

1994

THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

HOUSE OF REPRESENTATIVES

CORPORATIONS LEGISLATION AMENDMENT BILL 1994

EXPLANATORY MEMORANDUM

(Circulated by authority of the Attorney-General,
the Honourable Michael Lavarch MP)



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to application of changes -

CORPORATIONS LEGISLATION AMENDMENT BILL 1994

OUTLINE

1. The program for simplification of the Corporations Law that has been recently announced will take some little time to produce results. In the meantime, there are a number of miscellaneous amendments that need to be made as soon as possible to improve the operation of the Corporations Law and to facilitate the operations of the ASC and the Corporations and Securities Panel ("the Panel").

2. The key reforms proposed by the Corporations Legislation Amendment Bill 1994 ("the Bill") will:

- * confer civil jurisdiction under the Corporations Law on lower courts in the areas of debt recovery and monetary compensation;

- * make a number of further amendments to support the introduction of the Clearing House Electronic Subregister System ("CHESS") to be introduced by the Australian Stock Exchange;

- * extend the application of the fundraising provisions of the Corporations Law to the activities of building societies and credit unions and help to rationalise the respective roles of the Corporations Law and State and Territory Financial Institutions legislation;

- * better equip the Panel to fulfil its legislative charter of making timely commercial decisions in relation to takeovers and extend its jurisdiction to takeover conduct generally;

- * introduce a modified regime for the notification of persons affected by ASC decisions, of their rights of review under the Administrative Appeals Tribunal Act 1975;

- * introduce into the Corporations Law and the Australian Securities Commission Act 1989 the penalty units system to prescribe penalties;

- * transfer the Minister's functions and powers relating to unclaimed property to the ASQ

provide for the regulation of markets in certain securities using screen based trading systems;

* amend the provision regulating the segregation of client moneys by futures brokers; and

* amend the definitions of "securities" and "futures contract" to facilitate the trading of equity based instruments having the characteristics of both equity and futures products.

3. A detailed summary of the key reforms proposed by the Bill commences at page 5.

4. The Bill will also make a number of more minor miscellaneous amendments to:

* enable certificates of incorporation of a company and registration of a charge to be used in courts outside the State or Territory in which the company is incorporated;

* facilitate the conversion of certain companies limited by shares to no liability companies;

* simplify the requirements for registration of a change of name of a company to its registration number (ACN);

* correct inaccurate cross references in sections 896 and 930 of the Corporations Law;

* facilitate the trading on the Australian Stock Exchange of options over unissued shares;

* recognise in section 1154 that futures brokers can be natural persons as well as corporations;

* enable the ASC to continue actions commenced by State/Territory Corporate Affairs Commissions, as well as the NCSC; and

* amend the provision concerning the making of declarations of exempt futures markets to ensure that the conditions of declarations may be enforced.

FINANCIAL IMPACT STATEMENT

5. The Bill is not expected to have any significant financial impact on Government or business as the majority of the proposed amendments clarify existing provisions of the Corporations Law and will not result in additional costs.

6. The amendments proposed by Schedule 1 of the Bill to confer civil jurisdiction on lower courts may increase the number of civil actions brought under the Corporations Law. However it is not possible to determine the extent to which additional civil actions will be brought before lower courts, or the extent to which this would be counterbalanced by a consequential reduction in the number of civil actions brought before superior courts under the Corporations Law.

7. The court jurisdiction amendments will facilitate business, to the extent that those businesses with legitimate civil claims under the Corporations Law will be able to bring those actions in any lower court in Australia if the claim is within the court's usual monetary limits, without worrying about technical jurisdictional issues such as where the cause of action originated or the State or Territory jurisdiction in which the defendant company was registered.

8. The amendments relating to financial institutions proposed by Schedule 3 will result in some additional work for the Australian Securities Commission ("ASC") which will, on commencement of that Schedule, regulate the fundraising activities (with certain specified exceptions) of financial institutions within their State of origin as well as their interstate fundraising activities. No additional funding has been provided to the ASC for this purpose. On the other hand, since the ASC already regulates the majority of public fundraising the amendments will enhance regulatory efficiency.

9. The amendments proposed by Schedule 3, in combination with the complementary State and Territory amendments to the Financial Institutions legislation, are also expected to result in:

- * savings for the financial institutions industry by eliminating regulatory duplication and reducing the legal uncertainty; and

- * savings for the regulators under the Financial Institutions scheme which will have passed over responsibility for regulating the fundraising activities of financial institutions referred to above to the ASC.

10. The scheme proposed by Schedule 5, requiring the ASC to notify affected persons of their review rights, simply implements in primary legislation a scheme that has already been introduced by regulations made under the Administrative Appeals Tribunal Act. Thus the present amendments will have no significant financial impact.

11. The remaining amendments proposed by the Bill are of a clarifying nature to refine existing provisions and will have no significant financial impact.

ABBREVIATIONS

The following abbreviations are used in this explanatory memorandum:

- AAT - Administrative Appeals Tribunal
- AAT Act - Administrative Appeals Tribunal Act 1975
- the Account - Companies Unclaimed Money Account
- AFIC Code - Australian Financial Institutions Commission Code
- ASC - Australian Securities Commission
- ASC Act - Australian Securities Commission Act 1989
- ASC Law - alternative citation of certain provisions of the ASC Act
- ASX - Australian Stock Exchange
- the Bill - Corporations Legislation Amendment Bill 1994
- CHESS - Clearing House Electronic Subregister System
- FAST - Fast Accelerated Security Transfer System
- NGF - National Guarantee Fund
- the Panel - Corporations and Securities Panel
- SCH - Securities Clearing House
- SEGC - Securities Exchanges Guarantee Corporation

SUMMARY OF KEY AMENDMENTS PROPOSED BY THE BILL

Conferral of jurisdiction on lower courts

12. Over the last year there have been a number of court decisions to the effect that lower courts, such as district courts and county and magistrates' courts, do not have jurisdiction to hear civil claims made under the Corporations Law. These cases have generated concern that many legitimate civil claims will not be pursued under the Corporations Law because of the costs of bringing actions in superior courts.

13. Schedule I of the Bill will address these concerns by conferring on lower courts (including intermediate courts) in each State and Territory, civil jurisdiction in respect of corporate law claims relating to debt recovery or monetary compensation. Civil jurisdiction will not, however, be granted to lower courts where this would involve high level discretionary powers that should be confined to superior courts (such as approval of complex schemes of arrangement for a corporate group).

14. Jurisdiction to hear relevant civil actions will also be subject to the monetary limits which generally apply in each State and Territory jurisdiction.

15. The application to lower courts of the "cross-vesting" rules which currently apply to superior Courts in respect of corporate law matters, will enable relevant civil actions to be taken in any lower court able to hear civil claims for the amount involved, without the parties having to worry about technical jurisdictional issues.

Clearing house electronic subregister system ("CHESS")

16. Part 7.2A of the Corporations Law, inserted by Part 5 of the Corporate Law Reform Act 1992, provides a legislative framework for the electronic settlement of transactions on the Australian Stock Exchange ("ASX"). It enables the ASX to introduce a new Clearing House Electronic Subregister System ("CHESS") through the establishment of an approved Securities Clearing House ("SCH") and legislative support of its business rules.

17. The aim of CHESS is to have transactions settled and delivered within 3 days after trade and to replace the current paper document of transfer with electronic transfer.

18. Schedule 2 will make a number of further technical amendments to the Corporations Law to support the introduction of CHESS. These amendments will:

- * facilitate procedures for the cancellation of share certificates by brokers upon creation of an uncertificated securities holding on an electronic subregister operated by the SCH;

- * allow companies to set cut-off dates for voting purposes in respect of quoted securities; and

- * facilitate electronic acceptance of takeover offers.

Application of the Corporations Law to financial institutions

19. Presently, the activities of financial institutions (principally building societies and credit unions) are regulated by both the Corporations Law as well as by State and Territory Financial Institutions legislation.

20. The Ministerial Councils for Corporations and for Financial Institutions have agreed on the principles by which the interface between the Corporations Law and the Financial Institutions legislation is to be rationalised. Rationalisation will remove doubts and uncertainties for financial institutions as to which law applies to their activities. It will also remove any regulatory duplication and reduce the associated administrative burden.

21. Schedule 3 includes the amendments to the Corporations Law which are needed to implement the rationalisation decision in relation to the national companies and securities scheme laws.

22. In summary, the amendments in Schedule 3 will have the following consequences:

- * the fundraising provisions (ie Part 7.12 and certain provisions in Part 7.11 of the Corporations Law) are to apply to financial institutions with certain specified exceptions - namely withdrawable shares, deposit taking and other circumstances in which the provisions would not apply if the fundraiser were a bank. There will also be special provision for those bodies registered as special services providers under the AFIC Code;

- * the market offence provisions in Part 7.11 of the Corporations Law are to apply to financial institutions with certain specified exceptions;

* the duties of officers and charges over the property of financial institutions are to be regulated solely by the Financial Institutions legislation; and

* registration of financial institutions under the Corporations Law as registrable Australian bodies will no longer be required.

Corporations and Securities Panel

23. Schedule 4 of the Bill will make a number of changes to the legislation regulating the activities of the Corporations and Securities Panel ("the Panel") to better equip it to fulfil its legislative charter of making timely commercial decisions in relation to takeovers, as follows:

* the Panel's jurisdiction will be extended to cover matters concerned with takeover conduct generally; and

* the legislative procedures for the conduct of Panel hearings set out in the Australian Securities Commission Act 1989 ("the ASC Act") will be amended to specify with greater precision what constitutes procedural fairness for the purpose of the Panel's inquiries.

Notification of review of decisions

24. The Administrative Appeals Tribunal Act 1975 ("the AAT Act") was amended in 1992 by the inclusion of subsection 27A(1), which requires a person who makes a reviewable decision to take all reasonable steps to give any person whose interests are affected by the decision, notice of the making of the decision and of the right to have the decision reviewed.

25. At the time the AAT Act was amended, it was recognised that the requirements of that subsection would present the ASC with the difficult practical problem of identifying all of the persons who are affected by its more broad ranging decisions.

26. The Administrative Review Council, in conjunction with the ASC and the Attorney-General's Department, has examined all categories of decisions of the ASC to assess the extent to which exemption from the notification of the making of the decision and review rights may be justified.

27. Schedule 5 will implement the results of that examination by excluding certain decisions made under the Corporations Law and the ASC Law from the requirements of subsection 27A(1) of the AAT Act. Schedule 5 will also provide for a modified regime for the notification of persons affected by such decisions of their rights of review under the AAT Act.

28. The amendments proposed by Schedule 5 will enact in primary legislation the scheme enacted by the Administrative Appeals Tribunal Regulations (Amendment), Statutory Rules 1993 No 326, which commenced on 11 December 1993.

Penalty units

29. The introduction of penalty units will allow pecuniary penalties imposed by national scheme laws to be varied more easily. This system has already been introduced for Commonwealth offences as a result of amendments which were made in 1992 to the Crimes Act 1914. Those amendments were made in response to the recommendations of the Review of Commonwealth Criminal Law. Because of the nature of the national scheme laws the penalty unit system is being made to apply discretely to the ASC Act and the Corporations Law.

30. The amendments set out in Schedule 6 will convert penalties in the ASC Act and the Corporations Law from a reference to a dollar value to an equivalent amount of penalty units.

Unclaimed property

31. Part 9.7 of the Corporations Law requires that all unclaimed money and proceeds from the sale of unclaimed shares or other unclaimed property falling to be dealt with under the Corporations Law be paid by the Minister administering the Corporations Law into "the Account" which, in accordance with section 71 of the Corporations Act 1989, is established as a trust account for the purposes of the Audit Act 1901. The Minister may authorise payment out of the Account where a person is able to establish entitlement.

32. The unclaimed property functions are thus largely administrative in nature and, as such, would more appropriately be handled by the ASC.

33. Accordingly, Schedule 7 of the Bill will transfer the unclaimed property functions and powers of the Minister to the ASC.

Screen based trading systems

34. Certain of the amendments proposed by Schedule 8 of the Bill will provide for the establishment of stock markets in unquoted prescribed interests on which

the interests may be traded by means of an electronic trading facility (Items 1, 3, 9, 18, 19 and 20 of Schedule 8). As with stock exchanges, approved securities organisations and exempt stock markets, the establishment of any such market will be required to be approved by the Minister.

35. Presently, prescribed interests can only be issued or offered under a deed approved for the purposes of Division 5 of Part 7.12 of the Corporations Law. Such an approved deed must contain certain covenants including a buy-back covenant and a covenant requiring the management company to make and maintain adequate buy-back arrangements at all times (paragraphs 1069(1)(c) and (d)). The amendments proposed by the Bill will provide for the management company of a prescribed interest scheme to make written application to the ASC for approval by the Minister for the establishment of a section 770A stock market.

36. The proposed legislation, supplemented by regulations, will provide the necessary basis for the supervision by the ASC of any such approved market.

Clients' Segregated Accounts

37. Section 1209 is a key provision of the scheme of investor protection for the futures industry that underlines Chapter 8 of the Corporations Law. It is intended to provide protection for funds deposited with futures brokers by clients. Where money (or other property) is deposited with a futures broker by a client the broker is required by section 1209 to deposit the money in a clients' segregated account. Concerns have arisen as to the application of section 1209 in specific circumstances.

38. Amendments to section 1209 will clarify the application of the provision in particular circumstances where client moneys are held by futures brokers. In particular, the Bill will recognise that in a futures transaction involving a chain of intermediaries, monies can be identified as client monies and continue to be treated as such.

The definition of "securities" and "futures contract"

39. The proposed amendments to the definitions of "securities" and "futures contract" will enable consideration to be given to trading on the Australian stock and futures markets of specified kinds of agreements which may not fall squarely within the current definitions of either "securities" or "futures contract". This is particularly relevant at this time with the development of hybrid products and the responsibility of the Government to ensure adequate regulation while not retarding market innovation.

40. The proposed amendments provide for the prescription by regulation of certain kinds of agreement as securities or futures contracts. The proposed amendments will permit the modification of the Corporations Law in its application to such prescribed agreements to enable fine tuning of the Law to such hybrid instruments.

Miscellaneous

41. The remaining miscellaneous amendments in Schedule 8 of the Bill will:

- * enable certificates of incorporation of a company and registration of a charge to be used in courts outside the State or Territory in which the company is incorporated;
- * facilitate the conversion of certain companies limited by shares to no liability companies;
- * simplify the requirements for registration of a change of name of a company to its registration number (ACN);
- * correct inaccurate cross references in sections 896 and 930 of the Corporations Law;
- * facilitate the trading on the Australian Stock Exchange of options over unissued shares;
- * recognise in section 1154 that futures brokers can be natural persons as well as corporations;
- * enable the ASC to continue actions commenced by State/Territory Corporate Affairs Commissions, as well as the NCSC; and
- * amend the provision concerning the making of declarations of exempt futures markets to ensure that the conditions of declarations may be enforced.

CLAUSE-BY-CLAUSE COMMENTARY

PART 1 PRELIMINARY

Clause 1 Short title

42. Upon enactment, the Bill will be known as the Corporations Legislation Amendment Act 1994.

Clause 2 - Commencement

43. Parts 1, 2 and 3 and Schedules 5 and 9 will commence on the day on which the Bill receives the Royal Assent (subclause 2(1)).

44. In order for the system of penalty units to come into operation in a uniform way, Schedule 6 will not commence until after all other parts of this Bill and the Corporate Law Reform Act 1994 have commenced (subclause 2(2)). This will enable the various new and amended penalties to also be converted to penalty units at the same time as the existing penalties.

45. Schedule 1 (Amendments of Corporations Act and Corporations Law relating to civil jurisdiction of lower courts under the Corporations Law) will commence operation on a day or days to be fixed by Proclamation (subclause 2(3)). No specific time period has been set for commencement of these provisions because complementary State and Northern Territory amendments of the respective Corporations Acts will also be required to confer effective jurisdiction on lower courts under the national scheme laws. The Commonwealth has no control over the timing of the necessary State and Northern Territory amendments. It is proposed that a uniform date be set for commencement of the amendments to the national scheme laws through consultation with the State and the Northern Territory Governments.

46. Schedule 3 (Amendments of Corporations Law relating to financial institutions) will also commence operation on a day or days to be fixed by Proclamation (subclause 2(3)). No specific time period has been set for commencement of these provisions because complementary amendments to State and Territory legislation, the Financial Institutions Codes, is required to complete the task of rationalising the interface between the Corporations Law and the Financial Institutions Codes. The Commonwealth has no control over the timing of the amendments to the Financial Institutions Codes. It is proposed that a common date be set for commencement of the amendments contained in Schedule 3 and the

amendments to the Financial Institutions Codes through consultation with the Ministerial Council for Financial Institutions.

47. The remaining Schedules 2, 4, 7 and 8 will commence on a day or days to be fixed by Proclamation, or 6 months and one day after the Bill receives the Royal Assent, whichever is the earlier (subclauses 2(4) and (5)).

Clause 3 - Meaning of "AAT Act", "ASC Act". "Corporations Act" and Corporations Law "

48. Clause 3 defines the abbreviations "AAT Act", "ASC Act", "Corporations Act" and "Corporations Law" used throughout the Bill.

PART 2 THE SCHEDULES

Clause 4 Schedule 1 - Amendments of Corporations Act and Corporations Law relating to civil jurisdiction of lower courts

49. Clause 4 provides for the Corporations Act and the Corporations Law to be amended as set out in Schedule 1, to confer jurisdiction on lower courts.

Clause 5 - Schedule 2 - Amendments of Corporations Law relating to Clearing House Subregister System

50. Clause 5 provides for amendments of the Corporations Law, relating to the Clearing House Subregister System, as set out in Schedule 2.

Clause 6 - Schedule 3 - Amendments of Corporations Law relating to financial institutions

51. Clause 6 provides for amendments of the Corporations Law, relating to the application of that Law to financial institutions, as set out in Schedule 3.

Clause 7 - Schedule 4 - Amendments of ASC Act and Corporations Law relating to Corporations and Securities Panel

52. Clause 7 provides for amendments of the ASC Act and the Corporations Law, relating to the Corporations and Securities Panel, as set out in Schedule 4.

Clause 8 - Schedule 5 - Amendments of AAT Act, ASC Act and Corporations Law relating- to review of decisions

53. Clause 8 provides for amendments of the AAT Act, the ASC Act and the Corporations Law, relating to the review of decisions, as set out in Schedule 5.

Clause 9 - Schedule 6 - Amendments of ASC Act and Corporations Law introducing penalty units

54. Clause 9 provides for the ASC Act and the Corporations Law to be amended, as set out in Schedule 6, to introduce a system of penalty units applying to offences.

Clause 10 - Schedule 7 - Amendments of Corporations Act and Corporations Law relating to unclaimed property.

55. Clause 10 provides for amendments of the Corporations Act and the Corporations Law, relating to unclaimed property, as set out in Schedule 7.

Clause 11 - Schedule 8 - Miscellaneous amendments of Corporations Law

56. Clause 11 provides for miscellaneous amendments of the Corporations Law, as set out in Schedule 8.

Clause 12 - Schedule 9 - Amendments of ASC Act and Corporations Law relating to application of changes

57. Clause 12 provides for amendments of the ASC Act and the Corporations Law, relating to the application of the other amendments made by the Bill to the ASC Act and the Corporations Law, as set out in Schedule 9.

PART 3 - APPLICATION AND SAVING PROVISIONS RELATING TO AMENDMENTS OF CORPORATIONS ACT

Division 1 - Amendments relating to civil jurisdiction of lower courts

Introduction

58. Division I of Part 3 of the Bill deals with the application of proposed amendments to Part 9 of the Corporations Act 1989 (Commonwealth) ("Corporations Act (Commonwealth)") conferring civil jurisdiction on lower courts in the Corporations Law (Part 1 of Schedule 1). The provisions in Division 1 of Part 3 are intended to ensure that:

- * the amendments conferring civil jurisdiction:
- * are not taken to affect the operation of the law before commencement; and
- * apply in relation to proceedings commenced (or recommenced) after the amendments commence, whether the right of action arose before or after the commencement; and
- * where, before commencement, a lower court has made a decision in respect of a civil matter arising under the Corporations Law on the basis that it had jurisdiction to hear that matter, then in any proceedings arising after commencement, the court would determine whether it had jurisdiction in relation to that matter on the basis that Part 9 of the Corporations Act (Commonwealth), as amended by the jurisdiction amendments, had been in force at the time that the decision had been made.

Clause 13 - Interpretation

59. Clause 13 defines the terms "jurisdiction amendments" and "jurisdiction commencement" as used in the proposed application provisions in Clauses 14-16. The term "jurisdiction amendments" is defined to mean the amendments to Part 9 of the Corporations Act (Commonwealth) which would be made by the proposed amendments in Part 1 of Schedule 1. The term "jurisdiction commencement" is defined to mean the date of commencement of those amendments.

Clause 14 - Application of -jurisdiction amendments - general

60. Clause 14 provides that the jurisdiction amendments apply to proceedings commenced or recommenced after the jurisdiction commencement, whether the cause of action arose before or after commencement. This is intended to ensure that the capacity of a person to commence a relevant civil action in a lower court is not affected by whether the cause of action arose before commencement.

Clause 15 - Effect of decision that court did not have -jurisdiction

61. As indicated in the introductory notes to Schedule I following, there have been a number of court decisions over the last year that lower courts do not have civil jurisdiction under the Corporations Law. Clause 15 provides that the validity of such court decisions is not affected by the jurisdiction amendments and does not preclude the recommencement of proceedings in a lower court after commencement of the jurisdiction amendments.

Clause 16 - Effect of absence of decision that court did not have -jurisdiction

62. There may be some cases where, before commencement, lower courts have made decisions in relation to civil actions under the Corporations Law on the assumption that they had jurisdiction to hear the civil action, but where those decisions have not yet been enforced. While there may be only a limited number of such cases, there would be a legitimate expectation by parties to these proceedings that the lower court decision was capable of being enforced. In conjunction with the amendments in Schedule I clarifying the extent of jurisdiction by lower courts over civil matters arising under the Corporations Law, the provisions in Clause 16 are intended to preserve the jurisdictional validity of relevant lower court decisions made before commencement, if such decisions could have been validly made after commencement.

63. In the absence of special provisions of this nature, it would be possible for a party to relevant lower court proceedings which had been instituted before commencement to lodge an appeal after commencement, on the grounds that the lower court did not have jurisdiction to hear the matter. Alternatively, the party could seek a declaration from a superior court that the previous lower court decision had been invalid. While it may not be likely that such an appeal would be lodged or declaration sought if it was expected that the original applicant in the lower court proceedings could then simply recommence proceedings in a lower court, the original applicant may not be able to afford the costs of the superior court action and/or may not be able to recommence proceedings if the relevant limitations period has expired.

64. For these reasons, Clause 16 is intended to ensure that the jurisdictional validity of any lower court decision made before commencement on the basis that it was able to hear a civil matter arising under the Corporations Law is determined by application of the proposed jurisdiction amendments. Clause 16 provides that the proposed jurisdiction amendments apply to a relevant lower court decision made before commencement if no court had decided whether the lower court had jurisdiction to hear the matter, or if the lower court or an appeal court had decided before commencement that the lower court had jurisdiction to hear the matter.

Division 2 - Amendments relating to unclaimed property

Clause 17 - Schedule 7 - Saving provision relating to repeal of section 71

65. Clause 17 provides that despite the repeal of section 71 of the Corporations Act (Commonwealth), the existing Companies Unclaimed Money Account continues in existence, and the section continues to apply to it, until all the money in that account has been dealt with in accordance with proposed subsection 1404(1) of the Corporations Law. Proposed subsection 1404(1) requires that money in the existing Companies Unclaimed Money Account be paid as soon as practicable after commencement, into the ASC's unclaimed money account.

SCHEDULE 1 - AMENDMENTS OF CORPORATIONS ACT AND CORPORATIONS LAW RELATING TO CIVIL JURISDICTION OF LOWER COURTS

Overview

66. There have been a number of court decisions over the last year, including a decision of the full Supreme Court of South Australia and a decision of a single judge of the Federal Court, that lower courts, such as District courts and County and Magistrates courts, do not have jurisdiction to hear civil claims made under the Corporations Law. On the basis of these decisions it would, for example, always be necessary for a liquidator seeking the recovery of debts under the insolvent trading provisions in section 588G of the Corporations Law to commence proceedings in a superior court (ie, the Federal Court, or the Supreme Court of a State or Territory, or the Family Court or State Family Court), regardless of the amount involved. These court decisions have generated concern that many legitimate civil claims will not be pursued under the Corporations Law because of the costs of bringing actions in superior courts.

67. The Ministerial Council for Corporations, which is chaired by the Commonwealth Attorney-General and which also comprises the Attorneys-General in each State and the Northern Territory, has agreed that the national scheme laws should be amended to confer jurisdiction on lower courts in respect of civil matters arising under the Corporations Law that relate to debt recovery or monetary compensation. However, it is not proposed to grant civil jurisdiction to lower courts where civil actions under the Corporations Law do not relate to debt recovery or monetary compensation and where the grant of civil jurisdiction would involve high level discretionary powers which are appropriately confined to superior courts (for example, the making of Court orders for the winding up of a company under Part 5AB of the Corporations Law).

68. It is proposed that the jurisdiction of lower courts to hear relevant civil matters arising under the Corporations Law be subject to the monetary limits for civil claims which apply in each State and Territory jurisdiction. It is also proposed that lower courts be subject to the "cross-vesting" rules which currently apply to superior courts in respect of corporate law matters. Subject to appropriate legislative safeguards, this will enable civil actions to be taken in any lower court which, in the exercise of its general jurisdiction, is able to hear civil claims for the amount involved, without parties to the proceedings having to be concerned about technical jurisdiction issues.

69. The effective implementation of these proposed amendments within the National Scheme of Corporate Regulation will require uniform amendments to the Corporations Act 1989 (Commonwealth) and corresponding Corporations Acts in each State and the Northern Territory, as well as to the Corporations Law. The proposed amendments in Part I of Schedule I are intended to provide a legislative model for amendments to the corresponding Corporations Acts in each State and the Northern Territory.

70. It is proposed that the amendments in this Schedule and corresponding amendments of the Corporations Acts in each State and Northern Territory would come into operation on the same date, thereby enabling the simultaneous and uniform application of the amendments in each State and Territory jurisdiction.

Part 1 - Amendments of Corporations Act

Introduction

71. Division I of Part 9 of the Corporations Act (Commonwealth) deals with the vesting of jurisdiction of superior courts in respect of civil matters arising under the Corporations Law of the Capital Territory. The combined effect of Division 1 of Part 9 of the Corporations Act (Commonwealth) and the corresponding provisions in the Corporations Acts in each State (including the Northern Territory) is to provide for the cross-vested jurisdiction of superior courts in each State and the Capital Territory in respect of civil matters arising under Corporations Law of each State and the Capital Territory.

72. The proposed amendments to Part 9 of the Corporations Act would:

(a) expressly confer jurisdiction on lower courts in each jurisdiction in

Australia in relation to civil matters arising under the Corporations Law of the Capital Territory unless:

(i) the amount of the civil claim, or value of property associated with the civil claim, is not within the court's general jurisdictional limits; or

(ii) the Corporations Law clearly intends that jurisdiction in relation to that matter be confined to superior courts (proposed new section 5 1 B); and

(b) enable a lower court in a particular State or Territory jurisdiction to transfer proceedings in respect of civil matters arising under the Corporations Law of the Capital Territory either to:

(i) a lower court in that jurisdiction or a lower court in another jurisdiction;
or

(ii) to a superior court in that jurisdiction, on the basis that the proceedings would either be dealt with by that superior court, or be transfer-red to a superior court in another jurisdiction (proposed new section 53 AA).

73. The proposed amendments also include consequential amendments to existing provisions in Part 9 to reflect the principal amendments outlined above and the new terms and expressions used in those principal amendments.

74. In some cases, the terms and expressions used in the existing provisions in Part 9 are consistent with the principal amendments and associated new terms and expressions. In these cases, no amendments to Part 9 are required. For example, the provisions in section 53 which provide for the transfer of proceedings by courts other than the Family Court or the State Family Courts to courts in other jurisdictions do not require amendment; whereas consequential amendments are required to the provisions in section 53A dealing with the transfer of proceedings by the Family Courts and State Family Courts.

75. The proposed amendments to Part 9 of the Corporations Act (Commonwealth) would, together with complementary amendments to the Corporations Acts in each State and the Northern Territory and the proposed amendments to the Corporations Law, determine the extent of jurisdiction of lower courts in regard, to civil matters arising under the Corporations Law. It is intended that the corresponding amendments to the State Corporations Acts would each:

(a) confer jurisdiction on lower courts in each State (including the Northern Territory) and the Capital Territory in respect of civil matters arising under the Corporations Law of the particular State in which the legislation was enacted, subject to the jurisdictional requirements outlined at subparagraphs (a)(i) and (ii) above; and

(b) enable those lower courts to transfer proceedings in relation to those civil matters in accordance with subparagraph (b) above.

Item 1 - Proposed amendment to paragraph 49(1)(a)

76. The proposed amendment to subsection 49(1) will remove the existing definition of "civil matter". This definition will be relocated to subsection 50(1).

Item 2 - Proposed amendment to subsection 50)

77. This Item amends subsection 50(1) of the Corporations Act to include definitions of relevant terms used in the remaining provisions of this Schedule which provide for the conferral of jurisdiction on lower courts:

* "civil matter" is defined to have the same meaning as in existing paragraph 49(1)(a) - ie, a matter other than a criminal law matter arising under the Corporations Law;

* "Corporations Law" is defined to have the same meaning as in subsection 50(2) - ie, a reference to the "Corporations Law of the Capital Territory" includes the Corporations Regulations of the Capital Territory and the ASC Law and Regulations of the Capital Territory etc.;

* "lower court" is defined to mean any State or Territory court that is not a "superior court";

* "superior court" is defined to mean the Federal Court, the Supreme Court of a State (including the Northern Territory by virtue of the definition of "State" in section 4), the Supreme Court of the Capital Territory, the Family Court or a State Family Court;

* "superior court matter" is defined to mean a civil matter that the Corporations Law clearly intends to be dealt with only by a superior court, e.g., by use of the expression "Court" (see also the introductory notes to Part 2 of this Schedule following).

Item 3 Proposed section 51B - Jurisdiction of lower courts

78. Proposed subsection 51B(1) confers jurisdiction on lower courts in each State and the Capital Territory with respect to civil matters arising under the Corporations Law of the Capital Territory, subject to the jurisdictional limits imposed by proposed subsection (2), and except in respect of those civil matters where the Corporations Law clearly intends that jurisdiction be confined to superior courts.

79. Proposed paragraph 51B(2)(a) is intended to make the jurisdiction of lower courts with respect to relevant civil matters under the Corporations Law of the Capital Territory subject to the jurisdictional limits in relation to the amounts of civil claims, or the value of property, with which the court may deal in the exercise of its general civil jurisdiction outside of the Corporations Law. On this basis, where a civil matter arising under the Corporations Law is not a "superior court

matter, a lower court would have jurisdiction to hear the matter if the amount claimed or the value of the property with which the court is required to deal would be within the general jurisdiction of the court in respect of civil claims.

80. Proposed paragraph 51B(2)(b) is intended to ensure that the jurisdiction conferred on a lower court in respect of a civil matter arising under the Corporations Law of the Capital Territory is not limited by any other jurisdictional limits which apply to the court in the exercise of its general jurisdiction outside of the Corporations Law. This is intended to remove any uncertainty that particular types of civil matters arising under the Corporations Law may not fall within the general jurisdictional competence of the lower court.

Item 4 - Proposed amendment to subsection 52(3)

81. The proposed amendment to subsection 52(3) replaces the existing reference to "the Supreme Court" with a reference to "a court (not being a State Family Court)", thereby ensuring that appeals cannot be instituted from a decision of a court in one jurisdiction to the Federal Court, or to a court in another jurisdiction.

Items 5 and 6 - Proposed amendments to paragraphs 53A(2)(a), N and (c) and to subsection 53A(2)

82. The proposed amendments to paragraphs 53A(2)(a), (b) and (c) and to subsection 53A(2) replace the references in those paragraphs and that subsection to "Supreme Court" with a reference to "another court", thereby ensuring that in appropriate cases the Family Court, or a State Family Court, can transfer proceedings to a superior court or a lower court, where the proceedings before the Family Court or State Family Court arise out of or are related to proceedings pending in that superior court or lower court.

Item 7 - Proposed section 53 AA - Transfer of proceedings in lower courts

83. Proposed section 53 AA is consistent with the existing provisions of section 53, which deal with the transfer of proceedings by superior courts. The proposed section enables a lower court having jurisdiction in respect of a particular civil matter arising under the Corporations Law to transfer proceedings to another lower court having jurisdiction to hear the matter (whether the lower court is located in that jurisdiction or in another jurisdiction), or to transfer the proceedings to a superior court in that jurisdiction.

84. Proposed subsection 53 AA(1) ensures that a lower court is only able to transfer proceedings to another court if that court has jurisdiction to hear the matter under proposed section 5 1 B.

85. Proposed subsection 53 AA(2) provides that a lower court may only transfer proceedings to another court in accordance with proposed subsections 53 AA(3) and (4) if it appears to the first court that it is in the interests of justice to do so.

86. Proposed subsection 53 AA(3) enables a lower court to transfer proceedings to another lower court, whether that court is located within the jurisdiction of the first lower court, or in another jurisdiction. This section could apply, for example, where:

- * it is appropriate to transfer the proceedings to another lower court in the same jurisdiction because the civil claim arising under the Corporations Law is within the monetary limits of the other court and the costs of the proceedings will be reduced for parties to those proceedings; or

- * it is appropriate to transfer the proceedings to a lower court in another jurisdiction, having regard to the principal place of business of the parties to the proceedings and the place or places where the events that are the subject of the proceedings took place (see section 53B).

87. Proposed subsection 53AA(4) enables a lower court to transfer proceedings to the relevant Supreme Court in the same jurisdiction for the purpose of the proceedings being transferred to a superior court in another jurisdiction. The lower court may consider it appropriate that the superior court in that other jurisdiction hear the matter, having regard to the principal place of business of the parties to the proceedings, the place or places where the events that are the subject of the proceedings took place and the monetary limits which apply to lower courts in that other jurisdiction. However, given that it would not be appropriate for a lower court in one jurisdiction to transfer proceedings to a superior court in another jurisdiction, proposed subsections 53AA(4) and 53AA(5) provide a mechanism whereby the superior court in the first jurisdiction can determine whether it should deal with the application itself or transfer the proceedings to the superior court in the other jurisdiction.

88. Proposed subsection 53AA(6) ensures that proceedings may only be transferred by a Supreme Court in one jurisdiction to a court in another jurisdiction in accordance with the transfer of proceedings provisions in existing section 53 and the other requirements in Division 1 of Part 9.

89. Proposed subsection 53AA(7) defines the term "relevant Supreme Court" as used in the preceding subsections of proposed section 53AA.

Item 8 - Proposed amendment to section 53B - further matters for a court to consider when deciding whether to transfer a proceeding

90. Item 8(a) adds to section 53B a reference to proposed new section 53AA, so that a lower court must have regard to the matters listed in new section 53B in deciding whether to transfer proceedings under that proposed new section.

91. Item 8(b) requires a court, in deciding whether to transfer proceedings under existing sections 53 or 53A or proposed new section 53AA, to also have regard to other courts which may have jurisdiction to deal with those proceedings (for example, because the amount of the civil claim is within their general civil jurisdiction).

Item 9 - Proposed amendment to section 53C - transfer may be made at any stage

92. The proposed amendment to section 53C ensures that the capacity of a court to transfer proceedings at any stage applies also to provisions in proposed new section 53AA which deal with the transfer of proceedings.

Item 10 - Proposed amendment to section 53D - transfer of documents

93. The proposed amendment to section 53D ensures that the provisions in that section, relating to the transfer of documents between court Registrars and the continuity of proceedings as a result of the transfer of proceedings from one court to another court, also apply to the transfer of proceedings under proposed new section 53AA.

Items 11 and 12 - Proposed amendments to section 54 - conduct of proceedings

94. The proposed amendment to paragraph (c) of the definition of "relevant jurisdiction" in subsection 54(3) ensures that the provisions in subsections 54(1) and 54(2), dealing with the application of rules of evidence and procedure and with transferred proceedings respectively, apply where jurisdiction is conferred on a lower court of the Capital Territory with respect to civil matters arising under the Corporations Law of a State, as a consequence of the proposed amendments to the Corporations Act of that State.

95. The proposed amendment to paragraph (d) of the definition of "relevant jurisdiction" in subsection 54(3) ensures that the provisions in subsections 54(1) and 54(2) apply where jurisdiction is conferred on a lower court in a State in respect of civil matters arising under the Corporations Law of the Capital Territory.

Item 13 - Proposed amendment to section 55 - courts to act in aid of each other

96. The proposed amendment to section 55 removes an unnecessary reference to "Judges of those courts", while also removing any implication that the requirements of the section are confined to superior courts.

Item 14 - Proposed amendments to section 56 - exercise of -jurisdiction pursuant to cross-vesting provisions

97. Subsection 56(2) enables courts which exercise original jurisdiction under the Corporations Act (Commonwealth) to exercise cross-vested jurisdiction conferred by the Corporations Act of a State. The proposed amendments in Items 14(a) and (b) ensure that subsection 56(2) extends to lower courts in the Capital Territory.

Items 15, 16 and 17 - Proposed amendments to section 59 - enforcement of judgments etc

98. Subsection 59(1) deals with the enforceability of judgments of a court in the Capital Territory (as well as of the Federal Court or the Family Court) in the exercise of cross-vested jurisdiction under the Corporations Act (Commonwealth) or a State Corporations Act. The proposed amendment in Item 15 ensures that subsection 59(1) applies to a lower court of the Capital Territory, as well as to the Supreme Court of the Capital Territory.

99. The proposed amendment in Items 16 and 17 extend the provisions in subsection 59(2), dealing with the application of relevant provisions of a law of the Commonwealth or the Capital Territory other than in relation the enforceability of judgments, to a lower court of the Capital Territory or of a State.

Items 18 and 19 - Proposed amendments to section 61 - rules of the Supreme Court

100. Proposed subsection 61(1A) requires a lower court of the Capital Territory, in exercising civil jurisdiction under the Corporations Law of the Capital Territory, to apply rules of the Supreme Court of the Capital Territory made under subsection 61 M for the exercise of civil jurisdiction under the Corporations Law, subject to any alterations that are considered necessary by that lower court.

101. The proposed amendment to subsection 61(2) ensures that, in exercising cross-vested jurisdiction under the Corporations Law of a State, a lower court of the Capital Territory is required to apply the rules of the Supreme Court of the Capital Territory made under subsection 61 (I) for the exercise of civil jurisdiction under the Corporations Law, subject to any alterations that are considered necessary by that lower court.

102. The proposed amendment to subsection 61(3) ensures that, in exercising cross-vested jurisdiction under the Corporations Law of the Capital Territory, a lower court of a State, as well as the Supreme Court of a State, must apply the rules of court made under the provisions of the relevant State Corporations Act which correspond to subsection 61(1) of the Corporations Act (Commonwealth).

Part 2 - Amendments of Corporations Law

Introduction

103. It is proposed that lower courts, as well as superior courts, be able to exercise civil jurisdiction in respect of those provisions in the Corporations Law which:

- * provide for the making of civil claims relating to debt recovery or recovery of loss or damage arising from a contravention of the Corporations Law;
- * enable a court, as part of a criminal trial, to make a monetary award for compensation either because an offence has been committed or because there has been a contravention of the Corporations Law;
- * enable a court, as part of civil proceedings, to make a monetary order for compensation on the basis that there has been a contravention of the Corporations Law;
- * enable a court to relieve a person from civil liability under the Corporations Law, where that liability relates to the payment of a monetary amount; or
- * relate to minor administrative remedies which involve a limited court discretion and where the costs involved would be likely to prevent these remedies being sought in superior courts.

104. To give effect to the above principles, it is proposed to:

- * retain the existing distinction in the Corporations Law between "court" and "Court", on the basis that the former reference would apply where it was intended to enable lower courts, as well as superior courts, to exercise civil jurisdiction under a relevant provision in the Corporations Law, and the latter reference would apply where it was intended to confine jurisdiction to superior courts;

* retain existing provisions in the Corporations Law containing references to "court" or "Court" where those provisions are consistent with the policy principles outlined in the preceding paragraph;

* amend existing provisions in the Corporations Law which make reference to "court" or "Court" where those provisions are not consistent with the policy principles outlined in the preceding paragraph;

* delete references in the Corporations Law to "court of competent jurisdiction" and, where necessary, replace those references with references to "court" or "Court" as appropriate - on the basis that the former references:

- are unnecessary in view of proposed section 58AA (see notes on Item 21); and

- may otherwise create an implication that civil actions arising under other provisions of the Corporations Law may be brought in any lower court, regardless of whether a particular civil matter is within the courts general jurisdictional limits in regard to the amount of civil claims.

Item 20 - Proposed amendments to section 9 - (definitions of "court" and "Court")

105. In accordance with the drafting approach outlined in the introductory notes to Part 2 of this Schedule, Item 20 would omit the existing definitions in section 9 of "Court" and "court". New definitions of those expressions are proposed in section 58AA (see notes on Item 21 below).

Item 21 - Proposed new section 58AA - Meaning of "court" and "Court"

106. Proposed section 58AA(1) defines the expression "court" to mean any court when exercising jurisdiction under the Corporations Law of the relevant jurisdiction. The expression "Court" is defined to mean a superior court (ie, the Federal Court, the Supreme Court of a State or Territory jurisdiction, the Family Court of Australia or a State Family Court).

107. Proposed subsection 58AA(2) provides that, in the absence of any clear expression of a contrary intention (e.g. by use of the term "Court"), civil proceedings under the Corporations Law may be brought in any court.

108. Subsection 58(3) indicates that the jurisdiction of courts in respect of civil matters arising under the Corporations Law is dealt with in Part 9 of the

Corporations Act (Commonwealth) and in the corresponding provisions in each State Corporations Act (including the Northern Territory).

109. The effect of proposed subsections 58AA(1) and (2), in conjunction with the amendments to Part 9 of the Corporations Act (Commonwealth) and proposed amendments to corresponding provisions in the Corporations Acts in each State, would be that:

- * lower courts, as well as superior courts, would be able to exercise jurisdiction over civil matters arising under relevant provisions of the Corporations Law which expressly refer to the exercise of jurisdiction by a "court"; and

- * only superior courts would be able to exercise jurisdiction over civil matters arising under relevant provisions of the Corporations Law which expressly refer to the exercise of jurisdiction by a "Court".

110. By virtue of proposed subsection 58AA(2), where provisions in the Corporations Law relate to the exercise of civil jurisdiction under the Corporations Law, but do not expressly refer to the exercise of court jurisdiction, then, in the absence of any other clear intention that jurisdiction in respect of that matter be confined to superior courts, lower courts would be able to exercise civil jurisdiction in respect of those provisions.

111. Proposed subsection 58AA(4) indicates that the matters dealt with in Part 9 of the Corporations Act (Commonwealth), as proposed to be amended by Part I of this Schedule, as well as the matters to be dealt with in proposed amendments to the corresponding provisions in the Corporations Acts in each State, include provisions dealing with the jurisdictional competence of courts. This proposed subsection is intended to provide statutory guidance to the existence of limits imposed by that legislation on the amount of civil claims or the monetary value of property that can be dealt with by lower courts in exercising civil jurisdiction under the Corporations Law.

Item 22 - Proposed amendment to paragraphs 203(5)(a) and (b) - restriction on application of capital of company

112. In accordance with the drafting approach outlined in the introductory notes to Part 2 of this Schedule, the proposed amendment to paragraphs 203(a) and (b) would delete the references in those paragraphs to "court of competent jurisdiction", so as to enable lower courts, subject to the monetary limits of their jurisdiction, to exercise jurisdiction in respect of section 203. It is considered

appropriate that lower courts exercise jurisdiction under these provisions because they relate to the recovery by a company of money due to it as a debt.

Item 23 - Proposed amendment to section 206RA - specific performance or buy back agreements

113. The proposed amendment to section 206RA would substitute reference to "the Court" for the existing reference in that section to "court of competent jurisdiction". In accordance with the drafting approach outlined in the introductory notes to Part 2 of this Schedule, the intended effect of the amendment is that jurisdiction under section 206RA be confined to superior courts. It is not considered appropriate for a lower court to make an order for specific performance of an agreement constituting a "buy back", given the high level of discretion conferred.

Item 24 - Proposed amendment to subsection 419AM - liability of controller under pre-existing agreement about property used by corporation

114. The proposed amendment to subsection 419A(7) would substitute reference to "court" for the existing reference in that section to "Court". In accordance with the drafting approach outlined in the introductory notes to Part 2 of this Schedule, the intended effect of the amendment is that jurisdiction under section 419A be able to be exercised by lower courts within the monetary limits of their jurisdiction, as well as by superior courts. It is considered appropriate that a lower court be able to excuse a controller from liability for the payment of rent, on the basis that lower courts should be able to exercise civil jurisdiction in relation to "money matters" arising under the Corporations Law.

Item 25 - Proposed amendment to subsection 44313(8) - payments for property used or occupied by, or in the possession of, the company.

115. The proposed amendment to subsection 44313(8) would substitute reference to "court" for the existing reference in that section to "Court". In accordance with the drafting approach outlined in the introductory notes to Part 2 of this Schedule, the intended effect of the amendment is that jurisdiction under section 443B would be able to be exercised by lower courts within the monetary limits of their jurisdiction, as well as by superior courts. It is considered appropriate that a lower court be able to excuse an administrator from liability for the payment of rent, on the basis that lower courts should be able to exercise civil jurisdiction in relation to "money matters" arising under the Corporations Law.

Items 26 and 27 - Proposed amendments to subsection 588FF(1) and paragraphs 588FF(1)(c) and (d) - court may make orders about voidable transactions

116. The proposed amendment to subsection 588FF(1) would substitute references in that subsection to "a court" for the existing references to "the Court". The proposed amendments to paragraphs 588FF(1)(c) and (d) would substitute reference to "court's" for the existing reference in those paragraphs to "Court's".

117. In accordance with the drafting approach outlined in the introductory notes to Part 2 of this Schedule, the intended effect of the amendments is that jurisdiction under section 443B be able to be exercised by lower courts within the monetary limits of their jurisdiction, as well as by superior courts. It is considered appropriate that, within the monetary limits of its jurisdiction, a lower court be able to make orders where a transaction is voidable under section 588F, given that those orders will often relate to the payment of money or the transfer of property. Further, subsection 588FF(1) provides a flexible range of orders which are intended to be available in different circumstances and it would not be desirable to limit the power of a lower court to select a combination of orders which may be appropriate in a particular case.

Item 28 - Proposed amendments to subsections 588FG(1) and (2) - transaction voidable against certain persons

118. The proposed amendments to subsections 588FG(1) and (2), which would substitute references to "A court" for the existing references to "The Court" are consequential on the proposed amendments to section 588FF (see notes on Item 27 above).

Items 29 and 30 - Proposed amendments to subsection 588FH(2) and (3) liquidator may recover from related entity benefit resulting from insolvent transaction

119. It is proposed that lower courts be able to exercise jurisdiction under subsection 588FH(2) because the subsection relates to the recovery of debts by a liquidator and civil actions under the section would therefore fall within the principles outlined in the introductory notes to Part 2 of this Schedule.

120. The proposed amendment to subsection 588FH (2) would delete the references in that section to "proceedings in a court of competent jurisdiction". In accordance with the drafting approach outlined in the introductory notes to Part 2 of this Schedule, the intended effect of this proposed amendment is that lower courts would, subject to the monetary limits of their jurisdiction, be able to exercise jurisdiction in respect of subsection 588FH(2).

Item 31 - Proposed amendment to subsection 588FI(2) - creditor who gives up benefit of unfair preference may prove for preferred debt

121. The proposed amendment to subsection 588FI(2), which would substitute references to "A court" for the existing reference to "The Court", are consequential on the proposed amendments to section 588FF (see notes on Item 27 above).

Items 32 and 33 - Proposed amendments to subsection 588M(2) and (3) - recovery of compensation for loss resulting from insolvent trading

122. It is proposed that lower courts be able to exercise jurisdiction under section 588M because the section relates to the recovery of debts by a liquidator and civil actions under the section would therefore fall within the principles outlined in the introductory notes to Part 2 of this Schedule.

123. The proposed amendments to subsections 588M(2) and (3) would delete the references in those subsections to "proceedings in a court of competent jurisdiction". In accordance with the drafting approach outlined in the introductory notes to Part 2 of this Schedule, the intended effect of these proposed amendments is that lower courts would, subject to the monetary limits of their jurisdiction, be able to exercise jurisdiction in respect of section 588M.

Item 34 - Proposed amendment to subsection 588W(1) - recovery of compensation for loss resulting - from insolvent trading

124. It is proposed that lower courts be able to exercise jurisdiction under section 588W because the section relates to the recovery of debts by a liquidator and civil actions under the section would therefore fall within the principles outlined in the introductory notes to Part 2 of this Schedule.

125. The proposed amendment to subsection 588W(1) would delete the reference in that subsection to "proceedings in a court of competent jurisdiction". In accordance with the drafting approach outlined in the introductory notes to Part 2 of this Schedule, the intended effect of this proposed amendment is that lower courts would, subject to the monetary limits of their jurisdiction, be able to exercise jurisdiction in respect of section 588W.

Item 35 - Proposed amendment to subsection 1274(1) - registers

126. It is proposed that lower courts be able to exercise jurisdiction under subsection 1274(1) because the subsection involves a limited court discretion to provide an administrative remedy and the costs involved in commencing proceedings would otherwise be likely to prevent the ASC from taking action in a

superior court. Civil actions commenced by the ASC under this subsection would therefore fall within the principles outlined in the introductory notes to Part 2 of this Schedule.

127. The proposed amendments to subsection 1274(11) would substitute reference to "a court" for the existing references in the subsection to "the Court or any court of competent jurisdiction". In accordance with the drafting approach outlined in the introductory notes to Part 2 of this Schedule, the intended effect of the proposed amendments, would be to make it clear that lower courts would be able to exercise jurisdiction in respect of subsection 1274(11).

Item 36 - Proposed amendment to subsection 1317HD(1) - recovery of profits, and compensation for loss, resulting from contravention

128. It is proposed that lower courts be able to exercise jurisdiction under section 1317HD because the section relates to the recovery of money amounts as a debt where there has been a contravention of the Corporations Law. Civil actions under the section would therefore fall within the principles outlined in the introductory notes to Part 2 of this Schedule.

129. The proposed amendment to subsection 1317HD(1) would delete the reference in that subsection to "by proceedings in a court of competent jurisdiction". In accordance with the drafting approach outlined in the introductory notes to Part 2 of this Schedule, the intended effect of the proposed amendment is that lower courts would, subject to the monetary limits of their jurisdiction, be able to exercise jurisdiction in respect of subsection 1317HD(1).

Item 37 - Proposed amendment to section 1360 - debts due to the Commonwealth

130. It is proposed that lower courts be able to exercise jurisdiction under section 1360 because the section relates to the recovery of debts by the ASC and civil actions under the section would therefore fall within the principles outlined in the introductory notes to Part 2 of this Schedule.

131. The proposed amendments to section 1360 would delete the reference in that section to "in a court of competent jurisdiction". In accordance with the drafting approach outlined in the introductory notes to Part 2 of this Schedule, the intended effect of these proposed amendments is that lower courts would, subject to the monetary limits of their jurisdiction, be able to exercise jurisdiction in respect of section 1360.

**SCHEDULE 2 - AMENDMENTS OF CORPORATIONS LAW RELATING TO CLEARING HOUSE
SUBREGISTER SYSTEM**

Introduction

132. The Corporate Law Reform Act 1992 contained, among other things, amendments to the Corporations Law ("the Law") to facilitate the Clearing House Electronic Subregister System ("CHESS") which is envisaged to commence on 1 July 1994. While the amendments provide the basic legislative framework for the system, the technical details of the system are, for commercial flexibility, substantially left to the provisions of the Listing Rules of the ASX and the business rules of the proposed clearing house ("SCH business rules").

133. CHESS will bring the settlement facilities of the Australian Stock Exchange ("ASX") to world best standards. It represents the final stage of a three stage strategy adopted by the ASX in 1989:

- * Stage 1: was the introduction of uncertificated holdings through the Fast Accelerated Security Transfer ("FAST") system which eliminated the necessity for share certificates as evidence of title for eligible securities. FAST commenced in 1989 and some 900 companies currently participate in the scheme;
- * Stage 2: was the introduction of a trade plus five (T+5) business days fixed settlement regime which ensures that settlement of a sale of securities takes place within 5 days of trade. (The Corporations Legislation Amendment Act (No. 2) 1991 facilitated implementation of this regime). The target of T+5 was achieved in April 1993;
- * Stage 3: achievement of risk containment goals of a T+3 settlement and delivery versus payment regime which will be facilitated by CHESS.

134. FAST removed the certificate of title but retained the paper document of transfer. It is supported by ASC declarations modifying the Corporations Law and is regarded as a transitional scheme. CHESS will provide for purely electronic transfer.

135. CHESS will substantially reduce risks connected with settlement of ASX transactions by bringing forward the point in time at which the legal title (as opposed to the equitable title) to securities is transferred to the purchaser. Technically, this will be achieved by the clearing house subregister which will have

the legal status of a company subregister and the authority to maintain balances of holdings held in an uncertificated form.

136. Since the passing of the Corporate Law Reform Act 1992, the CHES project has progressed to its final stage of development and the need for some further amendments to the Corporations Law has been brought to the Government's attention. These amendments include:

- * provisions to support proposed certificate cancellation by brokers;
- * provisions to support electronic acceptances of takeover offers;
- * provisions to facilitate off-market CHES transfers of securities before their official quotation;
- * provisions to enable issuers to establish record dates to determine who is entitled to vote at meetings; and
- * provisions enabling SCH business rules to establish rules for determining who is entitled to receive dividends and other security benefits.

Item 1 - Dictionary

137. This item will insert two new definitions in section 9 (the general definitions section) to facilitate CHES:

- * "SCH certificate cancellation provisions" - which will be defined as provisions of the SCH business rules dealing with cancellation of certificates or other documents of title and with matters incidental thereto; and
- * "SCH subregister" - which will be defined as a subregister of quoted securities or quoted rights maintained by the securities clearing house under the SCH business rules.

Items 2 to 4 - Proposed amendments to section 210 - Inspection and closing of register

138. Section 210 requires companies to have their registers of members available for public inspection. It also provides that a company must not have the register closed for more than 30 days in any calendar year.

139. The proposed provisions dealing with the cancellation of certificates may, without appropriate safeguards, allow some scope for fraudulent misuse of share

certificate numbers (e.g. a broker fraudulently purporting to have cancelled a particular certificate and creating a corresponding CHES holding). One proposed safeguard is that the SCH business rules will prohibit issuing companies from including share certificate numbers on the copy of the register of members available for public inspection.

140. To facilitate the proposed prohibition, proposed subsection 210(3A) will provide that a company is not required to facilitate public inspection of share certificate numbers.

141. Consequential amendments will be made to subsections 210(2) and (3).
Takeover Schemes

142. The legislative regime for takeovers is based on the assumption of written offers and corresponding written acceptances accompanied by share certificates and transfer documents. The regime will not be compatible with the electronic environment of CHES and some adjustment to it will be necessary. In particular, it was thought important to allow an offeree who holds shares entered on a CHES subregister to accept a takeover offer in respect of those shares without having first to obtain certificates for them. Furthermore, an offeree who holds such shares should be able to send the acceptance through CHES, thus remaining within its fully electronic environment.

Item 5 - Proposed section 642A - Quoted securities - SCH business rules may specific mode of acceptance

143. This item will insert in Division 1 of Part 6.3 proposed new section 642A which will provide that where a takeover offer is made wholly or partly for shares that are quoted securities, the SCH business rules may prescribe the way in which the acceptance is to be made. Such acceptance will be effective despite any requirement in the offer.

Items 6 and 7 - Proposed amendments to section 650 - acceptance of takeover offers by trustees, nominees etc

144. A takeover offer, whether full or proportional, is made to a person. Section 650 regulates the effect of an offer in cases where, for example, the offeree's holding consists of several distinct portions or where the offeree holds the shares wholly or partially for someone else.

145. Subsection 650(2) provides that if a person holds shares that consist of two or more distinct portions, the takeover offer will be deemed to consist of separate takeover offers made in relation to the relevant distinct portions.

146. Subsection 650(3) provides that an acceptance that is deemed to exist by virtue of subsection 650(2) is ineffective unless the person has given to the offeror a written notice stating that the relevant shares consist of different portions.

147. Item 6 will amend subsection 650(3) by removing the requirement that the notice must be in writing, thus facilitating the possibility of an electronic notice.

148. Item 7 will insert in section 650 new subsection (3A) which will provide that a notice under subsection (3) in respect of shares that are entered on a SCH subregister must be in an electronic form approved by the SCH business rules, or otherwise in writing.

Items 8 to 11 - Proposed amendments to section 658 - effect of variation (of offer) on offeree who has accepted

149. Section 658 provides that an offeree who has accepted an offer that is subject to a defeating condition may withdraw the acceptance, if the offer has been varied so as to postpone for at least one month the time when the offeror's obligations must be satisfied. It also regulates the reversal of any transactions (such as payment of consideration, forwarding and transfer of shares etc.) that may have occurred between the offeror and the offeree before the withdrawal of the acceptance by the offeree.

150. Item 8 will amend subparagraph 658(a)(i) by removing the requirement that the notice (of withdrawal) must be in writing, thus facilitating electronic notices.

151. Items 9 and 10 will amend section 658 by replacing subparagraph (a)(ii) and paragraph (b) respectively. The amendment will make the provision compatible with the fully electronic environment of CHESSE. The provision will, in relation to shares entered on an SCH subregister, leave some of the regulatory details to the SCH business rules.

152. Item 11 will amend section 658 by adding new provisions which will become subsections (2), (3) and (4).

153. Proposed subsection 658(2) will provide for an electronic form of the notice referred to in subparagraph (1)(a)(i), where the notice relates to shares entered on a SCH subregister.'

154. Proposed subsection 658(3) will clarify how the return of consideration referred to in subparagraph (1)(a)(ii) is to be effected. In relation to shares on a SCH subregister, some details will be left to the SCH business rules.

155. Proposed subsection 658(4) will define the meaning of "withdrawal day" to be the last day on which an act required for withdrawal has been completed.

Items 12 and 13 - Proposed amendments to subsection 701(7) - Provisions relation to dissenting shareholders

156. Subsection 701(7) provides that where alternative terms were offered under a takeover offer to which section 701 applies, the dissenting offeree may, within a specified time, give the offeror written notice outlining which of the terms the offeree prefers.

157. Item 12 will amend subsection 701(7) so as to provide for the alternative modes of the notice referred to in the section.

158. Item 13 will insert new subsection 701(7A) which will provide that where the notice referred to in subsection (7) relates to shares entered on a SCH subregister, it must be in an electronic form approved by the SCH business rules, or otherwise in writing.

Item 14 - Proposed amendments to section 779F - SCH business rules have effect as contract under seal

159. Section 779F provides that issuing bodies are bound by the terms of the SCH business rules. Item 14 will repeal the provision and replace it with a new provision which purports to bind not only issuing bodies but also CRESS participants and the securities clearing house ("SCH") itself. This is considered necessary as there is some doubt as to the ability of the SCH business rules to bind issuing bodies and CHES participants given the possible lack of consideration and the rules governing privity of contract. The provision will not prevent the SCH business rules regulating the extent to which the individual parties are bound by them.

The National Guarantee Fund

160. Part 7.10 of the Corporations Law contains provisions dealing with the establishment, maintenance of, and claims against the National Guarantee Fund ("NGF").

161. Relevant to CHES is Division 7 of this Part, which was substantially amended by the Corporate Law Reform Act 1992. Since the passing of that Act,

procedures have been developed for the cancellation of share certificates (and other documents evidencing title to quoted securities) by brokers. To recompense a holder of such securities for certain losses occasioned by any contravention of those procedures, new heads of claim (new Division 7A) are to be inserted in, and some consequential amendment made to, the provisions of Part 7.10.

Items 15 to 18 - References to new Division 7A and other consequential amendments

162. References to new Division 7A will be inserted in sections 920, 932 and 932.

163. A reference to proposed subsection 961E(3) will be inserted in section 927.

Item 19 - Proposed Division 7A - Contraventions of SCH certificate cancellation Provisions

164. Item 19 will insert after section 961 B new Division 7A which will contain provisions dealing with claims against the NGF in respect of losses suffered by a person as a result of a contravention of the SCH certificate cancellation provisions by a broker.

Proposed section 961C - Interpretation

165. Proposed section 961C will contain two new definitions:

* "claim" - which will be defined as a claim under Division 7A against the Securities Exchanges Guarantee Corporation ("SEGC"); and

* "dealer" - which will be defined as a member of a participating exchange.

Proposed section 961D - Claim in respect of contravention of SCH certificate cancellation provisions

166. Proposed section 961D will provide that a person who suffers loss in respect of such a contravention may make a claim. It will preclude from recovery any person who was involved (as defined in section 79) in the contravention and it will not allow recovery if the loss was caused through an unauthorised execution within the meaning of section 956 of Division 7.

Proposed section 961E - How and when claim may be made

167. Proposed section 961E will set out the formal requirements of such a claim. It will allow the SEGC (which administers the NGF) to publish certain details in

respect of such a claim. Proposed subsection 96 1 E(7) will provide the SEGC with certain indemnities in relation to such a publication.

Proposed section 961F - How claim is to be satisfied

168. Proposed section 961F will set out how the claim is to be satisfied. Proposed subsection 961F(2) provides that if the SEGC allows the claim it must pay the claimant the pecuniary loss suffered as a result of a contravention in respect of which the claim was made. Proposed subsection 961F(3) will prevent double recovery.

Proposed section 961 G - Discretionary further compensation

169. Proposed section 961 G will provide that in addition to compensation for the actual pecuniary loss, the SEGC may provide further discretionary compensation.

Proposed section 961H - Preventing double recovery

170. Proposed section 961H will prevent multiple recovery in different Australian jurisdictions.

Items 20 to 24 - Further consequential amendments to Part 7.10

171. Item 20 will insert in subsection 977(7) a reference to proposed section 961F.

172. Item 21 will insert in section 980 new subsection (2A) which will provide for subrogation of the SEGC to all claimant's rights in relation to the contravention (of the cancellation provisions).

173. Items 22, 23 and 24 will insert in subsection 980(5), subsection 983(2) and subsection 983A(6), a reference to proposed new Division 7A.

Item 25 - Proposed amendments to section 1089 - loss or destruction of certificates

174. Section 1089 provides that where a document of title to shares, debentures or prescribed interests has been lost or destroyed and the holder of the relevant securities has applied to the company that issued the securities for a replacement document, the company must, within specified time, issue a replacement document to the owner.

175. Under the proposed cancellation procedures (primarily in the SCH business rules) a broker will, after communications with the relevant company through the

SCH, be able to cancel a document of title to securities by attaching to the document the broker's "cancellation stamp" (under the SCH cancellation

provisions - see Item 1). Simultaneously, there will be a corresponding holding of the relevant securities created on a SCH subregister.

176. If the broker's cancellation stamp were to be applied to a document of title erroneously, without creating a corresponding holding on a SCH subregister, there would be some doubt as to whether the broker could apply to the relevant company for a replacement document.

177. To remove this doubt, Item 25 will amend section 1089 by adding new subsection (4). The new provision will deem a document of title to securities that has been cancelled erroneously to have been destroyed.

Item 26 - Proposed amendments to section 1097B - SCH business rules may provide that securities or rights are taken to be quoted securities or rights

178. Section 1097B was inserted by the Corporate Law Reform Act 1992 to facilitate CHESSE. It provides that the SCH business rules may provide that securities or rights in respect of which quotation has been suspended continue to be quoted securities or rights.

179. To facilitate off-market transfers prior to the quotation of securities or rights approved for quotation by the ASX, proposed subsection 1097B(2) will enable the SCH business rules to deem such securities or rights to be quoted securities or quoted rights.

180. Item 26 will also amend section 1097B to extend its operation to a number of the proposed new provisions.

Items 27 and 28 - Proposed amendments to section 1109C

181. Section 1109C was inserted by the Corporate Law Reform Act 1992 to protect the integrity of the CHESSE system. On one interpretation of the provision it would have somewhat wider effect than originally intended.

182. It is proposed to narrow its operation by focusing attention away from the transfer of securities and rights in general, to the manner of their transfer.

183. Items 27 and 28 will amend section 1109C by limiting the manner in which securities or rights may be transferred.

Item 29 - Proposed sections 1109N and 1109P - Determination of who holds Quoted securities for the purposes of a meeting and of conferring security benefits

184. Under the current system, a listed body which decides to hold a meeting of holders of securities (e.g. a general meeting of a company) can avoid any uncertainty as to voting entitlements in relation to those securities at the time of the meeting simply by suspending registrations of transfers in those securities from the time when notices of the meeting are issued until after the meeting. Such convenient suspensions will not be possible under CHESSE, as the legal title to a security will be conferred upon the purchaser automatically on settlement. A similar problem arises in relation to conferring upon a security holder benefits such as dividends, bonus securities etc.

185. Consequently, proposed section 1109N will, subject to the SCH business rules, enable a listed body to specify a time and then use the register of holders of shares or other securities at that time to determine voting entitlements at the meeting. To ensure that the snapshot is as close to the register at the time of the meeting as possible, proposed subsection 1109N(3) will provide that the specified time must not be more than 48 hours before the meeting. Proposed subsection 1109N(7) will provide that particulars of the determination must be sent with the notice of the meeting, but that a failure to do so will not invalidate a determination.

186. Proposed section 1109P will provide that the SCH business rules may, for the purpose of determining who is entitled to receive dividends and other security benefits, establish rules for determining who holds or is taken to hold securities. The provision takes into consideration the established practice in trading of shares "cum" or "ex" dividends and will allow the SCH business rules to override provisions such as paragraph 191(2)(a) of the Corporations Law.

187. Proposed subsection 1109P(7) defines the scope of the provision by defining the meaning of "conferring of security benefit".

Items 30 and 31 - Proposed sections 11 12B. C and D - Criminal and civil liability in respect of contravention by broker of SCH cancellation provisions

188. Division 3 of Part 7.13 contains provisions dealing with the transfer of marketable securities and marketable rights. As discussed above in relation to Item 4, SCH cancellation provisions may, without appropriate safeguards, allow some scope for the fraudulent cancellation of share certificates and other documents of title to quoted securities. One proposed safeguard is that brokers will be subjected to both civil and criminal liability in respect of contraventions of the SCH cancellation provisions.

189. Proposed section II 12B will provide that a broker must not, intentionally or recklessly, contravene the SCH business rules by affixing, or failing to affix, a broker's cancellation stamp to a certificate or other document of title to quoted securities or quoted rights. A penalty of \$2500 or 6 months imprisonment or both will be inserted in Schedule 3 in relation to this provision by Item 31.

190. Proposed section II 12C will provide that a broker is liable for any loss that has resulted from the broker's contravention of the SCH cancellation provisions. The action, however, must be brought within 6 years and cannot be brought by a person who was involved (as defined in section 79) in the contravention.

191. Proposed section 11 12D will provide issuing bodies (as defined in section 1097) with some protection from the liability of brokers under section II 12C. However, this protection will not extend to issuing bodies who were involved (as defined in section 79) in a relevant contravention.

SCHEDULE 3 - AMENDMENTS OF CORPORATIONS LAW RELATING TO FINANCIAL INSTITUTIONS

Introduction

192. At present, certain activities of financial institutions (principally building societies and credit unions) are regulated by both the Corporations Law and the Financial Institutions legislation. The Financial Institutions legislation comprises the Financial Institutions Code and the AFIC Code as applied by each State and Territory.

193. The amendments proposed by Schedule 3 will implement in part the resolution of the Ministerial Council for Corporations of 4 February 1993 regarding the rationalisation of the interface of the Corporations Law and the Financial Institutions legislation. The resolution also related to complementary amendments to the Financial Institutions legislation.

194. On the same day, the Ministerial Council for Financial Institutions (the Council of State and Territory Ministers established by the Financial Institutions Agreement to oversee the regulation of financial institutions and the Financial Institutions legislation) agreed to the same principles for rationalisation.

195. Currently the Corporations Law applies in an uneven fashion to the activities of financial institutions. It primarily only impacts on the interstate activities of these bodies and its impact is affected by the legislation applying in the jurisdiction in which the financial institution carries on its activities.

196. Rationalisation of the interface between the Financial Institutions legislation and the Corporations Law will remove doubts and uncertainties for financial institutions as to which law applies to their activities. It will remove any possible regulatory duplication and reduce the associated administrative burden.

197. In brief, the Ministerial Councils decided that:

* the fundraising provisions of the Corporations Law are to apply to financial institutions with certain specified exceptions, ie, withdrawable shares, deposit taking and other circumstances in which the provisions would not apply if the fundraiser were a bank. There is also to be special provision for "special services providers";

* the market offence provisions in Part 7.1 1 are to apply with respect to the securities of financial institutions (again, with certain specified exceptions);

* the duties of officers of financial institutions and charges over the property of financial institutions are to be regulated only under the Financial Institutions legislation;

* registration of financial institutions under the Corporations Law as registrable Australian bodies should no longer be required;

* the takeover and substantial shareholding provisions of the Corporations Law and the provisions of the Corporations Law dealing with the regulation of the conduct of participants in the securities industry (other than dealings by officers of financial institutions in their own shares) are to continue to apply; and

* the enhanced disclosure provisions now contained in the Corporate Law Reform Act 1994 would generally apply subject to certain modifications.

198. Paragraph 1.4 of the Heads of Agreement for Future Corporate Regulation provides that the national scheme law will apply, inter alia, to building societies and credit unions only to the same extent (if any) and in the same way as the provisions of the cooperative scheme legislation applied to those bodies.

199. The comparable provision in the draft Corporations Agreement is subclause 503(2).

200. Therefore the unanimous agreement of the Ministerial Council for Corporations was required, and obtained by late in 1993, for the in-principle decision referred to above which was reached by a majority on 4 February 1993.

201. The Commonwealth has recently proposed that clause 503 of the draft Corporations Agreement be amended so that any further "roll-forward" of the Corporations Law or Regulations (as they apply to financial institutions) would require the unanimous agreement of both the Ministerial Council for Corporations and the Ministerial Council for Financial Institutions.

Item 1 - Proposed amendment to section 9 (paragraph N of the definition of "public company")

202. This proposed amendment will exclude financial institutions from the definition of "public company" for the purposes of section 232A, Part 3.2A and section 1376.

203. Section 232A relates to voting by interested directors of public companies; Part 3.2A relates to the giving of financial benefits to related parties of public companies; and section 1376 relates to the application of certain provisions in Part 3.2A. Part 3.2A is an extension of the regulation of directors' conduct in Part 3.2 of the Corporations Law.

204. The Ministerial Councils decided that the duties of officers of financial institutions should be regulated only by the Financial Institutions legislation. (Division I of Part 6 of the Financial Institutions Code regulates the duties of directors and officers of financial institutions.)

205. To implement this decision, it is proposed that:

* the definition of "public company" be amended as indicated above; and

* the definition of "corporation" be amended so that for the purposes of all Parts of the Corporations Law, except Parts 7.11 and 7.12, financial institutions will not be corporations (see proposed subsection 57A(3)). One result of this proposed amendment will be that provisions of Part 3.2 which refer to a "corporation", such as sections 229 and 232, will no longer apply to financial institutions.

Item 2 - Proposed amendment of section 9 (paragraph (a) of the definition of "public corporation")

206. Section 1064 provides that only public corporations may offer or issue prescribed interests.

207. The term "public corporation" is defined in section 9 to mean a public company or, in general terms, a body corporate declared by the ASC for the purpose.

208. This amendment will include financial institutions in the definition of "public corporation". It will thus obviate the need for a financial institution to obtain a declaration from the ASC before offering prescribed interests.

Item 3 - Proposed amendment to section 9 (definition of "registrable Australian body")

209. This proposed amendment will exclude financial institutions from the definition of "registrable Australian body". It will implement the decision of the Ministerial Councils that financial institutions no longer be required to register under the Corporations Law as registrable Australian bodies.

210. The reason for this decision is that financial institutions carrying on business interstate are required by the Financial Institutions legislation to register as foreign societies. In these circumstances the requirement for some financial institutions to register as a "registrable Australian body" is a duplication of registration requirements.

211. The proposed amendment (and the associated transitional provisions) will have certain consequences including the following:

- * Future charges over the property of financial institutions will no longer be regulated under Part 3.5 of the Corporations Law. Instead, such charges will be regulated only under Part 5 of Division 9 of the Financial Institutions Code. A charge taken by a financial institution over the property of a company (as defined in section 9 for the purposes of Part 3.5) will, however, still be subject to the provisions of Part 3.5 of the Corporations Law.

- * Financial institutions will no longer be within the definition of a "Part 5.1 body". Part 5.1 relates to arrangements and reconstructions and has been replicated, with certain modifications, in the Financial Institutions Code (section 337).

- * Financial institutions will no longer be within the definition of a "Part 5.7 body". Part 5.7 relates to the winding up of bodies other than companies. Again, non-application of this Part is appropriate because the Financial Institutions Code contains its own winding-up provisions which apply Parts 5.4, 5.5 and 5.6 of the Corporations Law with certain modifications.

- * Financial institutions will no longer have to comply with the requirement in section 362 that in certain circumstances they include on public documents their Australian Registered Body Number.

Item 4 - Proposed amendment to section 9 (definition of "corporation")

212. This amendment will provide a cross-reference to the new location of the definition of "corporation" - section 57A.

213. The definition will be moved because its complexity makes its location in section 9 inappropriate.

Item 5 - Proposed amendments to section 9 (new cross-references)

214. Cross-references to the additional definitions relating to financial institutions which will be inserted in proposed Part 1.213 will be inserted in section 9.

215. Additional definitions are proposed for the terms "AFIC Codes" "building society", "building society special services provider", "credit union", "credit union special services provider", "financial institution", "Financial Institutions Codes", "special services provider" and "withdrawable share".

Item 6 - Proposed section 57A - Meaning of "corporation"

216. The definition of "corporation" proposed by section 57A is based on the current definition of that term in section 9.

217. The only difference in substance is contained in subsection 57A(3) which provides that a financial institution (as defined in subsection 111 AZA(I)) is a corporation for the purposes of Parts 7.1 1 and 7.12 but is not a corporation for the purposes of the other provisions of the Corporations Law.

218. Part 7.11 includes provisions relating to conduct in connection with prospectuses (for example, section 996 which prohibits false or misleading statements in, or omissions from, prospectuses), market conduct (for example, insider trading (Division 2A of Part 7.1 1) and stock market manipulation (section 997)). It also includes provisions dealing with civil liability generally for contravention of Parts 7.11 or 7.12, and also in relation to liability in respect of prospectuses and unlawful market activity (Division 4 of Part 7.11).

219. Part 7.12 is entitled "Offering securities for subscription or purchase". Under this Part prospectuses are required for all offers, invitations and issues of securities except for excluded offers, invitations and issues. Excluded offers, issues and invitations of securities are defined in section 66. Certain corporations are excluded by section 65 and certain other bodies are rendered exempt bodies by section 66A.

220. The Ministerial Councils decided that:

(a) the definition of "corporation" in the Corporations Law should be amended to treat financial institutions as corporations for the purposes of their intra and interstate fundraising; and

(b) the fundraising provisions of the Corporations Law should apply other than to withdrawable shares, deposit taking and other circumstances in which the provisions would not apply if the fundraiser were a bank. (The fundraising provisions, according to the resolution, mean those matters presently dealt with in sections 995, 996, 1005 to 1012 and Part 7.12).

221. Proposed subsection 57A(3) will define financial institutions as corporations for the purposes of Parts 7.11 and 7.12, rather than for specific sections in Part 7.11, and for Part 7.12. This drafting approach will not result in financial institutions being subject to any additional provisions of Part 7.11 because "corporation" is only used in the provisions nominated in the resolutions of the Ministerial Council.

222. As indicated above, the application of the Corporations Law or Regulations to further areas of activity of financial institutions (ie, in addition to those to which it applied as at 1 January 1991 as varied by authority of the 4 February 1993 resolution of the Ministerial Council for Corporations) would require the unanimous agreement of that Council. Further, the Commonwealth has proposed that clause 503 be varied to require, in addition, the unanimous agreement of the Ministerial Council for Financial Institutions for such a "roll-forward".

223. Proposed Part 1.2B will assist the reader in understanding how various key terms used in the Corporations Law will apply to financial institutions. In relation to the application of Part 7.11 to financial institutions, it is noteworthy that financial institutions have been and will continue to be included in the term "person" and their securities in the phrase "securities of a body corporate".

224. The three activities mentioned in paragraph (b) above will be exempted from the application of Parts 7.11 and 7.12 by virtue of proposed sections 1015A and 1083A respectively.

Items 7 to 18 - Proposed amendments to section 66A - Exempt bodies

225. "Exempt bodies" are excluded from the definition of "corporation" by its terms and will continue to be exempt by virtue of proposed subsection 57A(4).
The

list of exempt bodies in relation to particular jurisdictions is provided in section 66A.

226. A number of amendments have been made to paragraphs of section 66A to reflect the repeal of, and amendments made to, various State and Territory Acts by the Financial Institutions legislation. Financial institutions will no longer be "exempt bodies" as such but will be separately excluded from the definition of "corporation" for certain purposes by proposed subsection 57A(3).

227. All the other bodies, for example terminating building societies, incorporated associations and friendly societies, which are now covered by section 66A, will remain "exempt bodies".

228. The opportunity has also been taken to insert two additional paragraphs into subsection 66A(1) which lists the exempt bodies in relation to New South Wales. The paragraphs refer to co-operatives within the meaning of the Co-operatives Act 1992 of New South Wales and friendly societies within the meaning of the Friendly Societies Act 1989 of New South Wales. Their insertion was requested by New South Wales.

Items 19 to 23 - Proposed amendments to section 69A - Exempt securities

229. Section 69A defines the term "exempt securities" which is used in section 1077A. Section 1077A provides that Division 6, Part 7.12 (which prohibits the hawking of securities) does not apply to an invitation to subscribe for or buy securities that, because of section 69A, are exempt securities.

230. The amendments to section 69A will update the references to reflect the repeal of, and amendments to, various State and Territory Acts by the Financial Institutions legislation. The effect of the amendments will be to omit those securities which are issued by financial institutions. The result of these proposed amendments is that no securities issued by a financial institution will be "exempt securities" but those securities and activities of a financial institution listed in proposed section 1083A will be exempt from Part 7.12, including the hawking provisions.

231. The opportunity has also been taken to include in the list of exempt securities, at the request of New South Wales, the securities of a body registered as a cooperative under the Co-operatives Act 1992.

Item 24 - Proposed Part 1.2B - Financial Institutions

232. This new Part will introduce the reader to the application of the Corporations Law to financial institutions.

Proposed Division 1 - Object of Part

Proposed section 111AY - Object of Part

233. The object of Part 1.213 will be to define key terms relevant to financial institutions (Part 1.213 Division 2) and to outline how the Law will apply to financial institutions (Part 1.213 Division 3).

Proposed Division 2 - Definitions

Proposed section 111AZ - Terms defined in Division

234. Proposed section 111AZ lists the terms which are defined in Division 2, Part 1.2B. They are "building society", "credit union", "building society special services provider", "credit union special services provider", "financial institution", "AFIC Codes", "Financial Institutions Codes", "special services provider" and "withdrawable share".

235. The terms "building society", "credit union", "financial institution", "special services provider" and "withdrawable share" are defined in terms of their meaning in the Financial Institutions Codes. This approach has been adopted, rather than replicating the definitions found in the Financial Institutions Code, as:

* replication would have resulted in substantially longer amendments to the Corporations Law; and

* the manner in which some terms are defined in the Financial Institutions legislation would mean that, even after replicating the definitions in the Corporations Law, the Law would still not, on its face, indicate exactly which institutions are, for example, financial institutions.

Proposed section 111AZA - Financial institution, building society and credit union

236. As indicated in the preceding paragraph the terms "building society", "credit union" and "financial institution" are defined in terms of their meanings for the purposes of any of the Financial Institutions Codes. There will be provision for exclusion of financial institutions by regulations under the Corporations Act 1989.

237. The Financial Institutions Codes in effect define "financial institution" to mean:

* a society (ie, a building society, credit union or any other body registered under the Financial Institutions Code as a society);

* an association (of financial institutions registered as an association under Part 12 of the Financial Institutions Code); or

* a special services provider (which is registered as such under the AFIC Code to provide services as a financial intermediary to societies).

Proposed section 111AZB - AFIC Codes

238. Queensland enacted the Australian Financial Institutions Commission Act 1992 which contains, in section 21, the AFIC Code. The other States and the Territories base their AFIC Codes on that template legislation.

239. Proposed section 111AZB lists the State and Territory AFIC Codes which are encompassed by the term "AFIC Codes".

Proposed section 111AZC - Financial Institutions Codes

240. Similarly, the other States and the Territories base their Financial Institutions Codes on the Financial Institutions template legislation enacted by Queensland the Financial Institutions (Queensland) Act 1992 which contains, in section 30, the Financial Institutions Code.

241. Proposed section 111AZC lists the State and Territory Financial Institutions Codes which are encompassed by the term "Financial Institutions Codes".

Proposed section 111AZD - Special services providers

242. The term "special services provider" is, for the reasons outlined above in the paragraphs of this memorandum relating to proposed section 111AZ, defined in terms of the bodies recognised as special services providers for the purposes of any of the AFIC Codes. There is provision for exclusion of special services providers by regulations under the Corporations Act 1989. Special services providers are registered under the AFIC Codes.

243. Briefly, "special services providers" provide certain facilities for building societies and credit unions. In particular they:

* provide treasury management services;

* receive deposits from building societies and credit unions and invest the funds in liquid assets; and

* provide loans or financial accommodation, and establish lines of credit for credit unions and building societies.

244. This section also defines "building society special services provider" and "credit union special services provides, which provide services of the kind referred to above to building societies and credit unions respectively.

Proposed section 111AZE - Withdrawable share

245. The term "withdrawable share" is, for the reasons outlined above in the paragraphs relating to section 111AZ, defined in terms of the definition contained in the Financial Institutions Codes.

246. As discussed in the paragraphs of this memorandum relating to the meaning of "corporation", the fundraising provisions of the Corporations Law are not to apply in relation to the issue of withdrawable shares. Withdrawable shares will be treated separately as in practice withdrawable shares have been used by societies as an alternative to deposit-taking.

Proposed Division 3 - Whether certain expressions cover financial institutions

Proposed section 111AZF - Key expressions in this Law - do they cover financial institutions?

247. This Division will explain to readers how various key expressions used in the Corporations Law apply to financial institutions. For this purpose it includes a table indicating how "body", "body corporate", "company", "recognised company", "foreign company", "corporation", "person", "registrable Australian body", "registrable local body" and "registrable body" will apply.

Proposed section 111AZG - Other expressions

248. Proposed section 111AZG explains that the list in proposed subsection 111AZF(1) is not exhaustive and that if another expression is used in a provision (e.g. "entity"), the provision and any relevant definition should be considered in determining whether the expression covers a financial institution.

Proposed section 111AZH - Examples of how this Law applies to financial institutions

249. This section will provide three factual situations as examples of how the Corporations Law applies or does not apply to financial institutions in those particular circumstances.

250. The examples refer to:

- * the application of the Corporations Law provisions relating to prospectuses and the relevant criminal and civil liability provisions;
- * the non-application of the Corporations Law provisions dealing with the duties of officers; and
- * the application of the Corporations Law provisions which require that a person who carries on an investment business be licensed or be an exempt investment adviser.

Proposed section 111AZI - Division only explanatory

251. Proposed section 111AZI makes explicit that Division 3 of Part 1.2B is only explanatory. If a provision of this Division is inconsistent with a provision elsewhere in the Law, the latter prevails.

Item 25 - Part 7.11 - Proposed Division 5 - Exemptions

Proposed section 1015A - Financial institutions - exemptions

252. Part 7.11 applies variously in relation to securities, securities of a body corporate and securities of a corporation.

253. By virtue of proposed section 57A, financial institutions will be corporations for the purposes of Part 7.11.

254. The purpose of proposed section 1015A is to exempt from regulation under Part 7.11 certain categories of activity of financial institutions.

255. The categories of activity which are to be exempt from Part 7.11 (except as provided in the regulations), by virtue of proposed section 1015A, are:

- * the issue of withdrawable shares by a financial institution (proposed paragraph 1015A(1)(a));
- * deposit taking by a financial institution (proposed paragraph 1015A(1)(b));
- * other activities of a financial institution which are analogous to "banking business" (proposed paragraph 1015A(1)(c) with a definition of "banking business" in proposed subsection 1015A(2));

* the provision by a special services Provider of services described in subparagraphs 36(2)(b)(i) - (v) of any of the AFIC Codes (proposed paragraph 1015A(1)(d)); and

* the issue of shares to a buildings society by a building society special services provider or to a credit union by a credit union special services provider (proposed paragraph 101 5A(1)(e)).

256. Proposed subsection 1015A(2) defines "banking business" in relation to financial institutions as that part of the institution's business that is substantially similar to the banking business of Australian banks.

Item 26 - Proposed subsection 1047(2AA)

257. Section 1047 imposes on companies and registered Australian bodies (other than registrable local bodies) that issue debentures, an obligation to keep a register of holders of debentures.

258. Financial institutions are to be excluded from the definition of registrable Australian bodies, but are to be subject to Part 7.12 with respect to their fundraising activities (with certain exceptions provided in proposed section 1083A).

259. It is therefore appropriate that a financial institution be required to keep a register of the holders of debentures it issues. Proposed subsection 1047(2AA) will require that a financial institution that is incorporated under a law of this jurisdiction and issues debentures (whether in this jurisdiction or elsewhere), must keep in Australia a register of holders of those debentures.

Item 27 - Proposed section 1083A - Financial institutions - exemptions

260. The purpose of proposed section 1083A is to exempt from Part 7.12 (except as provided by the regulations) certain categories of activity of financial institutions.

261. Financial institutions will be considered to be corporations for the purposes of Part 7.12 by virtue of proposed section 57A.

262. The categories of activity from which financial institutions are to be exempt for the purposes of Part 7.12 are:

* the issue of withdrawable shares by a financial institution (proposed paragraph 1083A(1)(a));

* deposit taking by a financial institution (proposed paragraph 1083A(1)(b));

* activities of a financial institution which are analogous to "banking business" (proposed paragraph 1083A(1)(c) with a definition of "banking business" in subsection 1083A(2));

* the provision by a special services provider of services described in subparagraphs 36(2)(b)(i) - (v) of any of the AFIC Codes (proposed paragraph 1083A(1)(d));

* the issue of shares to a buildings society by a building society special services provider or to a credit union by a credit union special services provider (proposed paragraph 1083A(1)(e)).

263. Proposed subsection 1083A(2) defines "banking business" in relation to financial institutions as that part of the institution's business that is substantially similar to the banking business of Australian banks.

Item 28 - Subsection 1097(1) (paragraph (a) of the definition of "eligible body")

264. Subsection 1097(1) defines the term "eligible body" for the purposes of Division 3 of Part 7.13 (Transfer of Marketable Securities). Briefly, an eligible body is defined as a company, a body corporate (other than a company) that is prescribed for the purpose or a listed unincorporated body that is prescribed for the purpose.

265. A body must come within this definition to gain access to the efficient means of transfer provided by this Division.

266. Currently, financial institutions must be prescribed for the purposes of the definition or obtain a declaration from the ASC modifying the provision.

267. The amendment will insert listed financial institutions into the definition of "eligible body" and hence avoid the need for them to seek a regulation or declaration.

Item 29 - Proposed amendment to section 1301 - Location of books kept on computers

268. This section will provide that where a corporation keeps required books in other than a written form (e.g. on a computer) it will be deemed to have complied with the requirements of the Law relating to the location of books if:

- * the information is available in written form at the place where the books are required to be kept;
- * the ASC is notified; and
- * changes in location are notified within 14 days.

269. The proposed amendment will add the words "or financial institution" after the word "corporation" and will thus extend the application of section 1301 to financial institutions.

Item 30 - Proposed amendment to subsection 1302(7) - Location of registers,

270. Subsection 1302(1) provides that a "company" (which is defined in subsection 1302(7) to include a registered body) which is required to keep certain registers (including those required by sections 715, 724 and 1047) must keep them at its registered office or principal place of business.

271. These registers will be able to be located elsewhere in the circumstances described in paragraphs 1302(1)(a)-(c). Subsection 1302(3) provides that failure to comply with subsections 1302(1) and (2) is an offence.

272. It is proposed that financial institutions no longer be included in the definition of "registrable Australian bodies". Proposed subsection 1401(2) provides that financial institutions which are registered Australian bodies at the time of commencement will cease to be so.

273. However, it is also proposed that financial institutions be subject to the provisions of section 1047 (the obligation to keep a register of debenture holders) to which subsection 1302(1) refers. In addition, listed financial institutions fall within the definition of "company" for the purposes of Chapter 6 and hence the registers required by sections 715 and 724 are relevant.

274. The proposed amendment to subsection 1302(7) will therefore extend the meaning of "company" in section 1302 to financial institutions.

Item 31 - Proposed amendment to subsections 1306(3) and (4) - Form and evidentiary value of books

275. Briefly, section 1306 relates to the form in which books required to be kept by the Law may be kept (subsections 1306(1) and (2)); the precautions which a corporation must take for guarding against destruction of or falsification of books required by the Law (subsection 1306(3)) and the evidentiary value of writing that reproduces matters recorded on a computer (subsection 1306(5)). It also provides that a corporation which stores matters on, for example, a computer must make the material available in written form if the Law imposes on it a duty to make the book available for inspection or to provide copies (subsection 1306(4)).

276. The proposed amendments to subsections 1306(3) and (4), by inserting "financial institution", will extend their operation to financial institutions when complying with the requirements of the Corporations Law.

SCHEDULE 4 - AMENDMENTS OF ASC ACT AND CORPORATIONS LAW RELATING TO CORPORATIONS AND SECURITIES PANEL

Introduction

277. The Panel is established under the ASC Act (Part 10) and is empowered by the Corporations Law (Part 6.9), upon application by the ASC, to examine takeover conduct, to make declarations of unacceptable conduct/acquisitions in respect of a takeover and make orders in relation to any unacceptable conduct/acquisitions that has occurred or would occur to any persons effected by the acquisition of shares or conduct in respect of a proposed takeover. The Panel may make a declaration or an order prohibiting such conduct which is enforceable in a court.

278. The Panel was envisaged as a peer review group body which would be able to come to quick decisions on matters relating to takeovers to ensure that participants in a takeover and affected shareholders were able to make decisions on the basis of full information.

279. The Panel's structure and the manner in which it conducted its hearings were found to be ineffective in its consideration of the acquisition and conduct involving the shares of Titan Hills Australia Limited and Precision Data Holdings Limited, the first application to come before the Panel.

280. The following technical problems with the current structure of the Panel have been identified:

- * the hearing powers do not discourage time wasting litigation between the parties;
- * the requirements of the rules of natural justice for the parties hinders the Panel from coming to quick commercial decisions;
- * the Panel's jurisdiction in relation to takeovers does not cover unfair conduct connected with some takeovers; and
- * the Panel cannot enforce undertakings that are given by the parties to its proceedings.

281. To meet these concerns a number of changes to the current operations of the Panel are proposed:

- * amendments to the Corporations Law and the ASC Law to improve the capacity of the members of the Panel to better "control" the Panel's

proceedings. The content of procedural fairness to be applied by the Panel and the Panel's procedures are to be expressly set out in Regulations. The Regulations will codify the mechanics of the inquiries in order to clarify to the maximum extent the rights, duties and responsibilities of parties and the Panel;

* the Panel's jurisdiction is to be extended to encompass certain conduct associated with a takeover; and

* the Panel will be empowered to accept undertakings from the parties which will be enforceable by the Court.

282. The thrust of the first two of these proposals in particular is to clarify what is required by procedural fairness for Panel inquiries. The removal of the present uncertainty through the legislative prescription of the content of procedural fairness in the Regulations should enable the Panel to fulfil its legislative charter of quick commercial decisions. The emphasis is to be on written submissions by parties and strict time limits for submissions by parties. This will enable the Panel to avoid being required to hear time consuming oral legal argument and oral evidence from witnesses. It is intended that the procedures should allow for an expeditious inquiry into the facts in order to allow the Panel to make a declaration through an examination of primarily written material rather than oral evidence. The Panel should be in the position to obtain the information it requires rather than only depending on the parties to provide appropriate information in the presentation of their cases. In effect, the Panel would be encouraged to adopt an inquisitorial role in relation to its hearings.

Part 1 - Amendments of ASC Act

Item 1- Proposed amendment to section 5 - (definition of witness)

283. A consequential amendment is to be made to the definition of "witness" in section 5 to take account of the fact that the Panel will hold inquiries rather than hearings.

Item 2 - Proposed amendments to subsection 184(4) - Constitution of Panel in relation to particular matters

284. Paragraphs 184(4)(a) and (b) are also to be amended to reflect the fact that the Panel will be conducting inquiries.

Items 3. 4 and 5 - Proposed amendments to section 185 - Disclosure of interests by members

285. Subsection 185(1) is to be amended to provide that a member with conflict of interest cannot take part in the performance or exercise of the Panel's functions or powers in relation to a matter except with the consent of the President of the Panel. The President of the Panel will only consent to a member taking part in such a matter if he believes on reasonable grounds that the conflict of interest is immaterial or indirect and would not prevent the member from acting impartially.

286. Under the existing provisions consent to a member with a conflict of interest acting in relation to a matter is required from all the parties to the matter.

287. Given that the Panel is a peer review body with most of its members drawn from the business community it may be difficult to constitute the Panel for the purposes of some matters without a member having a conflict of interest. Although many such conflicts are likely to be immaterial or indirect, there has been some concern that it would be difficult to get the consent of all the parties to a matter where such a conflict arises.

288. The proposed amendment replaces the consent of all the parties with the consent of the President of the Panel and specifies the conditions under which the President may grant his consent.

289. A consequential amendment is also to be made to subsection 185(2) to provide that where the President becomes aware of a member's conflict of interest he shall revoke a direction under subsection 184(2) that the member act in relation to a particular inquiry unless he believes on reasonable grounds that the conflict of interest is immaterial or indirect and would not prevent the member from acting impartially. Where the President does not revoke a declaration he must cause the interest of the member to be disclosed to the parties involved in the matter.

Item 6 - Heading to Division 3 of Part 10

290. The title of the Division is to be amended to reflect the approach that the Panel will adopt for the conduct of its proceedings.

Item 7 - Proposed amendment to subsection 187 (1) - Interpretation

291. The definition of a "hearing" is to be omitted and a new definition of an "inquiry" is to be substituted.

Item 8 - Proposed amendment to sections 188 and 189

292. These sections are to be repealed and the following sections substituted.

Proposed section 188 - Power to hold inquiries

293. The Panel will be empowered to hold inquiries in relation to its functions and powers (proposed subsection 188(1)).

294. The President of the Panel will be able to convene an inquiry to be held at a place and time that he or she determines (proposed subsection 188(2)).

Proposed section 189 - Who may be present at inquiry

295. An inquiry by the Panel will take place in private unless the Panel directs that the inquiry or part of it is to take place in public (proposed subsection 189(1)).

296. The purpose of this provision is to clarify that as the Panel will now be conducting inquiries, it is more likely that the Panel will undertake those inquiries in private. Under the current law the Panel could consider requests from either the ASC or the parties for a private hearing. It is considered that a private inquiry will enable the Panel to conduct its proceedings expeditiously without infringing parties rights.

297. Under the proposed Regulations, when holding an inquiry the Panel will invite written submissions from the parties and other persons who have an interest in the matters. After examination of those submissions, the Panel will decide whether a conference (an oral hearing) is necessary.

Item 9 - Proposed amendments to subsection 190 (1) - Panel may restrict publication of certain material

298. Subsection 190(1) is to be amended to provide that where the Panel is conducting an inquiry it may give directions preventing or restricting the publication of documents lodged with the Panel. This amendment is to take account of the new approach of the Panel to concentrate on the examination of written submissions by interested parties.

Item 10 - Proposed amendments to paragraph 190(2)(a) - Panel may restrict publication of certain material

299. Subsection 190(2) is to be amended to provide that when determining whether to give a direction, the Panel shall have regard to submissions or evidence made or given to the Panel. This amendment is consequential upon the Panel's approach

of prima facie conducting its proceedings by way of the examination of written submissions.

Item 11 - Proposed amendment to section 191

300. Section 191 is to be repealed and the following section substituted.
Proposed section 191 - How information or evidence given to Panel,

301. Proposed subsection 191(1) sets out the general rule that information or evidence given to the Panel will be by way of a written submission set out in accordance with the requirements of the regulations pertaining to the conduct of inquiries by the Panel.

302. Proposed subsection 191(2) provides that a person may appear before the Panel and give evidence where the person is requested by the Panel to do so. This reserves the right of the Panel to require oral evidence in its inquiries. The conduct of a conference (an oral inquiry) will be subject to the wide discretion vested in the Panel. A conference should be looked upon as, in effect, the last chance for the Panel to seek clarification of matters raised in written submissions or witnesses' statements or to invite views from persons on the issues raised by the Panel on matters not previously considered.

Items- 12 to 16 - Proposed amendments to section 192 - Power to summon witnesses and take evidence

303. Section 192 deals with the Panel's powers to exercise coercive powers to require witnesses to attend and to provide information.

304. A number of consequential amendments are to be made to section 192 to take account of the fact that the Panel will now be primarily conducting inquiries into takeover activity where there may have been unacceptable circumstances.

Item 17 - Proposed amendments to section 193

305. Section 193 is to be repealed and the following provisions substituted.
Proposed section 193 - Who presides at inquiry.

306. Proposed subsection 193(1) provides that the President is to preside at all inquiries at which he or she is present.

307. Proposed subsection 193(2) provides that if the President is not available, the Deputy President will preside.

Proposed section 193A - Quorum and determination of questions at inquiry

308. Proposed subsection 193A(1) provides that at an inquiry, two members will form a quorum.

309. Proposed subsection 193A(2) provides that any questions arising at an inquiry will be determined by a majority of the votes of the members present.

310. Proposed subsection 193A(3) provides that the member presiding at an inquiry has a deliberative vote but not a casting vote.

Items 18 and 19 - Proposed amendments to section 194 - Representation at hearings

311. References to "a hearing" in subsections 194(1), (2) and (3) are to be replaced with references to "an inquiry".

312. Under proposed new subsection 194(4), a person will no longer be entitled to be represented at an inquiry by his or her legal adviser. Instead, a person will be entitled to have another person present to assist, but the person who so assists will not be entitled to address the Panel.

313. As the matters that are the subject of the Panel's deliberations will not generally be technical legal matters, but matters of market behaviour and market standards, it is considered more appropriate that the parties rather than their legal advisers address the Panel. This should enable the Panel to concentrate its inquiries into issues of unacceptable market conduct as set out in the Eggleston principles codified in the Corporations Law.

314. This is the approach which has been successfully adopted in pre-decision conferences by the Trade Practices Commission under subsection 90A(7) of the Trade Practices Act 1974. Subsection 90A(7) states that a person participating in a pre-decision conference of the Commission is entitled to have another person assisting him/her, but that a person who so assists is not entitled to participate in the discussion.

Item 20 - Proposed amendment to section 195

315. Section 195 is to be repealed and the following section substituted.
Proposed section 195 - Procedure at inquiry

316. Proposed subsection 195(1) provides that an inquiry is to be conducted in accordance with the requirements set out in the ASC Law, the requirements of the regulations and the requirements of the Panel.

317. The purpose of this provision is to clarify what procedures are to be adopted for the conduct of Panel inquiries. It is expected that the regulations will provide a comprehensive guide for the conduct of proceedings by the Panel and will assist interested parties by providing clear guidance as to how they should make submissions to the Panel. There will remain, however, a discretion in the Panel to determine its procedure to the extent that matters are not covered by the legislation or Regulations.

318. Proposed subsection 195(2) provides that the regulations which set out how the Panel is to conduct its inquiries may deal with the following matters; the making of submissions or the giving of evidence, the right of parties to be represented, and the matters to be taken into account by the Panel when making a decision during the course of an inquiry.

319. Proposed subsection 195(3) provides that the rules of natural justice do not apply to an inquiry.

320. The crux of the problem which the Panel has encountered with the conduct of its hearings is how it is to provide procedural fairness to parties while at the same time coming to a timely decision concerning the acceptability of commercial takeover conduct.

321. Procedural fairness requires that a party has a right to be heard and present evidence, and the right to have a matter determined by an unbiased adjudicator. The content of the rules of procedural fairness are not fixed and immutable but vary with the circumstances. The notion underlying procedural fairness is that by ensuring that the process is fair, the chances that an unbiased decision-maker will make the best decision in the circumstances is maximised. The factors which can affect the content of the rules of natural justice include the nature of the interest affected and the nature of the power to be exercised. Ultimately, however, it is a question of what the statute conferring a decision-making power intended.

322. A number of points are worth noting when determining the content of procedural fairness required to be given by the Panel. They are:

- * procedural fairness does not require the Panel to behave like a court. (The High Court has held that the Panel does not exercise judicial power: Precision Data Holdings Ltd and Ors v Wills 6 ACSR 269)

- * the Panel can limit the number of witnesses called by a party in order to avoid too lengthy proceedings;

* cross-examination of parties/witnesses is not a requirement of procedural fairness especially where there are other equally effective means of testing material which has been placed before the decision-maker. What advocates and parties often try to achieve by cross-examination can be more effectively achieved by bringing evidence in rebuttal, whether it be by bringing a new witness or some other evidence;

* a tribunal such as the Panel has a wide discretion to control its processes, including the power to avoid irrelevancies and to curb repetition (*Wednesbury Corporation and Others v Minister of Housing and Local Government (No. 2)* (1966) 2QB 275);

* it is widely recognised that because the rules of procedural fairness are flexible, there can be a tendency for decision-makers to apply them at the highest level. If parties and their legal representatives are allowed to do what they want and to control the proceedings, the content of procedural fairness will be greater than what is necessary or appropriate for those proceedings.

323. On the one hand, the principles of natural justice demand that a person whose interests may be adversely affected by a decision must be provided with an opportunity to be heard. This is particularly important given the scope of the Panel's powers, and the fact that the Panel can effectively halt a takeover if it finds that the conduct of the parties has been in breach of the Eggleston principles.

324. Against this, one of the key policy reasons for the Panel was that it would enable matters to be dealt with quickly. Indeed, the Panel is required to resolve a matter before it within the time limits specified in subsection 733(4) of the Corporations Law, being within 90 days after the acquisition or 30 days after the application to the Panel, whichever is the later (although the Panel may apply to the Court for an extension of this time). Delays caused by over zealous demands that procedural fairness be afforded may be a major impediment to an expeditious hearing as required by the Law.

325. Timing is particularly crucial in takeover situations as a delay caused by ensuring that the requirements of procedural fairness are met could result in the conduct being complained of moving to irreversible completion, thus defeating the purpose of the Panel's review, although this is now less likely to be a problem with the interim order powers available to the Panel through sections 733A and 733B. An expeditious inquiry is important not only from the point of view of acting quickly to protect investors' interests, but also from the perspective of Panel members who are likely to be active in business and operating under time constraints. Indeed, there is a legislative exhortation in subsection 193(1) of the ASC Law that the Panel conduct its matters 'with as much expedition' as a proper consideration of the matter permits.

326. It is considered that the proposed Regulations will provide a comprehensive guide to how the Panel is to conduct itself to ensure that procedural fairness is provided to all parties to an inquiry.

Item 21 - Proposed amendments to subsection 196(1) - Reference to court of question of law arising at hearing

327. Subsection 196(1) is to be amended to provide that the Panel may only of its own motion refer to the Court for a decision a question of law arising at an inquiry. The purpose of this amendment is to restrict frivolous actions by individuals who could, in requesting that the Panel refer matters to the Court, impede the making of timely decisions by the Panel.

Item 22 - Proposed amendments to subsections 196(3) and (4)

328. Consequential amendments are to be made to subsections 196(3) and (4) as the Panel will now be conducting inquiries.

Item 23 - Proposed amendment to subsection 197(1) - Protection of members

329. A member will have, in the performance of any of his/her functions as a member at an inquiry, the same protection and immunities as a Justice of the High Court.

Item 24 - Proposed amendments to subsection 197(2)

330. Proposed subsection 197(2) will be omitted as legal representatives will not have the right to appear on a person's behalf at an inquiry. Under proposed subsection 194(4), as outlined in relation to Items 18 and 19 above, legal representatives will be able to attend a conference where the parties are requested to attend such a conference by the Panel and will be able to give advice to their client, but they will not be able to speak on behalf of their client.

Item 25 - Proposed amendments to subsection 197(3)

331. Consequential amendments are to be made to this subsection so that it refers to a person or witness appearing at an inquiry.

Items 26 and 27 - Proposed amendments to subsection 199 - False evidence

332. Subsection 199(1) is to be omitted. A new provision is to be substituted which sets out that a person must not, in a written submission given to the Panel for the purpose of an inquiry, or while appearing before the Panel at an inquiry, give information or evidence that is false or misleading in a material particular. The penalty for giving false evidence will be \$1,000 or imprisonment for 3 months or both.

333. A consequential amendment is also to be made to subsection 199(2) to include the giving of information, as well as evidence, to the Panel.

Item 28 - Proposed amendments to paragraph 200(1)(b)) - Contempt of Panel

334. A consequential amendment is to be made so that a person would be in contempt of the Panel where that person hinders or obstructs an inquiry.

Item 29 - Proposed amendment to subsection 201(1)- Powers of Court where non-compliance with section 192

335. Subsection 201 (I) will be amended so that the powers of the Court to investigate where a person has failed to comply with a summons issued by the Panel, relates to a person failing to attend an inquiry.

Item 30 - Proposed section 201 A - Undertakings to the Panel

336. Proposed section 201A is to be inserted in Part 10.

337. Proposed section 201A(1) provides that the Panel may accept a written undertaking from a person affected or likely to be affected by the inquiry.

338. It is considered that the Panel needs to be able to enforce undertakings about unacceptable market conduct given to it when seeking to reach settlement of issues which have arisen in an inquiry. The undertaking is to be enforceable by the Court and a person cannot withdraw or vary the undertaking, except with the consent of the Panel (proposed subsections 201 A(2) and (3)). The Court will be empowered to make orders directing the person who gave the undertaking to comply with the undertaking. The Court may make an order that a person compensate any other person who has suffered loss or damage as a result of the breach of the undertaking. The Court is also to be empowered to make any other order that it considers appropriate.

339. It is considered that the bolstering of the Panel's power to obtain and enforce undertakings will significantly assist the Panel in coming to speedy commercial decisions.

Part 2 - Amendments of Corporations Law

Item 31 - Proposed amendment to paragraph 73 1 (d) - Commission to take account of certain matters

340. Section 731 sets out the criteria which the ASC should take account of when deciding whether to modify the impact of the Takeover's Code on a company or person involved in a takeover. The ASC must take account of the desirability of the acquisition of shares in a company taking place in an efficient, competitive and informed market. One of those criteria is that, as far as practicable, all shareholders of a company have equal opportunities to participate in any benefits accruing to shareholders under any proposal under which a person would acquire a substantial interest in the company.

341. The purpose of the amendment proposed to section 731 and those amendments proposed to section 732 is to bring within the jurisdiction of the Panel, takeover conduct, which are primarily defensive tactics, which can defeat the spirit of the Takeover's Code.

Item 32 - Proposed amendment to section 732 - Occurrence of unacceptable circumstances

342. Section 732 sets out the Eggleston principles as to what are unacceptable circumstances in relation to the rights of shareholders and directors in a takeover.

343. A new subsection 732(2) is to be added which states that unacceptable circumstances in relation to a takeover shall be taken to have occurred where the actions of the person acquiring the substantial interest in the company, or actions of the director of the company, including actions that cause the acquisitions not to proceed.

344. The purpose of this provision is to ensure that the scope of unacceptable circumstances includes cases where the directors of a target company by their action, including such action which caused or contributed to the acquisition not proceeding, did not give shareholders of the company all reasonable and equal opportunities to participate in any benefits accruing to the company.

345. Existing paragraph 732(d) appears, at present, to only cover actions by the offeror, and it is desired that this should be widened to include, amongst other

things, illegitimate spoiling action by the Board of directors of the target company. The current jurisdiction relating to takeovers is to be expanded to cover other conduct which is related to the acquisition of shares such as defensive or frustrative actions by a company and actions by the offeror or target company which would lead to minority shareholders not having the opportunity to participate in the benefits derived in the takeover.

Item 33 - Proposed amendment to subsection 733(5) - Declarations by Corporations and Securities Panel

346. Where unacceptable circumstances have occurred in a takeover or in relation to the shares of a company, the ASC can apply to the Panel for a declaration in relation to the conduct (section 733).

347. Subsection 733(5) is to be amended so that the Panel may only make a declaration if it has given each person to whom the declaration relates, an opportunity to make submissions to the inquiry. A person will no longer have a right to appear at a hearing. However, under the proposed Regulations the Panel may invite the person to attend a conference where oral evidence is given.

348. The rationale of this amendment is that as the Panel will now primarily rely on written submissions it would be counter productive to provide a person with a right to appear at an inquiry. It is considered that adoption of a practice of requiring written submissions from parties and, where necessary further oral evidence, will lead to the Panel fulfilling its charter of speedy commercial decisions in relation to whether takeover conduct is in breach of the principles of fair play set out in the Corporations Law. The rights of individuals will be safeguarded by the Panel adhering to procedural fairness as set out in the ASC Act and the proposed Regulations in the conduct of its inquiries.

Item 34 - Proposed amendment to subsection 734(6) - Power of Panel to make orders

349. Where there is a declaration by the Panel relating to unacceptable conduct relating to an acquisition or unacceptable conduct relating to the affairs of a company, the Panel, on application of the ASC, may make an order to protect the rights of parties.

350. An amendment which excludes the right of a person to appear at a hearing before an order is made will be made to the Panel's power to make orders. The Panel shall not make an order until it has given a person an opportunity to make a submission to the inquiry conducted by the Panel.

SCHEDULE 5 - AMENDMENTS OF AAT ACT, ASC ACT AND CORPORATIONS LAW RELATING TO REVIEW OF DECISIONS

Introduction

351. Subsection 27A(1) of the Administrative Appeals Tribunal Act 1975 ("AAT Act") requires a person who makes a reviewable decision to take all reasonable steps to give any person whose interests are affected by the decision notice of the making of the decision and of the right to have the decision reviewed.

352. At the time the AAT Act was amended to include subsection 27AM, it was recognised that the requirements of that subsection would present the ASC with the difficult practical problem of identifying all of the persons who are affected by its more broad ranging decisions. In many instances such persons include the relevant company and its directors, shareholders and creditors. This difficulty is magnified by both the broad array of decisions made by the ASC that are subject to review and the high volume of decisions made each year.

353. The Administrative Review Council, in conjunction with the ASC and the Attorney-General's Department, has examined all categories of decisions of the ASC to assess the extent to which exemption from the notification of the making of the decision and review rights may be justified.

354. Schedule 5 will implement the results of that examination by excluding certain decisions made under the Corporations Law and the ASC Law from the requirements of section 27A(1) of the AAT Act. Schedule 5 will also provide for a modified regime for the notification of persons affected by such decisions of their rights of review under the AAT Act.

Part 1 - Amendment of AAT Act

Item 1 - Proposed amendments to paragraphs 27A(2)(d) and (e)

355. Existing paragraph 27A(2)(d) of the AAT Act exempted decisions of the ASC or its delegate made under the Corporations Law from the requirements of subsection 27A(1) for a period of six months after the commencement of that section. That exemption expired on 10 December 1993. Paragraph 27A(2)(e) of the AAT Act also made provision for the continuation of the exemption of such decisions by declaration in the regulations.

356. Regulation 3 of the Administrative Appeals Tribunal Regulations (Amendment), Statutory Rules 1993 No 326, inserted a new regulation 5C which

continues the exemption of such decisions from the requirements of subsection 27A(1) and which also implements by regulation a modified notification regime in respect of those decisions.

357. Existing paragraph 27A(2)(d) no longer has any continued operation. In addition, paragraph 27A(2)(e) will no longer be required upon the commencement of Schedule 5 of the Bill, which will replicate in primary legislation the notification regime presently provided for in regulation 5C of the AAT Regulations.

358. Existing paragraphs 27A(2)(d) and (e) will therefore be omitted. The paragraphs to be substituted in their place will exempt from the requirements of subsection 27A(1) a decision made under the Corporations Law which, pursuant to section 1317B of the Law, may be reviewed by the AAT. Also exempted from the requirements of subsection 27A(1) will be a decision which section 244 of the ASC Law provides may be reviewed by the AAT.

Part 2 - Amendment of ASC Act

Item 2 - Proposed section 244A - Notice of reviewable decision and review rights

359. Proposed section 244A of the ASC Act will apply to those decisions of the ASC which, pursuant to subsection 244(2) of that Act, are reviewable by the AAT (proposed subsection 244A(1)).

360. Proposed subsection 244A(2) sets out the general principle that the ASC must take such steps as are reasonable in the circumstances to give each person whose interests are affected by the decision, notice of the making of the decision and of the person's rights of review by the AAT.

361. The general principle in subsection 244A(2) will, however, be subject to the qualification set out in proposed subsection 244A(3) that the ASC will not be required to give notice to a person or class of persons affected by a decision if the ASC determines that, having regard to the cost of giving the notice and the way in which the person(s) interests are affected, notice is not warranted. It is thus envisaged that the ASC will give the requisite notice to persons most directly affected by a decision, but will not be required to give notice to persons who are only remotely affected, if the cost of giving notice to those persons does not warrant it.

362. Proposed subsection 244A(4) provides that any failure by the ASC to give the requisite notice will not affect the validity of the decision.

363. To limit any possible detriment to a person who does not receive notice of a decision and who, as a result, is out of time in making an application for review of the decision, proposed subsection 244A(5) will provide that the absence of notice will constitute special circumstances for the purposes of subsection 29(6) of the AAT Act. Subsection 29(6) allows the AAT to entertain an application for review that is made out of time, if it is of the opinion that there are special circumstances that justify it in doing so.

364. The declaration that the absence of notice constitutes special circumstances for the purposes of subsection 29(6) will not mean that every applicant for review that is out of time will be entitled to review simply because of the ASC's failure to notify. Whether these "special circumstances" (namely the absence of notice) justify the Tribunal entertaining an application pursuant to subsection 29(6) in a particular case, will still be within the discretion of the AAT.

Part 3 - Amendments of Corporations Law

365. The amendments proposed by Part 3 to the Corporations Law will mirror those proposed by Part 2 to the ASC Act.

Item 3 - Proposed amendment to section 1317C

366. The insertion of proposed paragraph 1317C(h) will ensure that a decision to make a determination under proposed subsection 13171(3) will not itself be reviewable under the AAT Act.

Item 4 - Proposed section 1317D - Notice of reviewable decision and review rights

367. Proposed section 1317D of the Corporations Law will apply to those decisions of the Minister, the ASC or the Companies Auditors and Liquidators Disciplinary Board (collectively called the "decision maker") which, pursuant to section 1317B of the Law, are reviewable by the AAT (proposed subsection 13171(1)).

368. Proposed subsection 13171(2) sets out the general principle that the decision maker must take such steps as are reasonable in the circumstances to give each person whose interests are affected by the decision, notice of the making of the decision and of the person's rights of review by the AAT.

369. The general principle in subsection 13171(2) will, however, be subject to the qualification set out in proposed subsection 13171(3) that the decision maker will not be required to give notice to a person or class of persons affected by a decision

if the decision maker determines that, having regard to the cost of giving the notice and the way in which the person(s) interests are affected, notice is not warranted. It is thus envisaged that the decision maker will give the requisite notice to persons most directly affected by a decision, but will not be required to give notice to persons who are only remotely affected, if the cost of giving notice to those persons does not warrant it.

370. Proposed subsection 1317D(4) provides that any failure by the decision maker to give the requisite notice will not affect the validity of the decision.

371. To limit any possible detriment to a person who does not receive notice of a decision and who, as a result, is out of time in making an application for review of the decision, subsection 13171)(5) will provide that the absence of notice will constitute special circumstances for the purposes of subsection 29(6) of the AAT Act. Subsection 29(6) allows the AAT to entertain an application for review that is made out of time, if it is of the opinion that there are special circumstances that justify it in doing so.

372. The declaration that the absence of notice constitutes special circumstances for the purposes of subsection 29(6) will not mean that every applicant for review that is out of time will be entitled to review simply because of the decision maker's failure to notify. Whether these "special circumstances" (namely the absence of notice) justify the Tribunal entertaining an application pursuant to subsection 29(6) in a particular case, will still be within the discretion of the AAT.

SCHEDULE 6 - AMENDMENTS OF ASC ACT AND CORPORATIONS LAW INTRODUCING PENALTY UNITS

Introduction

373. The introduction of penalty units will allow pecuniary penalties imposed by national scheme laws to be varied more easily. This system has already been introduced for Commonwealth offences as a result of amendments which were made in 1992 to the Crimes Act 1914.

374. The amendments which relate to the introduction of a system of penalty units to the ASC Act are contained in Part I of Schedule 6 and those relating to the Corporations Law are in Part 2 of Schedule 6.

375. The introduction of penalty units will not change the value of any penalties. The penalty units system will be implemented by converting all existing penalty amounts in those Acts into penalty units by dividing them by the value of the penalty unit. The initial penalty unit value will be \$100, so for example, an existing penalty of \$500 will be expressed as 5 penalty units.

376. In future, when it becomes necessary to make uniform, general changes in penalties to keep their relative value in relation to price movements in the wider economy, a simple increase in the value of the penalty unit will achieve this result. The changed penalties will then be calculated by multiplying the number of penalty units for any particular offence by the new unit value.

Part 1 - Amendments of ASC Act

Item 1 - Proposed amendment to subsection 50)

377. The definition of "penalty unit" will be inserted in subsection 5(1). A penalty unit is equal to \$100.

Item 2 - Proposed amendments to Act in accordance with table

378. Item 2 introduces penalty units into the ASC Act through a table. All penalty amounts in the ASC Act will be amended by reference to the table, which converts the dollar amount of the penalty into penalty units by dividing that amount by \$100.

Part 2 - Amendments of Corporations Law

Item 3 - Proposed amendment to section 9

379. The same definition of "penalty unit" as in the ASC Act will be inserted in section 9.

Item 4 - Proposed amendments to Law in accordance with table

380. Item 4 introduces penalty units into the Corporations Law through a table. As with Part 1 of Schedule 6, the various penalty provisions in the Corporations Law will be converted to penalty units by reference to the table.

SCHEDULE 7 - AMENDMENTS OF CORPORATIONS ACT AND CORPORATIONS LAW RELATING TO UNCLAIMED PROPERTY

Introduction

381. A number of provisions of the Corporations Law provide for the transfer to the Minister of unclaimed money, or proceeds from the sale of unclaimed shares or other property (including shares), to be dealt with under Part 9.7 of the Law. The Minister is required to pay unclaimed money into the Companies Unclaimed Money Account ("the Account"), which is established under section 71 of the Corporations Act 1989 ("Corporations Act"), and to dispose of other unclaimed property and to pay the proceeds into the Account (section 1339). Where a person claims to be entitled to any money which has been paid into the Account, the Minister considers the claim, and may direct that a payment be made to the claimant.

382. The following proposed amendments will transfer to the ASC the Minister's powers and functions under Part 9.7 of the Corporations Law; ie, to accept the transfer of unclaimed money or property, to pay unclaimed money into the Account, to dispose of unclaimed property and pay the proceeds into the Account and to determine whether persons are entitled to payment out of the Account. These powers and functions, which are administrative in nature, are appropriate to be exercised by officers of the ASC and do not require the personal attention of the Minister.

Part 1 - Amendments of Corporations Act

Item 1 - Proposed repeal of section 71 Corporations Act

383. Item 1 will repeal section 71 of the Corporations Act. Section 71 provides for the establishment of the Companies Unclaimed Money Account as a trust account under section 62A of the Audit Act 1901. Its repeal is consequential upon the setting up of an unclaimed money account by the ASC under section 63J of the Audit Act 1901.

Part 2 - Amendments of Corporations Law

Item 2 - Proposed amendment to section 9 - (definitions of "unclaimed money account" and "unclaimed property")

384. Item 2 will amend section 9 by inserting definitions of "unclaimed money account" and "unclaimed property".

385. "Unclaimed money account" will be defined to be an account which the ASC maintains under section 63J of the Audit Act 1901, and is maintained for the sole purpose of containing money that is unclaimed property.

386. The proposed definition of "unclaimed property" relocates, as amended to reflect the proposed transfer of functions to the ASC, the interpretative provisions in existing section 1337.

Item 3 - Replacing references to "Minister" with references to the "Commission"

387. Item 3 will change references to the "Minister" in a number of provisions of the Corporations Law to references to "Commission", to reflect the transfer of unclaimed money functions from the Minister to the ASC. As amended, the sections involved will deal with the following matters:

* subsection 414(15) - payment to the ASC, to be dealt with under Part 9.7, of unclaimed money arising from the acquisition of shares of shareholders dissenting from a scheme of arrangement;

* section 544 - payment to the ASC, rather than to the Minister, by a liquidator of unclaimed money arising from the liquidation of the property of a company;

* subsections 702(5)-(6) and (8)-(10) - payment to the ASC, to be dealt with under Part 9.7, of unclaimed money of dissenting shareholders to a takeover scheme, which has been transferred from the company's unclaimed property register;

* section 1340 - in respect of unclaimed shares, the ASC is not liable to pay calls, contribute to or discharge debts or other liabilities or do any other act or thing;

* subsections 1341(3)-(5) - there will be a right of appeal to the Court where a person is dissatisfied with the ASC's decision in respect of the person's claim for money in the ASC's unclaimed money account; the ASC is not liable for money paid in error out of its unclaimed money account or out of the Consolidated Revenue Fund;

* section 1342 - neither the Commonwealth nor the ASC will be liable for any loss or damage arising out of the exercise of, or failure to exercise any of the powers in relation to unclaimed property functions; and

* section 1343 - transfer to the ASC, to be dealt with under Part 9.7, of shares held by persons whose location is unknown.

Item 4 - Proposed amendment to subsection 577(4) - Disposal of outstanding interests in property.

388. Item 4 will amend subsection 577(4) by omitting "pay the remainder (if any) of the moneys to the Minister to be dealt with" and substituting "deal with the rest (if any)". This amendment is consequential upon the transfer of unclaimed money functions to the ASC.

Item 5 - Proposed repeal of section 1337 - Interpretation

389. The definition of "unclaimed property" in section 1337 is to be replaced by the proposed definition of "unclaimed property" in the amendment of section 9 (Item 2).

Item 6 - Proposed amendments to section 1339 - Commission to deal with unclaimed property

390. Item 6 will substitute a new section 1339. This replacement section will transfer to the ASC the obligation to pay unclaimed money into its unclaimed money account, and to sell or dispose of unclaimed property and pay the proceeds into that account.

Item 7 - Proposed amendments to subsections 1341 (1) and (2) 391. Item 7 will substitute new subsections 1341 (1) and (2).

392. Proposed new subsection 1341(1) provides that if the money is not paid out of the Commission's unclaimed money account in accordance with section 1341 or 1339(3) within 6 years after it was originally paid into that account under subsection 1339(2), it must be paid into the Consolidated Revenue Fund.

393. Proposed new subsection 1341(2) provides that if a person claims to be entitled to money paid into an unclaimed money account under section 1339(2) and the ASC is satisfied that the person is entitled to the money, the ASC must pay the money to the person out of the ASC's unclaimed money account (unless the money has been paid into Consolidated Revenue, in which case, the ASC must pay an equivalent amount to the person be paid out of money appropriated by Parliament from the Consolidated Revenue Fund).

SCHEDULE 8 - MISCELLANEOUS AMENDMENTS OF CORPORATIONS LAW

Item 1 - Proposed amendments to section 9 (definition of "unauthorised stock market")

394. The term "unauthorised stock market", as defined in section 9 of the Corporations Law, is to be amended to reflect the introduction of a further category of approved stock market, being a stock market approved by the Minister pursuant to proposed section 770A for unquoted prescribed interests (see Item 19). This Item specifically excludes from the definition of "unauthorised stock market" a section 770A stock market.

Item 2 - Proposed amendment to section 9 (definition of "clients' segregated account")

395. "Clients' segregated account" will be defined to mean, in relation to a member of a futures Organisation, an account that the person maintains with an Australian bank or a foreign bank approved under the business rules of a futures Organisation, and which is maintained for the sole purpose of containing money deposited into the account under section 1209. The obligation inherent in the current definition to designate an account as a clients' segregated account will be made an express obligation under section 1209 (proposed subsection 1209(4A)).

Item 3 - Proposed amendment to section 9 - insertion of definitions of "approved foreign bank" and "section 770A stock market"

396. "Approved foreign bank" will be defined to mean, in relation to a person, a foreign bank which has been approved by a futures Organisation in accordance with its business rules. A futures Organisation may approve foreign banks for the purpose of enabling any of its members to open a clients' segregated account where client moneys are received in a foreign country and for the purpose of enabling a futures broker to invest moneys held in a clients' segregated account under proposed subparagraph 1209(5)(d)(iii).

397. A definition of "section 770A stock market", being a stock market that has been approved by the Minister under section 770A of the Corporations Law, is also to be inserted in section 9.

Items 4 and 5 - Proposed amendment of section 72 (definition of "futures contract")

398. Section 72 is to be amended to enable the definition of "futures contract" to be expanded to include a kind of agreement which is prescribed by regulation for

the purposes of that section. The need for this amendment has arisen because of the development of derivative products which have characteristics in common with both equity and futures products. For the purpose of facilitating the trading of such products on either securities or futures markets, the Corporations Law is to be amended to allow prescription by regulation of certain agreements under either or both the definitions of "securities" (section 92) or "futures contract" (section 72). (see also Items 6, 7, 8 and 21)

399. The regulations may provide that an agreement prescribed for the purposes of the definition of "futures contract" under paragraph 72(1)(ca) is taken not to be a futures contract for the purpose of specified provisions of the Corporations Law, and/or that the regulations may modify the application of the Corporations Law to such a prescribed agreement - proposed subsections 72(1 A) and (1B).

Items 6, 7 and 8 - Proposed amendment of section 92 (definition of "securities")

400. Section 92 is to be amended to enable the definition of "securities" to be expanded to include a kind of agreement which is prescribed by regulation for the purposes of that section. The need for this amendment has arisen because of the development of derivative products which have characteristics in common with both equity and futures products. For the purpose of facilitating the trading of such products on either securities or futures markets, the Corporations Law is to be amended to allow prescription by regulation of certain agreements under either or both the definitions of "securities" (section 92) or "futures contract" (section 72). (see also Items 4, 5 and 21)

401. The regulations may provide that an agreement prescribed for the purposes of the definition of "securities" under paragraph 92(1)(f) is taken not to be a security for the purpose of specified provisions of the Corporations Law, and/or that the regulations may modify the application of the Corporations Law to such a prescribed agreement - proposed subsections 92(1 A) and (I B).

Item 9 - Proposed amendment to subsection 102AQ)

402. Section 102A, which facilitates the administration of the Corporations Law on a national basis, is to be amended to provide a legislative basis for an application to be made to the ASC for approval as a section 770A stock market under the Corporations Law of each jurisdiction. Approval under section 770A is expressly subject to section 102A.

Item 10 - Proposed amendment to subsection 120(2) - registration

403. Subsection 120(2) precludes the ASC from registering a company under Division 1 by a particular name unless either:

* the name is reserved under section 373; or

* the company is seeking to register its Australian company registration number as its name, in a form consistent with section 372.

404. Subsection 372(2) provides that the general registration requirement in subsection 120(2) does not apply where the memorandum, or the application for the registration of a company name has been lodged, and also states that the company's name on registration is to be its registration number.

405. The proposed amendment to subsection 120(2) replaces an incorrect reference to subsection 372(3), with a reference to subsection 372(2).

Item 11 - Proposed amendment to section 122 - Evidentiary certificates

406. A number of provisions of the Corporations Law allow a person to tender a certificate of incorporation issued by the ASC to prove in a court a matter relating to a company. Similarly, a certificate issued by the ASC with the particulars of a registered charge may be used as conclusive evidence in a court. It is important for the national application of the Corporations Law that these certificates have equal effect in courts throughout Australia, regardless of the State or Territory in which the company is incorporated. The proposed minor amendments to sections 122, 149 and 272(4) will ensure that such certificates can be treated as conclusive evidence in courts throughout Australia.

407. The proposed amendments to section 122 will allow a person to prove the existence of a company to a court anywhere in Australia through the tender of a certificate of incorporation issued by the ASC.

408. Section 122 currently enables the proof of the incorporation of a company only in the courts in the State or Territory in which the relevant company is incorporated. It follows that a certificate under the Commission's common seal stating that a specified company has been registered under Division I of Part 2.2 of the Corporations Law of another jurisdiction does not in one of the other State or Territory jurisdictions provide proof of the matters referred to in section 122.

409. This situation is contrary to the policy that the Corporations Law should have equal effect in every jurisdiction. The proposed amendments will widen the application of section 122 to certificates of incorporation of companies

incorporated under the Corporations Law of another jurisdiction. This change will enable the proof of incorporation of a company in courts outside the State or Territory in which the company is incorporated.

Item 12 - Proposed amendment to section 149 - Evidentiary certificates

410. The reasons for the amendments to section 149 are the same as those for section 122 outlined in the preceding paragraphs. The amendments will allow a person to prove the existence of a company to a court anywhere in Australia through the tender of a certificate of incorporation issued by the ASC.

411. Section 149 currently enables the proof of the incorporation of a company only in the courts in the State or Territory in which the relevant company is incorporated. It follows that a certificate under the Commission's common seal stating that a specified company has been registered under Divisions 3 and 4 of Part 2.2 of the Corporations Law of another jurisdiction does not in one of the other State or Territory jurisdictions provide proof of the matters referred to in section 149.

412. This situation is contrary to the policy that the Corporations Law should have equal effect in every jurisdiction. The proposed amendments will widen the application of section 149 to certificates of incorporation of companies incorporated under the Corporations Law of another jurisdiction. This change will enable the proof of incorporation of a company in courts outside the State or Territory in which the company is incorporated.

Item 13 - Proposed amendments to paragraphs 167(a), (b) and (c)

413. Item 13 will make a minor technical amendment to paragraphs 167(a), (b) and (c) consequential upon the amendment to subsection 167(1) described in the following paragraphs.

Item 14 - Proposed amendments to subsection 167(1)

414. Section 167 allows five specific changes of status for companies. For example, it allows a no liability company to convert to a company limited by shares, provided all the issued shares have been fully paid up. It also allows a company limited by shares or by guarantee to convert to a company limited by both shares and guarantee. The changes of status listed in section 167 do not include conversion from a limited company to a no liability company.

415. The no liability company is available for mining ventures, and it has a number of features which particularly suit it to the speculative nature of such ventures.

In particular, the memorandum of a no liability company must provide that acceptance of shares in the company gives rise to no contractual obligation on the member to pay calls or to contribute to the company's debts (the holder of partly-paid shares in a limited liability company can be required to contribute the balance of the nominal value of the shares). Other important features include the requirement that dividends and distributions be paid in proportion to a member's holding, regardless of the amount paid-up on that holding, and the ability of no liability companies to issue shares at a discount without the need for court approval.

416. The capacity to issue shares at a discount is particularly attractive for mining companies whose shares are trading at below their par value, since it can then be difficult to attract new equity without offering shares at a discount.

417. Item 14 will amend subsection 167(1) by inserting a new paragraph 167(1)(f), which provides that a limited company which is a mining company (defined in section 9) may convert to a no liability company if all the shares in the company are fully paid up.

418. The requirement that all issued shares be fully paid up at the time of conversion is intended to avoid the need for complex contribution rules equivalent to those set out in Division 2 of Part 5.6 in respect of conversions from unlimited liability to limited liability.

419. The requirement also provides an adequate safeguard against vendors or promoters securing an inappropriate advantage over other shareholders, thus avoiding the need to modify sections 396 and 397 (which deal with the priority of vendor or promoter shareholders, vis-a-vis other shareholders, in the case of a no liability company).

Item 15 - Proposed amendments to subsection 272(4)

420. Subsection 272(4) is being amended for the same general reason outlined in the preceding paragraphs of this memorandum relating to the amendment of section 122. The amendments will allow a person to prove the existence of a registered charge over company assets to a court anywhere in Australia through the tender of a certificate of the particulars of a charge issued by the ASC.

421. Subsection 272(4) currently enables the proof of registration of a charge only in the courts in the State or Territory in which the relevant company is incorporated. It follows that a certificate under the Commission's common seal stating that a specified charge has been entered on the register under subsection 272(3) of the Corporations Law of another jurisdiction does not in one of the other State or Territory jurisdictions provide proof of the matters referred to in subsection 272(4).

422. This situation is contrary to the policy that the Corporations Law should have equal effect in every jurisdiction. The proposed amendments to this subsection will widen the application of subsection 272(4) to a charge registered under Division 2 of Part 3.5 of the Corporations Law of this or another jurisdiction. This change will enable the proof of the existence of a charge through the tender of a certificate of the particulars of a charge in courts outside the State or Territory in which the company is incorporated.

Item 16 - Proposed amendments to subsection 382(2) - change of name

423. Subsection 382(2) prevents the ASC from approving a change of name of a company unless the proposed name is reserved in respect of the company under section 375.

424. The proposed amendment to section 382(2) will make the operation of the section subject to proposed new subsection 382A(1).

Item 17 - Proposed section 382A - Change of name to registration number

425. Proposed subsection 382A(1) will enable a company to change its name without first reserving the name with the ASC under section 375, where it is proposed to change the company's name to its Australian Company Number. In these circumstances, it is unnecessary to require the prior reservation of the proposed change in company name because that proposed name will automatically be available for registration.

426. Proposed subsection 382A(2) has the effect that where a company seeks to change its name to its registration number, the ASC must register the new name, and then cancel the registration of the previous company name.

Item 18 - Proposed amendment to heading to Part 7.2

427. This item will amend the heading to Part 7.2 to reflect the introduction of a further category of approved stock market, being a stock market approved by the Minister pursuant to proposed section 770A for unquoted prescribed interests.

Item 19 - Insertion of proposed sections 770A, 770B and 770C

428. Proposed section 770A will provide for the establishment of stock markets for unquoted prescribed interests where approved by the Minister. The insertion of sections 770A, 770B and 770C will enable the management company of a prescribed interest scheme, in respect of which there is an approved deed for the purposes of Division 5 of Part 7.12, to seek approval for the establishment of a secondary market in the prescribed interests of that scheme through the medium of an approved electronic trading system.

429. Market approval for each kind of prescribed interest to be traded will be required. Each market will be a separate market conducted by the particular management company and must be operated in accordance with the business rules of the management company, relevant agreements contemplated by those rules, and any conditions imposed on the approval.

Proposed section 770A - Approval of special stock markets for unquoted prescribed interests

430. Proposed subsection 770A(1) provides that the management company in relation to unquoted prescribed interests may make written application to the ASC for approval by the Minister of a stock market on which the interests (whether or not they remain unquoted) may be traded by means of an electronic trading facility. The term "unquoted" in relation to prescribed interests is defined by proposed subsection 770A(5).

431. Proposed subsection 770A(2) provides that the Minister may give written approval of a stock market for unquoted prescribed interests (see proposed subsection 770A(5)) only where satisfied that:

- * the business rules of the management company make satisfactory provision for the fair and orderly conduct of the stock market;
- * the business rules make provision for a person or partnership (the "supervisor") to monitor compliance with the business rules in the conduct of the market. The supervisor, having regard to the regulations, must be independent and appropriately qualified;
- * the management company must make and maintain satisfactory arrangements to meet any liabilities which may arise in the course of conducting the market. This will of course include making arrangements for the purposes of meeting any loss incurred by a unitholder resulting from a fraud such as an unauthorised transfer of prescribed interests; and
- * the market will be dedicated to the trading of the prescribed interests (in relation to which there is an approved deed) in respect of which stock market approval was sought.

432. Proposed subsection 770A(3) provides that approval by the Minister may be subject to conditions that are specified in the instrument of approval (paragraph 770A(3)(a)). For the purposes of maintaining an informed market, and in the absence of a current prospectus, the management company is required to comply with the requirements of any regulations for the lodging (see section 9 definition of "lodge") of documents containing information relating to the prescribed interests (paragraph 770(3)(b)). Paragraph (c) of proposed subsection 770A(3) requires the 'supervisor' to advise the ASC of a contravention of the management company's business rules with 7 days of becoming aware of such contravention and paragraph 770(3)(d) requires the "supervisor" to properly perform its duties under the management company's business rules.

433. Failure to comply with any of the conditions specified in an instrument of approval issued by the Minister may result in the revocation of that approval.

434. Proposed subsection 770A(4) provides that the Minister may revoke approval for the stock market where any of the preconditions to the granting of approval as provided under subsection 7709A(1) are no longer satisfied, or that any of the conditions as provided by subsection 770A(3) has been breached. Further, paragraph (c) of subsection 770A(4) provides that the Minister may revoke approval where otherwise satisfied that approval should be revoked.

435. Proposed subsection 770A(5) defines, for the purposes of this section, "unquoted" in relation to prescribed interests. That term is defined to mean interests that are not included in any class of securities that are quoted on the stock market of a securities exchange.

Proposed section 770B - Section 770A stock markets - separate markets exist in relation to different kinds of prescribed interests

436. Proposed subsection 770B(1) provides ' in effect, that separate stock markets in respect of a range of different prescribed interests may be conducted by the management company of different prescribed interest schemes under the same business rules. Each of those markets is, however, subject to a separate application for approval by the Minister and may be subject to different conditions.

437. Proposed subsection 770B(2) provides that prescribed interests to which a particular deed relates constitute, for the purposes of subsection 770A(1), a kind of prescribed interest. However, where a deed provides for a number of undertakings (see section 9 definition of "undertaking"), approval for a proposed section 770A stock market is required for each undertaking to be traded by means of an electronic trading facility.

Proposed section 770C - Section 770A stock markets - regulations may make additional provision

438. Proposed section 770C provides that regulations may be made in relation to a section 770A stock market for the purpose of providing for matters of the kind dealt with in sections 774 to 779 (inclusive) and section II 14. Those sections deal with matters such as:

- * notification to the ASC of amendments to the business rules; power of the ASC to prohibit trading in particular securities;

- * the provision of assistance to the ASC in the performance of its supervisory functions; and

- * the ability of the ASC to seek a Court order in respect of a range of matters including giving directions in relation to compliance with the business rules, restraining a person from carrying on a business or doing an act or classes of act in relation to the securities, or any ancillary order considered just and reasonable in consequence of making any such Court order.

Item 20 - Proposed amendment to section 772

439. Section 772 provides that any instruments executed in relation to the granting of approval of a stock exchange, approval as an approved securities Organisation, or exempt market approval must be published in the Commonwealth of Australia Gazette. Item 20 will amend section 772 by adding to the kinds of instrument required to be published in the Gazette, an instrument executed under subsection 770A(2).

Item 21 - Proposed amendment of section 778 (definition of "futures contract")

440. This item will amend section 778 to enable the trading on a futures or securities exchange or an exempt stock market of agreements prescribed as ,.'securities" under paragraph 92(1)(f) or as "futures contracts" under paragraph 72(1)(ca). Section 778 provides that laws concerning gaming or wagering will not prevent the entering into, or the validity or enforceability of, an option contract entered into on the stock market of a securities exchange or an exempt stock market. The scope of section 778 is to be extended to include "securities" prescribed under paragraph 92(1)(f) or "'futures contracts" prescribed under paragraph 72(1)(ca). (see also Items 4, 5, 6, 7 and 8)

Item 22 - Proposed amendment to paragraph 896(b)

441. Paragraph 896(b) will be amended by replacing incorrect references to subsections 902(5) and 904(5) with references to sections 902 and 904.

Item 23 - Proposed amendment to paragraph 930(e)

442. Paragraph 930(e) will be amended by replacing the references to subsections 938(9), 940(6) and 941(5) with references to sections 938 and 940.

Item 24 - Proposed subsection 11130A)

443. This item will insert subsection (IA) in section 1113 defining "securities" for the purposes of that section to include marketable securities and marketable rights within the meaning of Division 3 of Part 7.13. Section 1113 authorises the ASC to, either wholly or partially and subject to such conditions as it determines, grant exemptions from compliance with the requirements relating to the transfer of securities where it is satisfied that adequate protection will be maintained for the holders of those securities and that the exemption would result in a more efficient transfer of those securities.

444. This proposed amendment will enable the ASC to make a declaration under subsection 1113 (6) to apply the transfer of title provisions of the Corporations Law to listed company options over unissued shares and to thereby permit such options to be traded on the Fast Accelerated Security Transfer System ("FAST") of the ASX.

Item 25 - Proposed subsection 1113(6A)

445. This item will insert subsection (6A) in section 1113 which in effect provides that the ASC in granting an exemption under subsection 1113(6) may modify, in relation to Division 3 of Part 7.13, the relevant forms for the transfer of marketable securities and marketable rights specified in Schedule 2.

Item 26 - Proposed subsections 11270A) and 0B)

446. Proposed subsection 1127(1A) will provide that a person must not contravene a condition specified in a declaration made under section 1127. Proposed subsection 1127(1B) will provide that if a person contravenes a condition to which a declaration is subject, the ASC may apply to a Court for an order that the person comply with the condition.

Item 27 - Proposed amendment to subsection 1154(1)

447. This amendment will delete "a corporation that is" from subsection 1154(1) to reflect the fact that under the Corporations Law futures brokers can be natural persons as well as corporations.

Item 28 - Proposed insertion of subsections 1209(4A) and (4B)

448. Proposed subsection 1209(4A) will require an account to be designated as a clients' segregated account. However, it will not be necessary to designate an account as a clients' segregated account where the account is maintained outside Australia and the law in force in the country where it is kept requires the account to be designated in some other way.

449. Proposed subsection 1209(4B) will provide that an account does not cease to be a clients' segregated account if the designation given to the account departs from that required by subsection 1209(4A) in some minor respect.

Item 29 - Proposed amendment to paragraph 1209(5)(b)

450. Paragraph 1209(5)(b) will be amended by substituting "clients only" for "the client". The substitution of "clients" for "the client" is intended to clarify that clients' segregated accounts are not intended to operate in the same manner as individual trust accounts. Under a clients' segregated account system monies deposited with respect to client trading are segregated generally from non-segregated monies but not in relation to each individual account. The word "only" is inserted to clarify that a broker who receives a net deposit or margin call which does not differentiate between client positions and house positions may not use client funds indirectly to meet obligations relating to house positions. To comply the broker should first pay the amount due with respect to its own positions from its own funds.

Item 30 - Proposed amendment to subparagraph 1209(5)(d)(iii)

451. Proposed subparagraph 1209(5)(d)(iii) will replace the former reference to a "banking corporation" with an "Australian bank". The reference to "banking corporations" in this context is inappropriate as it excludes State banking not extending beyond the limits of a State. Proposed subparagraph 1209(5)(d)(iii) will also enable deposits to be made for the investment of funds in a clients' segregated account with an overseas bank approved by a futures exchange in the case of overseas maintained accounts.

Item 31 - Proposed amendment to subsection 1209(5)

452. The proposed amendment will correct the cross-reference to subsection 1209(10) in subsection 1209(5).

Item 32 - Proposed insertion of subsections 1209(5A) and 1209(513)

453. In the futures industry it is a common practice for a dealing on behalf of a client to pass through the hands of a number of brokers, each performing different functions. For example, one broker may accept client instructions and funds, another may execute those instructions on the floor of the exchange and a third may register the futures contract with the clearing house.

Brokers may be clients of other brokers. By the application of section 27 of the Corporations Law each broker is deemed to acquire, dispose of or deal in futures contracts on behalf of the intermediary broker passing on the instructions, as well as each person from whom that broker accepted instructions. However, the identity of each client entitled to the protection of a clients' segregated account may not be known and, if the intermediary broker is not a client within the meaning of subsection 1209(1), the entitlement to segregation may not be apparent to the broker receiving the money.

454. To ensure protection for funds deposited with futures brokers by clients in these circumstances new subsections 1209(5A) and (513) will introduce a notification procedure which will require a broker transferring a client's funds to another broker to notify the second broker that the funds are client funds and must be deposited in a clients' segregated account.

455. Proposed subsection 1209(5A) will provide that where funds are withdrawn from a clients' segregated account and paid to another broker (the "receiving broker"), the first broker ("the paying broker") must ensure that the receiving broker is notified - at the same time or as close to the time when the payment is made - that those funds have been withdrawn from the clients' segregated account of the paying broker and the receiving broker must deposit those funds in its clients' segregated account.

456. Under proposed subsection 1209(5B), a notification may be in writing or in an electronic or other form and may convey its message by express words or by a code or some other means understood by the brokers concerned.

Item 33 - Proposed amendment to subsection 1209(8)

457. Subsection 1209(8) requires a broker investing client money from a clients' segregated account to obtain from the investment body a signed statement setting out the amount invested and acknowledging that the broker has informed the institution as required. Proposed new subsection 1209(8) will enable a broker to

maintain a continuous account with a person for the investment of funds in a clients' segregated account.

Item 34 - Proposed insertion of subsection 1209(19)

458. Proposed subsection 1209(19) will provide that a broker must not pay an amount into a clients' segregated account except as required or authorised by this section. It will also enable regulations to be made specifying other circumstances where money may be paid into a clients' segregated account.

Items 35 and 36 - Proposed amendments to section 1336A

459. Under the former co-operative scheme for corporate regulation, proceedings for offences against the Companies Code could only be brought by:

- * the National Companies and Securities Commission ("NCSC");
- * a delegate of the NCSC; or
- * a person authorised by a delegate or the Ministerial Council: section 36 of the Companies and Securities (Interpretation and Miscellaneous Provisions) Code.

460. In practice, most proceedings for offences against the Companies Code were brought by the State/Territory Corporate Affairs Commissions as delegates for the NCSC.

461. Under section 1336A of the Corporations Law, proceedings commenced by or against the NCSC prior to the introduction of the national scheme may be continued or commenced by or against the ASC. The section does not, however, specifically refer to proceedings commenced by or against delegates of the NCSC.

462. To put it beyond doubt that the ASC can continue or commence proceedings that were or could have been commenced by the State/Territory Corporate Affairs Commissions as delegates of the NCSC, Items 35 and 36 will include in section 1336A a specific reference to such delegates of the NCSC. Similarly they will allow proceedings to be continued or commenced against the ASC where they were or could have been commenced against a delegate of the NCSC. This will be achieved by specifying relevant proceedings in application orders.

463. To ensure the validity of proceedings begun or continued since the introduction of the national scheme, proposed section 1405, to be inserted by Item 3 of Schedule 9 of the Bill, will make the amendments retrospective to 1 January 1991.

Item 37 - Proposed amendment of Schedule 3

464. In connection with the penalty units amendments, an incorrect reference to section 126 is to be removed from Schedule 3 of the Corporations Law.

SCHEDULE 9 - AMENDMENTS OF ASC ACT AND CORPORATIONS LAW RELATING TO APPLICATION OF CHANGES

465. Schedule 9 contains application and commencement provisions relating to the amendments proposed by other Schedules of the Bill.

Part 1 - Amendment of ASC Act

Item 1 - Insertion of proposed Part 17 - Commencement and Application of Certain Amendments of the ASC Law

466. A new Part 17 is to be inserted in the ASC Act and will contain the commencement and application provisions relating to amendments made by other Schedules of the Bill to the ASC Law.

Division 1 - Preliminary

Proposed section 263 - Meaning of "ASC Law"

467. Proposed section 263 defines the abbreviation "ASC Law" used in Part 17. Part 17 will, by the operation of section 58 of the Corporations Act 1989 of each State and the Northern Territory, have effect as part of the ASC Law of each of those jurisdictions in addition to the Australian Capital Territory.

Proposed section 264 - Meaning of "amendment of the ASC Law"

468. Proposed section 264 defines the meaning of the phrase "amendment of the ASC Law" used in Part 17.

Division 2 - Amendments made by the Corporations Legislation Amendment Act 1994

Proposed section 265 - Meaning of "Amending Ace"

469. Proposed section 265 defines the term "Amending Ace" used in Part 17 to mean the Bill once it is enacted.

Proposed section 266 - Schedule 4 - application of amendments made by Part I of the Schedule

470. The amendments of the ASC Law relating to the Corporations and Securities Panel, made by Part I of Schedule 4 to the Bill, will apply to inquiries begun by the Panel after the commencement of Schedule 4.

Proposed section 267 - Schedule 5 - application of amendments made by Part 2 of the Schedule

471. The amendments of the ASC Law relating to the review of decisions, made by Part 2 of Schedule 5 to the Bill, will apply to decisions made after the commencement of Schedule 5.

Part 2 - Amendments of Corporations Law

Item 2 - Insertion of proposed section 1362A - Meaning of "amendment of this Law"

472. Proposed section 1362A defines the meaning of the phrase "amendment of this Law" used in Part 9.11 of the Corporations Law.

Item 3 - Insertion of proposed Division 7 - Amendments made by the Corporations Legislation Amendment Act 1994

Proposed section 1399 - Meaning of "Amending Act"

473. Proposed section 1399 defines the term "Amending Act" 'used in proposed new Division 7 of Part 7.11 of the Corporations Law to mean the Bill once it is enacted.

Proposed section 1400 - Schedule I - application of amendments made by Part 2 of the Schedule

474. Proposed section 1400 will operate in conjunction with the proposed provisions in Division 1 of Part 3 dealing with the application of proposed amendments of the Corporations Act (Commonwealth) in Part 1 of Schedule, which confer civil jurisdiction on lower courts under relevant provisions of the Corporations Law. The net effect of the proposed application provisions in the Corporations Act and the Corporations Law will be to ensure that relevant lower court actions can be taken under the Corporations Law after commencement, even if proceedings had been originally been taken in a lower court before commencement, or the cause of action had otherwise arisen before commencement.

Proposed section 1401 - Schedule 3 - application of amendments

475. The purpose of this section is to ensure the orderly introduction of the amendments which will assist in the rationalisation of the interface between the Corporations Law and the Financial Institutions legislation. The section therefore specifies the circumstances in which, despite the commencement of an amendment, certain transactions will continue to be governed by the current regulatory regime.

476. Briefly the circumstances covered by proposed section 1401 are:

- (a) where a charge on the property of a financial institution is registered under Part 3.5 of the Corporations Law at the date on which the amendment which omits financial institutions from the definition of "registrable Australian body" commences, then that charge will continue to be governed by that Law (proposed subsection 1401(1));
- (b) similarly, where a receiver has been appointed under a floating charge over the property of a financial institution in the circumstances described in section 433 at that date, then that section would continue to govern the priority of the payment of claims under the charge and certain other debts (proposed subsection 1401(3));
- (c) where a compromise or arrangement between a financial institution and its creditors, for example, under Part 5.1 has been approved at that date then the Corporations Law continues to apply in relation to the compromise or arrangement (proposed subsection 1401(4));
- (d) where a winding up of a financial institution under Chapter 5 has begun before that date then the Corporations Law continues to apply (proposed subsection 1401(5));
- (e) where there is a controller of property of a financial institution at the date at which the amendment of the definition of "corporation" commences, then the relevant provisions of the Corporations Law (particularly Part 5.2 and section 1379) continue to apply (proposed subsection 1401(6));
- (f) where a debt has been incurred before that date by a company which is a subsidiary of a financial institution, then Division 5 of Part 5.7B continues to apply (proposed subsection 1401(7));
- (g) if a disclosure statement is registered under the Financial Institutions Codes as at that date, then Parts 7.11 and 7.12 do not apply to the issue (proposed subsection 1401(8)).

477. In addition, those financial institutions which are registered in accordance with the requirements relating to registrable Australian bodies (Division 1 of Part 4.1) will cease to be so registered on the date on which the amendment omitting financial institutions from the definition of registrable Australian bodies comes into effect (proposed subsection 1401(2)).

Proposed section 1402 - Schedule 4 - application of amendments made by Part 2 of the Schedule

478. The amendments of the Corporations Law relating to the Corporations and Securities Panel, made by Part 2 of Schedule 4 to the Bill, will apply to inquiries begun by the Panel after the commencement of Schedule 4.

Proposed section 1403 - Schedule 5 - application of amendments made by Part 3 of the Schedule

479. The amendments of the Corporations Law relating to the review of decisions, made by Part 3 of Schedule 5 to the Bill, will apply to decisions made after the commencement of Schedule 5.

Proposed section 1404 - Schedule 7 - transitional provisions relating to unclaimed property

480. The purpose of proposed section 1404 is to ensure, as far as is practicable, that particular unclaimed money matters arising before the commencement of the amendments to the unclaimed money provisions in the Corporations Law are dealt with by the ASC after that commencement and that powers or functions exercised by the Minister before the commencement can continue to be exercised by the ASC after the commencement.

481. Proposed subsection 1404(1) requires that money in the existing Companies Unclaimed Money Account be paid as soon as practicable after the relevant commencement (see definition in proposed subsection 1404(13)), into the ASC's unclaimed money account.

482. Proposed subsection 1404(2) provides, for the purposes subsections 1341 (1) and (2) as in force after the relevant commencement, that money paid into the ASC's unclaimed money account under proposed subsection 1404(1) will be taken to have been paid into that account under subsection 1339(2) on the day when it was paid to the credit of the then Companies Unclaimed Money Account under section 1339 as in force before the relevant commencement.

483. Proposed subsection 1404(3) provides for unclaimed money held before the relevant commencement to be transferred to the ASC's unclaimed money account.

484. Proposed subsection 1404(4) provides for unclaimed property (other than money) which has not been disposed of under section 1339 before the relevant commencement to vest in the ASC.

485. Proposed subsection 1404(5) provides, inter alia, that where before the relevant commencement, unclaimed money or property is required or permitted to be transferred to the Minister under a transfer provision (see definition in proposed subsection 1404(13)) as then in force, but the transfer is not completed at the time immediately after the relevant commencement (either because the money or the property has not been transferred, or the transfer has not yet taken effect), the money or property is to be transferred to the ASC. In certain cases, the transfer is deemed to have been effected to the ASC.

486. Proposed subsection 1404(6) provides that transfers of unclaimed property occurring before the relevant commencement, but not taking effect until after relevant commencement, must in the case of unclaimed money, be paid by the Minister into the ASC's unclaimed money account, and in the case of other property vest in the ASC immediately after the transfer takes effect.

487. Proposed subsection 1404(7) provides that the requirement under existing subsection 544(3) to give a receipt to a liquidator in respect of unclaimed money paid to the Minister under section 544 continues to apply to a payment made to the Minister under section 544 as so in force after the relevant commencement.

488. Proposed subsection 1404(8) will ensure that a copy of a register of property unclaimed by dissenting shareholders to a takeover scheme, kept by a company for the purposes of subsection 702(5) in respect of a calendar year beginning before the relevant commencement and ending at or after the relevant commencement, is to be provided to the ASC, rather than to the Minister.

489. Proposed subsection 1404(9) will ensure that the amended provisions in subsection 702(8) - production of documents identified in an unclaimed property register, subsection 702(9) - direction to correct error in register, and subsection 702(10) - examination of accounting records where there is a failure to lodge a copy of register, apply after relevant commencement as if the register had been given, or required to be given, to the ASC, rather than to the Minister.

490. Proposed subsection 1404(10) provides that claims made against the Companies Unclaimed Money Account before the relevant commencement are to continue to be dealt with by the Minister, who may direct that payment be made out of the ASC's unclaimed money account, after relevant commencement.

491. Under existing subsections 1341(4) and (5), the Minister is not liable to any person who claims to be entitled to money which had been paid to another person in accordance with subsection 1341(2). If the first-mentioned person is entitled to the money, then that person may recover the money from the other person.

492. Proposed subsection 1404(11) provides that subsections 1341(4) and (5) as in force before the relevant commencement continue to apply in relation to money that was paid, or money an amount equivalent to which was paid as directed by the Minister but dealt with after the relevant commencement.

493. Proposed subsection 1404(12) will ensure that the immunity provided to the Commonwealth and the Minister in relation to the exercise before the relevant commencement of the Minister's unclaimed money powers and functions under Part 9.7 continues to apply after the relevant commencement.

494. Proposed subsection 1404(13) defines the terms "relevant commencement", "transfer" and "transfer provision". These terms are used in proposed section 1404:

* "relevant commencement" is defined to mean the commencement of Item 3 of Schedule 7 to the Amending Act;

* "transfer" is defined to include "pay"; and

* "transfer provision" is defined to be any of subsections 414(15), 544(1), 577(4), 702(6), section 1343 or an order of the Court under paragraph 544(2)(c).

Proposed section 1405 - Schedule 8 - application and commencement of amendments

495. The amendments of section 1336A of the Corporations Law, proposed by Items 35 and 36 of Schedule 8, will have a retrospective operation and will be taken to have commenced on 1 January 1991, the date of commencement of the national scheme laws.