10. The proposed amendments will implement recommendation 3 of the report into the CLERP Bill by the Parliamentary Joint Committee on Corporations and Securities, with modifications. The Committee recommended that section 664A be amended so that a compulsory acquisition can only occur within 6 months of the proclamation of the legislation or within 6 months of the person seeking to make the acquisition becoming a 90% shareholder.

3.11. The modification is to allow a longer period of 12 months from the proclamation of the legislation for an existing 90% holder to utilise the new compulsory acquisition power. This will effectively allow a transitional period for existing 90% holders who would otherwise be forced to use the compulsory acquisition power within 6 months of commencement of the CLERP Bill or lose that right. The 6 month period will apply to persons who become a 90% holder after commencement.

*Item 27 Compulsory acquisition provisions — section 665B*

3.12. The proposed amendments will implement recommendation 5 of the report into the CLERP Bill by the Parliamentary Joint Committee on Corporations and Securities, with modifications. The Committee recommended that a notice to the holders of convertible securities under section 665B should include the additional information given to recipients of compulsory acquisition notices under the compulsory acquisition powers set out in section 664C(1)(c)-(e).

3.13. The proposed amendment will require the notice given to convertible security holders under section 665B to include the information previously given under sections 664C(1)(d) and (e). The notice will not be required to include the information in section 664C(1)(c), as recommended by the Committee, as that information is irrelevant to convertible security holders. The information required by section 664C(1)(c) is only relevant to the holders of securities being compulsorily acquired, not to holders of securities who are given the option of being bought out.

*Item 28 Compulsory acquisition provisions — section 665C*

3.14. The proposed amendment will implement recommendation 6 of the report into the CLERP Bill by the Parliamentary Joint Committee on Corporations and Securities. The Committee recommended that section 665C be amended so that any court order made under that section applies to all securities of the same class.

3.15. The proposed amendment will provide that, where a court makes an order under section 665C in relation to the terms of a buy-out, the order applies to all holders who have applied to the court for an order. This is consistent with a similar provision in section 661E(3).

*Items 29 and 30 Fundraising — sophisticated investor exemption — section 708*

3.16. The proposed amendments will implement recommendation 8 of the report into the CLERP Bill by the Parliamentary Joint Committee on Corporations and Securities. The majority report recommended that the legislation should clarify the sanctions applicable to a licensed dealer who breaches section 708(8)(c). The proposed amendment adds a note to section 708(8)(c) clarifying the sanctions applicable to a licensed dealer. The licensing provisions of the Corporations Law, and the sanctions applicable to licensed dealers, are being considered further under CLERP 6.

*Item 31 Fundraising — section 708*

3.17. The proposed amendment will add a further subsection to section 708 of the CLERP Bill which lists which offers of securities do not need disclosure.

3.18. Proposed subsection 708(20) will provide that an offer of a body's securities for issue does not need disclosure under Part 6D if the body is an exempt public authority of a State or Territory. This will ensure that where a State or Territory government raises funds through a public authority, the fundraising provisions do not apply. This is consistent with the proposed amendment at item 58 which clarifies the application of the fundraising provisions to State and Territory governments.

3.19. The proposed amendment also includes a note, clarifying that debentures, stocks or bonds issued by the Commonwealth, or a State or Territory government are not securities covered by the fundraising provisions because of the operation of subsection 92(3). A government is not a 'body' as defined by the Corporations Law and the fundraising provisions only apply to securities of a 'body'.

*Items 32 and 33 Fundraising — section 723*

3.20. The proposed amendments will implement recommendation 10 of the report into the CLERP Bill by the Parliamentary Joint Committee on Corporations and Securities. The Committee recommended that the CLERP Bill be amended to revert to the position under the current law on the quotation of securities, section 1031(1), by making any issue of securities void if the securities are not admitted for quotation on a securities exchange when the disclosure document states that the

securities will be quoted on a securities exchange. The amendment will also ensure that where an issue of securities is void, application monies are returned to investors as soon as possible.

*Items 34, 35, 36 and 37 Fundraising — sections 724 and 725*

3.21. The proposed amendments will implement recommendation 9 of the report into the CLERP Bill by the Parliamentary Joint Committee on Corporations and Securities. The Committee recommended that sections 724(2)(b) and (c) be amended to replace the term ‘reasonable opportunity’ with a minimum period of 10 working days.

3.22. The proposed amendments will implement this recommendation with modifications. The impetus behind the recommendation is to provide certainty, by replacing ‘reasonable opportunity’ with a fixed period. However, the recommendation as framed would allow the person offering securities to choose a longer period. This undermines the primary objective of providing certainty with a fixed period. Accordingly, the proposed amendments will replace ‘reasonable opportunity’ with a period of 1 month. This is consistent with sections 737 and 738 of the CLERP Bill which allow an investor to return securities within a period of 1 month.

3.23. Consequential amendments to sections 725(3)(b) and (c) are proposed which also replace the term ‘reasonable opportunity’ with a minimum period of 1 month.

*Item 38 Debentures — technical correction*

3.24. Section 260FB of the CLERP Bill will require, in relation to a debenture trust deed, that the deed must provide that certain rights are held in trust by the trustee for the benefit of the debenture holders. These rights include the right to enforce the borrower’s duty to repay, any charge and any right to enforce the duties owed by the borrower and any guarantor.

3.25. The proposed amendment will include a transitional provision in the CLERP Bill to provide that, where a debenture trust deed is in existence immediately before the commencement of the relevant amendments in the CLERP Bill, if the deed does not contain all of the provisions specified in section 260FB, it shall be deemed to contain them.

*Item 39 Fundraising — technical correction*

3.26. The proposed amendment will omit item 13 of Schedule 3 of the CLERP Bill. Item 13 is redundant, as the same amendment is made by item 81 of Schedule 3 of the CLERP Bill.

*Item 40 Fundraising — technical correction*

3.27. This is a technical amendment to the definition of ‘securities law’ in section 9 of the Corporations Law to ensure that the definition includes a reference to the new takeovers and fundraising chapters. Currently, the definition includes Chapters 6 and 7 of the Law. Consequential on the move of the takeover and fundraising provisions into new Chapters, the definition will be amended to include Chapters 6A, 6B, 6C and 6D.

*Item 41 Fundraising — technical correction*

3.28. The proposed amendment will omit item 89 of Schedule 3 of the CLERP Bill. Item 89 is redundant. It purports to amend section 216A of the Corporations Law, however section 216A was repealed by the *Company Law Review Act 1998*.

*Item 42 Officers — technical correction*

3.29. Technical amendment to correct an inaccurate reference. Item 123 is redundant. It purports to amend section 31. Section 31 is repealed by Schedule 3 item 311.

*Item 43 Officers — technical correction*

3.30. Technical consequential amendment to paragraph 601CE(c) of the Corporations Law to correct the inaccurate reference from subsection “242(2)” to the accurate reference of “205B(3)”.

*Item 44 Officers — technical correction*

3.31. Technical amendment to correct a redundant reference to section 200B.

*Item 45 Officers — technical correction*

3.32. Technical amendment to correct an inaccurate reference to subsection 81(3).

*Item 46 Officers — technical correction*

3.33. Technical amendment to remove Item 193 which is redundant. It purports to amend section 283B (note 1). Section 283B has been repealed.

*Item 47 Takeovers — technical correction*

3.34. The proposed amendment will allow fees to be charged for the funding of the Corporations and Securities Panel.

3.35. The CLERP Bill will reconstitute the Panel so that it becomes the principal forum for resolving takeover disputes during the bid period. The 1999-2000 Budget provided funding to upgrade the Panel for this purpose. Going forward, it is intended to apply full cost-recovery to the Panel’s operations, by imposing fees and charges on parties bringing matters before the Panel.

3.36. Under the Corporations Law, fees can only be prescribed for ‘chargeable matters’. The proposed amendment will amend the definition of chargeable matter to allow fees to be charged in relation to the Panel.

*Item 48 Takeovers — technical correction*

3.37. The CLERP Bill will insert a new definition of ‘class’ into the Corporations Law. The proposed amendment will ensure that the existing definition of ‘class’ is repealed and replaced by the new definition.

*Items 49 and 50 Takeovers — technical correction*

3.38. The CLERP Bill will insert a new definition of ‘voting share’ into the Corporations Law. The proposed amendment will ensure that the existing definition of ‘voting share’ is repealed and replaced by the new definition.

*Item 51 Panel provisions — technical correction*

3.39. Consequential on the amendment made by item 14 to remove subsections 623(2) and (3) of the CLERP Bill, the proposed amendment will omit the penalties proposed for those subsections.

*Item 52 Panel provisions — technical correction*

3.40. Consequential upon the amendment made by item 15, the proposed amendment will clarify that ‘Panel proceedings’ include applications made to the Panel and references made to the Panel by a Court under new section 657EB.

*Item 53 Panel provisions — technical correction*

3.41. Consequential upon the amendment made by item 15, the proposed amendment will enable the making of regulations on the constitution of the Panel for the purposes of conducting a review of a Panel decision.

*Item 54 Panel provisions — technical correction*

3.42. The proposed amendment corrects a technical error in the CLERP Bill. In relation to the Panel, the CLERP Bill replaces existing references to ‘inquiries’ with references to ‘Panel proceedings’. The proposed amendment removes a remaining reference to ‘inquiry’.

*Item 55 Panel provisions — new section 194*

3.43. The proposed amendment ensures that parties to Panel proceedings may only have legal representation in the proceedings with the leave of the Panel. Parties to Panel proceedings should be able to give evidence with the minimum of legal formality.

3.44. The Panel reforms, as a whole, are designed to facilitate the speedy resolution of takeover disputes and reduce the amount of tactical litigation. The proposed amendments will further these aims, by ensuring that Panel proceedings are conducted with a minimum of formality and with expedition.

*Item 56 Officers — technical correction*

3.45. A technical amendment to Schedule 5, which will make consequential amendments to the *Commonwealth Authorities and Companies Act 1997*.

*Item 57 Officers — technical correction*

3.46. A technical amendment to Schedule 5, which will make consequential amendments to the *Commonwealth Authorities and Companies Act 1997*.

*Item 58 Fundraising — technical correction*

3.47. The CLERP Bill will remove the immunity of the Federal Government from the fundraising and takeover provisions of the Corporations Law. The proposed amendment to section 17 of the *Corporations Act* will clarify that the immunity of the State and Territory Governments from the fundraising and takeover provisions is *not* removed.

*Item 59 Fundraising — technical correction*

3.48. The proposed amendment to section 30 of the *Corporations Act* will ensure that references to 'Chapter 7', which currently contains the fundraising provisions, will include references to 'Chapter 6D', which will contain the fundraising provisions when the CLERP Bill commences.

*Item 60 Fundraising — Cullen Bay Marina — section 66A*

3.49. The Cullen Bay Marina Management Corporation (the Corporation) was established by section 8(1) of the (Northern Territory) *Cullen Bay Marina Act 1992*. It was established to own and manage the common property of a prestigious waterside residential development in Darwin. The *Unit Titles Act* was not used although in many ways the Corporation is analogous to a unit titles body corporate.

3.50. With the approval of the Ministerial Council for Corporations, an amendment to the *Corporations (Northern Territory) Act* provides that the Cullen Bay Marina Management Corporation is excluded from the definition of 'corporation' in section 9 of the Corporations Law of the Northern Territory. One of the effects of this is to take the Corporation out of the fundraising provisions of the Corporations Law.

3.51. This proposed amendment makes the comparable amendment to section 66A of the Corporations Law. The purpose of making this amendment is to ensure that such exemptions are apparent on the face of the Corporations Law.

3.52. While the fundraising provisions have been rewritten (see proposed Chapter 6D), an offer of a body's securities does not need disclosure if the body is an exempt body of the jurisdiction (see proposed subsection 708(19)).

*Item 61 ASIC — disclosure of interests*

3.53. Members of ASIC are subject to the following requirements regarding conflicts of interest by virtue of sections 123 and 124 of the *Australian Securities and Investments Commission Act 1989*:

- the Chairman is required to notify the Minister of his direct or indirect pecuniary interests in, or in a body corporate carrying on a business carried on in Australia and certain other interests (section 123);
- all members are required to comply with the 'ad hoc' disclosure regime described in section 124; and
- any member exercising a power as a delegate of the Commission must comply with the 'ad hoc' disclosure regime described in section 124.

3.54. Section 123 is to be repealed and a new section substituted. The principal differences are:

- the new section requires routine disclosure by all members of the Commission, not just the Chairperson;
- it clarifies the range of financial products that it applies to;
- it requires disclosure of agreements, understandings or expectations that a member will resume a business relationship or enter into a new business relationship when he or she ceases to be a member, and any related severance arrangement or ongoing financial arrangement.

3.55. In addition, an amendment to paragraph 124(1)(b) will counter any suggestion that 'other interests' could be read down to mean interests relating to matters coming within the regulatory domain of ASIC.

*Item 62 ASIC — unclaimed moneys***Proposed item 11C**

3.56. The proposed *Superannuation (Unclaimed Money and Lost Members) Act 1999* will provide a new regime for the handling of unclaimed money under the *Superannuation Industry (Supervision) Act 1993* (SIS Act) and the *Retirement Savings Accounts Act 1997* (RSA Act). It will formalise the transfer of administrative responsibility for unclaimed superannuation money to the Commissioner of Taxation, while the proposed *Superannuation (Unclaimed Money and Lost Members) Consequential and Transitional Act 1999* will remove relevant provisions from the SIS Act and the RSA Act.

3.57. Paragraph 127(1D)(c) of the *Australian Securities and Investments Commission Act 1989* currently provides that disclosing particulars of names of beneficiaries and amounts set out in a statement of unclaimed money given to ASIC under section 225 of the SIS Act (which is included in Part 22) is authorised use and disclosure of the information.

3.58. This paragraph is to be repealed because Part 22 of the SIS Act is being repealed and ASIC will no longer have any function in relation to unclaimed superannuation money.

**Proposed item 11D**

3.59. Section 135 of the *Australian Securities and Investments Commission Act 1989* regulates how the Commission's money may be applied.

3.60. An amendment to subsection 135(4), inserted by the *Financial Sector Reform (Amendments and Transitional Provisions) Act 1998*, included a reference to Part 22 of the SIS Act so that ASIC could, when satisfied regarding a claim for unclaimed superannuation moneys paid to it by a trustee, pay the claimant.

3.61. This subsection is being amended to omit the reference to Part 22 of the SIS Act because ASIC will no longer have any function in relation to such money.

*Item 63 ASIC — performance indicators*

3.62. This amendment will insert in section 138 a requirement that ASIC include in its annual report the performance indicators used and the Commission's performance against those indicators.

*Item 64 ASIC — cash dealers reports*

3.63. Section 243D requires cash dealers to report to the Australian Transaction Reports and Analysis Centre, details of transactions to which they are a party, where they have reasonable grounds to suspect that information they have could be relevant to the investigation or the prosecution of a person for an offence against the ASIC Law or the Corporations Law.

3.64. The proposed amendments are technical amendments which will bring this provision into line with the comparable provision (section 16) in the *Financial Transaction Reports Act 1988*.

3.65. The amendment inserts the following:

- new subsection 243D(5A) which provides that where a cash dealer provides information to the Director of the Australian Transaction Reports and Analysis Centre concerning a suspect transaction in accordance with subsection (1), the cash dealer must not, unless required to do so by another law, disclose to anyone else that the cash dealer had formed the suspicion, that the information has been given or disclose any



other information from which the person to whom the information is disclosed could reasonably infer that the suspicion had been formed or the information given;

- new subsection 243D(5B) which provides a comparable prohibition in relation to further information provided to the Director pursuant to a request under subsection (4);
- new subsection 243D(5C) which provides penalties for breach of subsection (5A) or (5B) — a fine of not more than 120 penalty units or imprisonment for not more than 2 years, or both, if the cash dealer is a natural person, or a fine of not more than 600 penalty units if the cash dealer is a body corporate;
- new subsection 243D(5D) which provides certain exemptions from the prohibitions provided in subsections (5A) and (5B) to accommodate the disclosure of information to ASIC, securities and futures exchanges, exempt markets, clearing houses and certain other bodies which are listed.

3.66. New subsections 243D(5E) and (5F) address the extent to which documents and evidence relating to, for example, reports of suspicions, are admissible in court. The object of new subsection 243D(5F) is to make suspect transaction reports inadmissible in evidence in other legal proceedings, and thereby prevent the examination in a legal proceeding of the circumstances relating to the making of the report. It is intended to address some of the concerns expressed by the Senate Committee in recommendation 16 of *Checking the Cash*.

*Item 65 Related parties — technical correction*

3.67. The proposed amendment corrects an inaccurate cross-reference in subsection 243V(2) from “(1)(d)” to “1(e)”.

*Item 66 Financial reporting — technical correction*

3.68. The proposed amendment is a technical correction to paragraph 309(3)(b) of the Corporations Law to correct a cross referencing error.

*Item 67 Concise financial reporting — technical correction*

3.69. The Corporations Law currently requires a company to send to its members either a complete copy of its financial statements or a concise financial report. Concise financial reports are prepared in accordance with the accounting standards and consist of abridged financial statements accompanied by appropriate discussion and analysis of the financial statements.

3.70. However, while many companies have opted to provide shareholders with concise financial reports, the discussion and analysis contained in the reports has generally been uninformative due to the requirement that it must be audited. The proposed amendment will overcome this problem by amending section 314 to provide that the discussion and analysis provided in concise financial reports does not have to be audited.

3.71. In addition, a proposed amendment to paragraph 334(4)(b) will enable accounting standards to apply to periods starting on or after a date specified in the standard.

*Item 68 Technical corrections*

3.1. The proposed amendment corrects a cross-referencing error in paragraph 601CE(c), substituting “242(2)” for “242(3)”.

3.2. The proposed amendment to paragraph 1085(1)(c) substitutes “constitution (if any) and any replaceable rules that apply to the company” for the reference to “constitution”. The proposed amendment takes into account the change made by the *Company Law Review Act 1998*, that companies are no longer required to have a constitution, but can rely solely on the replaceable rules.

*Item 69 Schedule 10 — Amendments consequential on amendment of the Commonwealth Authorities and Companies Act 1997 (the CAC Act)*

3.3. The reforms to directors' duties and corporate Governance introduced by the CLERP Bill will apply to Commonwealth companies (defined in section 34 of the CAC Act as Corporations Law companies in which the Commonwealth has a controlling interest). Schedule 5 of the CLERP Bill will amend the CAC Act to apply the reforms, where appropriate, to Commonwealth authorities (defined in sections 5 and 7 of the CAC Act).

3.4. Schedule 10 contains technical amendments to Commonwealth authority legislation, consequential upon the changes to be made to the CAC Act.

*Item 70 ASIC Act title change — consequential amendments*

3.5. This inserts proposed Schedule 11 which includes amendments to the Corporations Law to amend references to 'ASC Law' and 'ASC Regulations' so that they read 'ASIC Law' and 'ASIC Regulations'. This is consistent with recently agreed amendments to the Corporations ([Name of State]) Acts (following the Commission's change of name from 1 July 1998).

*Item 71 ASIC Act title change — consequential amendments*

3.6. This inserts proposed Schedule 12 which will make comparable amendments to the references to 'ASC Law' and 'ASC Regulations' in other Acts.