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HOUSE OF REPRESENTATIVES

CORPORATIONS LEGISLATION AMENDMENT  
BILL (NO. 2) 1991

EXPLANATORY MEMORANDUM

Circulated by the authority of the Attorney-General,

the Hon. Michael Duffy, MP

CONTENTS

	<u>Paragraph</u>
INTRODUCTION	
OUTLINE	1
FINANCIAL IMPACT STATEMENT	5
ABBREVIATIONS	9
FRAMEWORK OF NEW NATIONAL SCHEME	10
PRINCIPAL FEATURES OF THE BILL	30
CONTENTS OF BILL:	

CORPORATIONS LEGISLATION AMENDMENT BILL (NO. 2) 1991

PART 1 - PRELIMINARY

Section

1. Short title	59
2. Commencement	60

PART 2 - AMENDMENT OF THE  
CORPORATIONS ACT 1989.

3. Amendment of section 52 of the Corporations Act 1989	63
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PART 3 - AMENDMENTS OF THE  
CORPORATIONS LAW

4. Corporations Law	64
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5. Amendments relating to the National Guarantee Fund	64
6. Amendments relating to fundraising	64
7. Amendments relating to registration numbers of companies and registrable bodies	64
8. Amendments relating to registration of charges	64
9. Miscellaneous substantive and technical amendments	64
10. Commencement and application of changes to Corporations Law resulting from this Act	64

PART 4 - AMENDMENT OF THE CORPORATIONS  
LEGISLATION AMENDMENT ACT 1990

11. Principal Act	66
12. Schedule 1	67

PART 5 - AMENDMENTS OF THE COMPANIES  
AND SECURITIES LEGISLATION (MISCELLANEOUS  
AMENDMENTS) ACT 1985

13. Principal Act	69
14. Repeal of sections 78, 80, 81, 83 and 116	70

PART 6 - AMENDMENTS OF THE CO-OPERATIVE SCHEME  
LEGISLATION AMENDMENT ACT 1989

15. Principal Act	73
16. Repeal of Parts 4 and 9	74

SCHEDULES

## SCHEDULE 1

AMENDMENTS OF THE CORPORATIONS LAW RELATING 77  
TO THE NATIONAL GUARANTEE FUND

## SCHEDULE 2

AMENDMENTS OF THE CORPORATIONS LAW RELATING 311  
TO FUNDRAISING

## SCHEDULE 3

AMENDMENTS OF THE CORPORATIONS LAW RELATING 430  
TO REGISTRATION NUMBERS OF COMPANIES  
AND REGISTRABLE BODIES

## SCHEDULE 4

AMENDMENTS RELATING TO REGISTRATION  
OF CHARGES 459

## SCHEDULE 5

MISCELLANEOUS SUBSTANTIVE AND TECHNICAL 474  
AMENDMENTS

## SCHEDULE 6

COMMENCEMENT AND APPLICATION OF CHANGES 494  
TO THE CORPORATIONS LAW RESULTING  
FROM THIS ACT

CORPORATIONS LEGISLATION AMENDMENT BILL (NO. 2) 1991

INTRODUCTION

This explanatory memorandum:

- (a) contains an outline of the amendments proposed by the Bill to the national companies and securities scheme and a statement of the financial impact of the Bill (paras 1 to 8);
- (b) contains a description of the framework of the new national scheme (paras 10 to 29);
- (c) contains a summary of the principal features of the Bill (paras 30 to 58); and
- (c) deals sequentially with each clause of the Bill (paras 59 to 497).

OUTLINE

The Corporations Legislation Amendment Bill (No. 2) 1991 (the Bill) amends the Corporations Legislation Amendment Act 1990 and the Corporations Law ('the Law') as set out in section 82 of the Corporations Act 1989.

2. The Bill forms part of the arrangements for the new national scheme for corporate regulation which came into operation on 1 January 1991. By virtue of the Corporations Act 1989 of the Commonwealth and the corresponding Corporations Acts of the States and the Northern Territory, amendments of the Corporations Law will come into operation automatically in each State and Territory.

3. In accordance with the arrangements under the Heads of Agreement on Corporate Regulation between the Commonwealth and the States, the Ministerial Council for Corporations has been consulted on the Bill and has approved its introduction into Parliament.

4. The major amendments proposed in the Bill relate to:

- . the National Guarantee Fund;
- . fundraising;
- . registration numbers of companies and registrable bodies; and
- . miscellaneous substantive and technical amendments.

Financial Impact Statement

5. The financial impact of the various key provisions of the Bill is as follows.

6. The part of the Bill dealing with the National Guarantee Fund will have no impact on Government funding. It will assist the Australian Stock Exchange to introduce reforms

which are expected to lead to greater efficiency in settlement procedures which will in turn benefit investors.

7. The amendments to the fundraising provisions will have no significant impact on Government funding or business costs. Because the amendments are of a clarifying nature with a view to ensuring business certainty, the amendments are more likely to reduce costs for business.

8. The provisions of the Bill dealing with the registration numbers of companies and registrable bodies will have no impact on Government funding. It will, however, reduce the costs for:

- . certain businesses issuing cash register receipts produced by an electronic machine. The Australian Company Number (ACN) or Australian Registrable Body Number (ARBN) will no longer have to appear on certain receipts.
  
- . transport companies. The Australian Securities Commission will be empowered to exempt such companies from the requirement to place an ACN or ARBN on documents that are used in connection with transportation where it is necessary or desirable in the interests of consistency in international practice.

ABBREVIATIONS

9. The following abbreviations are used in this explanatory memorandum:

ACN	Australian Company Number
ARBN	Australian Registrable Body Number
ASX	Australian Stock Exchange Limited
ASC	Australian Securities Commission
the Bill	Corporations Legislation Amendment Bill (No. 2) 1991.
the Exchange	Australian Stock Exchange Limited
FAST	Flexible Accelerated Securities Transfer System
the Law	Corporations Law as set out in Section 82 of the <u>Corporations Act 1989</u> (Cth)
NGF	National Guarantee Fund
SEGC	Securities Exchanges Guarantee Corporation
SEATS	Stock Exchange Automated Trading System
TDS	Transfer Delivery Service
State Application Act	Corporations (Name of State/Territory) Act 1990 of each of the States and the Northern Territory, respectively.
State	Includes the Northern Territory, unless otherwise indicated.



FRAMEWORK OF NEW NATIONAL SCHEME

10. The purpose of this part is to give an outline of the framework of the new national scheme.

Heads of Agreement between the Commonwealth, the States and the Northern Territory for future regulation of companies and securities

11. The administrative and legislative framework of the new national companies and securities scheme, which commenced on 1 January 1991, stems from the Heads of Agreement on future corporate regulation in Australia. That Agreement was approved by Commonwealth, State and Northern Territory Ministers responsible for companies and securities administration and regulation in Alice Springs on 28/29 June 1990.

12. In those Heads of Agreement Ministers agreed on the establishment of a new scheme for the regulation of companies, securities and futures industries under which the Corporations Act 1989 and the Australian Securities Commission Act 1989 (ASC Act) would form the basis of the substantive legislation of the new scheme. However, Ministers agreed that those Commonwealth laws would be amended to limit their effect to the Australian Capital Territory. The Australia-wide effect of the new scheme would come about by an application of laws regime. Under that regime each of the States and the Northern Territory would pass complementary legislation applying the Commonwealth laws as laws of those jurisdictions.

13. The Alice Springs Heads of Agreement will form the basis of a new formal agreement between the Commonwealth and the States and the Northern Territory on future corporate regulation. The new formal agreement is being considered by State Ministers. It has been agreed that when the Agreement is approved by all Governments, the Commonwealth will introduce amending legislation to annex the Agreement to the Commonwealth legislation. The principal features of the Heads of Agreement agreed to by Ministers are set out below.

## Administration

14. The principal objective of the new scheme is the establishment of a single national regulatory framework. Consistent with that approach, the Australian Securities Commission (ASC) is established as the principal administering authority under the new scheme, replacing the National Companies and Securities Commission and former State Corporate Affairs offices. Under the new scheme the States have no responsibility for the matters transferred to the ASC's authority. The ASC is formally accountable and responsible to the Commonwealth Attorney-General and the Commonwealth Parliament, and does not have any formal responsibility or accountability to State Ministers or State Parliaments.

## Roles of Commonwealth and States in relation to the Ministerial Council for Corporations

15. The Ministerial Council continues with its existing membership, although with a revised role in the light of the new national arrangements. The Commonwealth Attorney-General is permanent Chairman of the Council. Consistent with the operation of the ASC as a national Commonwealth agency, the Council has no control or power of direction over the ASC. On the other hand, in relation to legal policy issues the Council is consulted in relation to all legislative proposals involving amendment of companies and securities laws.

16. However, the Commonwealth has sole responsibility in relation to legislative proposals for the national markets (ie takeovers, securities, public fundraising and futures). In relation to other legislative proposals, that is, principally "traditional" company law type matters, the Ministerial Council must approve the legislation before its introduction into the Commonwealth Parliament, but the Commonwealth is not obliged to introduce any such proposal with which it does not concur. In addition, for the purposes of Ministerial Council voting on those legislative proposals for which the Commonwealth and States share responsibility, the Commonwealth has 4 votes and each State and the Northern Territory has 1 vote. The Commonwealth also has a casting vote. At the time

of introducing legislative proposals into the Commonwealth Parliament, the Commonwealth is required to table in the Parliament the outcome of the advice of the Ministerial Council arising out of its consideration of the proposal. Where amendments to legislative proposals for which the Commonwealth and States share responsibility are moved in the Commonwealth Parliament, the Commonwealth is to use its best endeavours to consult with the Ministerial Council on those amendments.

#### Legislative Framework

17. The Corporations Legislation Amendment Act 1990 ("the Amendment Act"), which was introduced into the Commonwealth Parliament on 8 November 1990 and passed in December 1990, gave effect to the Commonwealth's obligations under the Heads of Agreement. The States and the Northern Territory passed complementary legislation, (in N.S.W. for example the Corporations (NSW) Act 1990) to give effect to their corresponding obligations under the Heads of Agreement.

18. That legislation, which brought the new national scheme into operation, commenced on 1 January 1991.

19. To give effect to the legislative scheme set out in the Agreement, the Amendment Act altered the Corporations Act 1989 and the Australian Securities Commission Act 1989 to remove their former Commonwealth constitutional underpinning as laws applying over all Australia, and substantially recast those Acts as laws applying for the Australian Capital Territory.

20. The consequence of this is that the original Commonwealth Corporations Act 1989 has been retained but now serves a different function. The Amendment Act converted the Corporations Act in such a way as to separate the machinery provisions, which relate to the application of the law and the supporting legislative infrastructure (called the covering provisions), from the substantive laws to be applied. Parts 2 - 13 of the Corporations Act establish the legal framework in which the substantive companies and securities law will operate as part of a new national scheme of applied

laws. These Parts provide for the way in which the law of the new scheme is to apply and be cited; the judicial, administrative and enforcement arrangements; the mechanisms for the making of subordinate instruments (such as regulations, rules of court etc); and other machinery matters for the new national scheme. The complementary State and Territory Application Acts contain corresponding provisions.

21. The major feature of the Corporations Act of the Commonwealth, and the States Application Acts, is the use of these legal devices to establish an innovative constitutional framework that creates a uniform legal text that has the appearance, and for most practical purposes, the effect of a single national law. This text, which sets out the substantive law relating to companies, the securities and futures industries to apply throughout Australia is called the "Corporations Law". To establish the Corporations Law the Amendment Act inserted into the Corporations Act a new Section 82 which sets up the opening provisions of the Law. Section 7 of the Amendment Act created the text of the Corporations Law out of the existing Corporations Act (as modified by the various Schedules of the Amendment Act). Section 5 of the Corporations Act (as amended) applies the Corporations Law set out in Section 82 of the Act in the Australian Capital Territory as a law for the government of the Capital Territory.

22. A similar approach is adopted in Part 4 of the Amendment Act to convert the ASC Act into a law for the Australian Capital Territory, some provisions of which are applied by complementary application legislation in each State and the Northern Territory as the ASC Law of the State or Territory.

23. The national operation of the new scheme comes about by each State and the Northern Territory having complementary Application Legislation applying the Corporations Law (as set out in the Commonwealth's Corporations Act) as the law of each of those jurisdictions. This ensures its Australia-wide application. Section 7 of the State Application Acts applies the Corporations Law "as in force for the time being". The Corporations Law thus has been applied in a way that ensures that any further amendments to the Corporations Law by the

Commonwealth Parliament (in accordance with the arrangements described above) will automatically apply in the States and the Northern Territory.

24. In this way the Corporations Law states the uniform text of the new national law applying in all jurisdictions.

'Federalisation' of Administrative Law, Investigations and Prosecutions

25. A further major innovation that is adopted in the State laws is the "federalising" formula. Under this device, the applied State and Territory laws have the characteristics of, and are to be treated, so far as practicable, as if they were Commonwealth rather than State or Territory Laws. The "federalisation" approach involves the State Application Acts applying Commonwealth administrative review, criminal law and prosecution legislation in relation to the national scheme laws. The State laws confer powers on Commonwealth authorities and officers to exercise their powers and functions under those Commonwealth laws applied in the States, as if the Corporations Law or ASC Law of the jurisdiction was Commonwealth legislation.

Law Reform

26. The Attorney-General has announced that the Government will be undertaking a major reform program in relation to companies and securities law.

27. Earlier this year Parliament enacted a Bill containing major amendments to the law relating to insider trading and the introduction of a requirement for the consolidation of accounts for related corporate entities. These major reforms to the Corporations Law came into operation on 1 August 1991.

28. The current Bill deals with reform of other discrete areas of the Corporations Law. Those areas are the fundraising provisions, the Australian Company Number provisions and legislative backing for the introduction of a mandatory settlement period for securities transactions.

29. A further Bill is being prepared for exposure later this year. It will contain major amendments to the areas relating to loans to directors, directors duties, insolvency law and further proposals for improvements in clearance and settlement procedures for the Australian Stock Exchange.

SUMMARY OF THE PRINCIPAL FEATURES OF THE BILLIntroduction of fixed date settlement for market transactions

30. The proposed amendments to the Corporations Law will facilitate the introduction of a fixed settlement regime for securities transactions by the Australian Stock Exchange. The purpose of this regime is to ensure that settlement of a sale of securities takes place on the 5th business day after the trade. It is anticipated that this requirement will reduce the risk in settlements of share transfers and the claims on the National Guarantee Fund, lead to more certainty for market participants and improve the international competitiveness of the Exchange.

31. These amendments will contribute to bringing Australia's system for clearance and settlement of equities transactions up to world standards.

32. In 1989 the Group of 30 (G30) (an organisation made up of major financial intermediaries in the US, the UK, Europe and Japan who are concerned with the workings of international finance systems) issued a report which focussed on clearance and settlement of transactions in securities. The report called for new procedures to reduce risks and to improve the efficiency of clearance and settlement processes. The aim of G30 is to introduce efficiencies into major equity markets by recommending standardisation for clearing and settlement procedures. The report was endorsed by the International Organisation of Securities Commissions (IOSCO).

33. Australia's existing settlement system has significant limitations which make the implementation of the G30 recommendations fundamental to the maintenance of the competitive position of the Australian securities market. Also major offshore markets have adopted these recommendations and are in the process of introducing their own programmes of reform. Failure to implement the changes in Australia could lead to those offshore markets becoming more efficient and

more competitive than the domestic market. This will in turn erode the liquidity of the Australian securities markets.

(i) Securities Loans Guarantees

34. The Exchange proposes to introduce a fixed settlement system for securities transactions under which settlement would routinely take place on the fifth business day (T+5) after trading. The introduction of this T+5 settlement requirement is a preliminary step to the introduction of further significant reforms to settlement and clearance systems.

35. As a broker may not have securities ready for delivery on the settlement day for a variety of reasons, the Exchange proposes to establish a securities lending scheme in association with institutional investors. Under the scheme, a broker whose client failed to deliver securities in time to meet a T+5 settlement requirement, or who was otherwise unable to comply with the T+5 requirement, would be able to borrow securities from a pool of securities owned by the institutional investor through the scheme operated by the Exchange, in order to meet the T+5 requirements. The broker would return the securities under the loan in due course. As part of the loan arrangements, the broker will be required to provide collateral.

36. The Exchange will administer the scheme and will be exposed to the risk that the borrowing broker will fail to pay collateral or return the securities.

37. Amendments to the Corporations Law are proposed which will enable the Exchange to claim from the National Guarantee Fund (NGF) in either of these circumstances.

(ii) Netting

38. In a further move to speed settlement procedures, the Exchange is proposing to develop through the Business Rules a system of netting of brokers' payment and delivery obligations in securities transactions. The aim is to reduce the movement



of documents when a series of transactions relating to the same securities must be settled on the same day. Netting will be achieved by a process of novation whereby an exchange subsidiary will be interposed between the transferor and the transferee. The transferor broker's obligation to deliver securities would then be owed to the exchange subsidiary which would in turn owe such an obligation to the transferee.

39. The requirement to pay a net amount of cash to the Exchange clearing house and to transfer a net number of securities does not fit easily into the existing Contract Guarantee provisions (Part 7.10 Division 6). Therefore proposed Division 6B is inserted to provide a right to claim against the NGF where the netting rules apply and there is a failure to pay a net amount or to transfer a net number of securities.

(iii) Transfer Delivery Service

40. To speed settlement particularly between brokers in different cities, the Exchange has instituted a transfer delivery service. The transfer delivery service permits a selling broker to deliver securities in (say) Hobart which will be "received by" a buying broker in (say) Perth on the same day. This is achieved by the selling broker delivering securities to the Exchange in Hobart and the Exchange instructing its office in Perth to deliver out an equivalent quantity of securities to the buying broker in Perth. Normally the securities delivered by the selling broker will be registered into the name of the Exchange's clearing nominee, although sometimes they will be on-delivered by the Exchange to satisfy another delivery obligation in the same city.

41. Again, the existing contract guarantee provisions (Division 6) may not allow the buying and selling brokers using a delivery service to make a claim in respect of a failure to deliver securities or to pay the consideration in respect of a purchase. A defective delivery to the clearing nominee will be allocated to a buying broker. That buying broker is likely to be a broker other than the one who bought

from the broker who supplied the inadequate documents. The buying broker who contracted with the defaulting broker may have received valid settlement documents through the allocation and arguably therefore has no claim against the Fund under section 950. The buying broker to whom the defective documents have been allocated might not have a claim because arguably the selling broker who contracted with him or her, has supplied valid settlement documents under the agreement between them by delivering the documents to the transfer delivery service.

42. Division 6C provides specifically for claims against the Fund in respect of losses incurred through the operation of the transfer delivery service.

Other Amendments to the National Guarantee Fund provisions

43. Other amendments to the National Guarantee Fund provisions include:

- . a provision enabling the Securities Exchanges Guarantee Corporation Limited (SEGC) to borrow if the Board considers that it is in the interests of the sound financial management of the Fund. The SEGC has advised that such a power is necessary; and
- . a provision enabling the SEGC to levy borrowers under guaranteed securities loans.

Fundraising

44. Significant reforms to the regulation of corporate fundraising came into effect under the Corporations Law on 1 January 1991. These new fundraising provisions have been the subject of some controversy. They have been subject to critical examination by industry, legal practitioners and other professional advisers.

45. The Government is satisfied with the substance of the fundraising reforms. The new provisions have resulted in

better information being provided to potential investors and a more informed market.

46. However, the Government recognises that the experience since 1 January has resulted in the identification of a number of matters which warrant clarification. This Bill includes a number of essentially technical amendments for this purpose with a view to ensuring commercial certainty. These amendments are essentially those set out in the Exposure Draft with some modifications of a technical nature as a result of comments made during the exposure period.

47. At the time of releasing the Exposure Draft in August, the Attorney-General announced that he had asked his Department to review the application of s.996 of the Law which prohibits the issue of prospectuses which contain materially false or misleading statements or from which there are material omissions. A range of conflicting views were expressed by various interested parties. It is felt that it would not be desirable to amend s.996 in a manner which would involve any significant policy changes at this stage without the benefit of public exposure of the amendments. Instead, the Bill includes an amendment which clarifies the position of s.996 by providing that it does not apply to those offers in relation to which a prospectus is not required to be lodged with the ASC. The long term approach to civil and criminal liability in relation to the offers of securities will be reviewed in the context of consideration of the Companies and Securities Advisory Committee's recent report entitled "Report on An Enhanced Statutory Disclosure System" (see below).

48. Other significant amendments to the fundraising provisions in the Bill:

- . make it clear that the fundraising provisions do not apply to trading of securities on the stock exchange;
- . clarify how the prospectus provisions apply to other secondary offers of securities; and

clarify the operation of various defences against civil liability for misstatements in, and omissions from prospectuses.

49. The Government is committed to raising the standard of conduct in the financial markets in order to restore local and international confidence. The reforms to the fundraising provisions in the Corporations Law are a significant step to achieving this end. Now that the regulation of primary offers of securities has been placed on a better footing, the Government will be looking to see whether further reforms to the regulation of secondary markets are desirable. To this end in June 1991 the Attorney-General asked the Companies and Securities Advisory Committee to report on the need for, and the content of, a legislatively based continuous disclosure regime. That Committee reported recently, making wide ranging recommendations for the establishment of such a regime. Those recommendations are to be examined by the Attorney-General's Department in consultation with relevant interest groups with a view to draft legislation being exposed for public comment in 1992.

50. The regulation of prescribed interests and arrangements (such as unit trusts) under the Corporations Law has also been the subject of some controversy. Apart from the question of the regulation of unlisted property trusts which is being dealt with in separate legislation, the issue of whether the trustee or the management is responsible for the keeping of the books of accounts for prescribed interests has caused particular concern.

51. The ASC has adopted the view that the Law does not permit the trustee to cause the management company to keep these books of account as had been the usual practice prior to 1 January 1991, but rather must keep the books itself. The ASC has under its discretionary powers granted trustees relief from this apparent obligation until 31 December 1991.

52. Earlier this year the Attorney-General asked the Australian Law Reform Commission and the Companies and Securities Advisory Committee to conduct a wide ranging review

of the regulatory framework for prescribed interests and other collective schemes. Pending the outcome of this review and in order to avoid unnecessary and costly disruption to the administration of unit trusts, the Bill contains an amendment to make it clear that the trustee may continue to cause the books of accounts for prescribed interests to be kept by the management company.

Registration Numbers of Companies and Registrable Bodies

53. The purpose of the Australian Company Number (ACN) and Australian Registrable Body Number (ARBN) is to provide a simple way of assisting persons dealing with companies, foreign companies and registrable bodies to identify those bodies. The ACN and the ARBN are a unique nine digit identifying number for each Australian company, foreign company and other registrable body.

54. A moratorium on the use of an ACN or ARBN currently applies to the requirement for companies, foreign companies and other registrable bodies to display their ACN or ARBN on public documents or eligible negotiable instruments under s.219(3) and s.362(4) of the Corporations Law. However, companies and bodies are still required to display their ACN or ARBN on their common seal and any document that is required by the Law to be lodged with the ASC. This moratorium expires on 31 December 1991.

55. The amendments proposed to the ACN and ARBN provisions are:

- . cash register receipts produced by an electronic machine and which set out information which is stored in the machine will not be required to contain the ACN or ARBN of the company or body issuing the receipt;
- . alternative abbreviations for ACN and ARBN (without full stops) will be available for use by companies and bodies in all official documents.

- . the definition of 'public document' has been redrafted to clarify that, other than for official documents of a company, the requirement for an ACN or ARBN to appear on company documents will only apply to documents that are signed or issued in the course of, or for the purposes of, a particular transaction or dealing. An advertising document issued by a company which is not also used as a document for undertaking some form of transaction with a person will not be required to contain the company's ACN or ARBN;
  
- . the ASC will be empowered to exempt companies or bodies that operate in transportation of persons or goods from being required to place ACN or ARBN on documents that are used in connection with transportation where it is necessary or desirable in the interests of promoting or maintaining consistency in international practice relating to the form, content or use of transport documents;
  
- . labels and packaging will not be required to display the ACN or ARBN of the company described on the label or the package.

Miscellaneous substantive and technical amendments

Non-marketable securities

56. To facilitate the trading of new products in Australian securities markets, the ASC will be able, by declaration, to extend the benefits conferred on marketable securities and marketable rights by the Law to other securities.

57. Other miscellaneous amendments concern Australian residence of a secretary (section 240) and the use of "limited" and "no liability" by bodies other than companies (section 369).

Other amendments

58. The amendments in Schedule 4 are technical amendments relating to the registration of charges. The remaining amendments in Schedule 5 are technical - correcting erroneous references and grammatical and typographical errors.

CORPORATIONS LEGISLATION AMENDMENT BILL (NO. 2) 1991

PART 1 - PRELIMINARY

Clause 1 - Short Title

59. The short title is to be the Corporations Legislation Amendment Act (No. 2) 1991.

Clause 2 - Commencement

60. It is proposed that the Corporations Legislation Amendment Bill (No. 2) 1991 (except Part 2 and Part 4) commence on the day on which it receives Royal Assent.

61. Part 2, which amends the Corporations Act 1989 is taken to have commenced immediately after the commencement of the amendment of the Corporations Act 1989 referred to in paragraph 2(3)(d) of the Corporations Legislation Amendment Act 1991.

62. It is proposed that Part 4, which amends the Corporations Legislation Amendment Act 1990, be taken to have commenced on 1 January 1991.

PART 2 - AMENDMENT OF THE CORPORATIONS ACT 1989

Clause 3 - Amendment of section 52 of the Corporations Act 1989

63. Section 52 is to be amended to take account of the fact that appeals in respect of non-Federal matters from the Family Court of Western Australia lie to the Full Court of the Supreme Court of Western Australia, while appeals in respect of Federal matters go to the Full Court of the Family Court of Australia. The amendment ensures that the normal hierarchy of appeals from the Western Australian Family Court applies.



PART 3 - AMENDMENTS TO THE CORPORATIONS LAW

Clause 4 - Corporations Law

64. The phrase "Corporations Law" is defined as the Corporations Law set out in section 82 of the Corporations Act 1989.

Clause 5 - Amendments relating to the National Guarantee Fund

Clause 6 - Amendments relating to fundraising

Clause 7 - Amendments relating to registration numbers of companies and registrable bodies

Clause 8 - Amendments relating to registration of charges

Clause 9 - Miscellaneous Substantive and technical amendments of the Corporations Law

Clause 10 - Commencement and application of changes to the Corporations Law resulting from this Act

65. These provisions will bring into effect the proposed amendments of the Law as set out in Schedules 1 (National Guarantee Fund), 2 (fundraising), 3 (registration numbers), 4 (charges) 5 (miscellaneous and technical) and 6 (commencement and application of changes).

PART 4 - AMENDMENTS OF THE CORPORATIONS

LEGISLATION AMENDMENT ACT 1990

Clause 11 - Principal Act

66. The Corporations Legislation Amendment Act 1990 is defined as the Principal Act for the purposes of Part 4.

Clause 12 - Schedule 1

67. The Corporations Legislation Amendment Act 1990 amended subsection 1224(1) of the Law which deals with the power of the Court to restrain dealings with the bank accounts of a futures broker by substituting "that the person holds or maintains in Australia (whether in this jurisdiction or not)" for the expression "of the person".

68. The amendment proposed in the Bill makes it clear that the substitution was intended to amend the last reference to "of the person" occurring in subsection 1224(1).

PART 5 - AMENDMENTS OF THE COMPANIES AND SECURITIES  
LEGISLATION (MISCELLANEOUS AMENDMENTS) ACT 1985

Clause 13 - Principal Act

69. The Companies and Securities Legislation (Miscellaneous Amendments) Act 1985 is defined as the Principal Act for the purposes of Part 5.

Clause 14 - Repeal of sections 78, 80, 81, 83 and 116

70. Sections 78, 80, 81 and 83 refer to the concept of relevant time and the preparation of company reports and their presentation to members at the annual general meeting.

71. Section 116 provides for registered foreign companies to lodge an additional report with the National Companies and Securities Commission relating to their operations in Australia.

72. Following the commencement of the Corporations Law these provisions have become redundant and therefore will be repealed.

PART 6 - AMENDMENTS OF THE CO-OPERATIVE SCHEME  
LEGISLATION AMENDMENT ACT 1989

Clause 15 - Principal Act

73. The Co-operative Scheme Legislation Amendment Act 1989 is defined as the Principal Act for the purposes of Part 6.

Clause 16 - Repeal of Parts 4 and 9

74. Following the commencement of the Corporations Law on 1 January 1991, Part 4, which deals with on-market buy-backs

of shares, has become redundant. Equivalent provisions in the Corporations Law commenced operation on 8 April 1991.

75. Part 9 relates to amendments of Co-operative Scheme Fees Acts to give effect to revised funding arrangements for the National Companies and Securities Commission. The provisions were not able to be proclaimed because of the failure of most States to pass the necessary enabling legislation. Following the commencement of the new national companies and securities scheme, and the replacement of the NCSC by the Australian Securities Commission, the provisions have become redundant.

76. Part 4 and Part 9 are therefore to be repealed.

**SCHEDULE 1 - AMENDMENTS OF THE CORPORATIONS LAW  
RELATING TO THE NATIONAL GUARANTEE FUND**

**Background**

77. "Exchange" is defined in section 9 of the Corporations Law to mean Australian Stock Exchange Limited. It is used in this sense many times in the Bill and this explanatory memorandum.

78. In this Bill and explanatory memorandum, the term "participating exchange" is used a number of times. This phrase is defined in section 761 of the Law to mean the Australian Stock Exchange Limited and other securities exchanges (but not Exchange subsidiaries) that are members of the Securities Exchanges Guarantee Corporation (SEGC) (see sections 66 to 69 of the Corporations Act 1989 and sections 926 to 928 of the Law). The SEGC administers the National Guarantee Fund (see Part 7.10 of the Law).

79. Also in the Bill and explanatory memorandum, reference is made to the "business rules" of a participating exchange. Any amendment to the business rules or listing rules of a securities exchange may be disallowed by the Attorney-General in accordance with the procedure set out in section 774 of the Law.

80. Under section 774, a securities exchange must lodge with the Australian Securities Commission (ASC) written notice of any amendment of its business or listing rules as soon as practicable after the amendment is made (subsection 774(1)). If the amendments are not lodged with the ASC within 21 days after they are made, the amendments cease to have effect (subsection 774(3)). The ASC must send to the Attorney-General a copy of the notification as soon as possible after its receipt (subsection 774(4)). Within 28 days of receipt of the notice by the ASC, the Attorney-General may, if he or she thinks fit, disallow the whole or a specified part of such an amendment (subsection 774(5)).

81. In the event that the Attorney-General decides to disallow an amendment to the business or listing rules, the ASC must, as soon as practicable after the disallowance, give notice of the disallowance to the relevant securities exchange. On receipt of that notice the amendment, to the extent of the disallowance, ceases to have effect (subsection 774(6)).

## Section 920 - Interpretation

### Background

82. The proposed amendments insert additional definitions and amend certain existing definitions in subsection 920(1).

### Proposed amendments

83. The proposed amendments:

- . insert references to the new Divisions 6A (Securities loans guarantees), 6B (Claims in respect of net obligations) and 6C (Transfer delivery service guarantees) of Part 7.10 in the definition of "claim";
- . ensure that the definition of "settlement documents" in section 920 does not apply in relation to guaranteed securities loans;

- . ensure that the definition of "transaction" (currently defined as a sale or purchase of securities) means, except in Division 6B, not only a sale or purchase but also a guaranteed securities loan.

84. In addition, a proposed amendment inserts "securities" in the definition of "property". This is relevant particularly to Division 8 claims relating to dealer insolvency. Section 963 requires the claimant to show that "property" was entrusted to or received by the dealer on behalf of or as trustee for a person. The amendment ensures the coverage of, for example, FAST securities for which certificates are not issued. The comparable definition in the Securities Industry Act referred to "money, securities, and documents of title to, and instruments of transfer relating to, securities". This amendment thus confirms that the coverage has not been reduced by any change of words from those in the Securities Industry Act 1980.

85. The amendments to section 920 insert the following additional definitions:

- . "clearing nominee" - which is defined as a subsidiary of a participating exchange operated for the purpose of facilitating the transfer of securities. Its use is described in more detail in the introduction to Division 6C below.
- . "securities" - which is defined for the purposes of Part 7.10 (other than Division 7) as including marketable securities or marketable rights within the meaning of Division 3 of Part 7.13. In Division 7 "securities" has the meaning given by subsection 955(1).
- . "transfer delivery service provisions" - which are defined as those provisions of the business rules of the participating exchange under which a person may bring about a transfer of securities by transferring securities of a kind and number to a clearing nominee

of the participating exchange and the clearing nominee transferring securities of that kind and number to another person.

"TDS nominee" - which is defined as the clearing nominee referred to in the transfer delivery service provisions.

86. It also provides cross-references to the definitions of "borrower", "guaranteed securities loan", "replacement agreement", "transfer" and "transfer documents".

Proposed Section 924 - Transfer of securities etc. and payment of money

Background

87. Section 924 was repealed by the Corporations Legislation Amendment Act 1990. A new section 924 is proposed.

Proposed Amendment

88. This proposed section is an interpretation provision which will provide the meaning of the following words used in Part 7.10 (but not for the purpose of Division 7): transfer, transfer documents, transferee and transferor.

89. Under proposed section 924, the transferor transfers securities to a transferee if, and only if, the transferor delivers or causes to be delivered to the transferee documents (called "transfer documents") that are sufficient to enable the transferee to become the registered holder of the securities without the transferor doing anything more (or causing anything more to be done) by way of executing or supplying documents (proposed subsection 924(2)). Thus paragraph 954Y(1)(e) defines default by the clearing nominee in terms of a purported transfer that is not sufficient for the purpose referred to in subsection 924(2). Special provision is made for marketable rights (paragraph 924(2)(b)).

90. Subsection 924(3) provides that where a person causes property (other than securities or money) to be transferred, or causes title documents to be delivered, to another person, the first person is taken to have transferred the property to the other person.

91. Similarly, if a person causes money to be paid to another person, the first person is taken to have paid the money to the other person (subsection 924(4)).

Proposed Section 924A - Novation of agreements

92. Proposed section 924A provides that for the purposes of Part 7.10, an agreement is novated if and only if the agreement is discharged and replaced with one or more other agreements ("replacement agreements") because of the operation of the business rules of a participating exchange.

93. Such provision is inserted to take account of the fact that netting of payment or delivery obligations may be implemented by a process of novation.

Proposed Section 924B - Attributing securities and payments to transactions

Background

94. Where payment is required to be made to the Exchange or securities are required to be delivered to the Exchange by a dealer in respect of a number of transactions entered into by the dealer it may not be possible to ascertain how the amount paid or the securities delivered are to be attributed to each transaction. Such difficulty arises where the dealer has failed to deliver the full amount of money or all the securities the subject of the settlement statement to the participating exchange.

95. The business rules of the Exchange may set out rules for determining how money and securities are to be attributed to transactions in these circumstances.

Proposed Amendment

96. The proposed section gives effect, for the purposes of Part 7.10, to such business rules of a participating exchange as determine how many of the securities transferred and how much of the payment made is attributable to each of a number of transactions, when it is not otherwise possible to tell how the money or securities are to be attributed.

Section 927 - Management Sub-CommitteeBackground

97. Sub-section 927(2) expressly empowers the Board to delegate all or any of its powers to a management sub-committee except the power to delegate (section 927), to determine that a payment be made from the Fund into a securities industry development account (section 944) and to determine that a late claim is not barred (subsections 954(5) (in Division 6) and 969(3) (in Division 8)).

Proposed amendment

98. It is proposed to insert in the list of powers that cannot be delegated in subsection 927(2) the references to the comparable provisions in proposed Divisions 6A, 6B and 6C (proposed subsections 954F(2), 954Q(2) and 954Y(2)) and Division 7 (proposed section 959(3)) which allow the Board to determine that a late claim not be barred.

99. Further, it is proposed to insert subsection 927(5A) which provides that a delegation under section 927 continues in force even if there is a change in the membership of the Board or of the sub-committee.

Proposed Section 927A - Sub-delegation by management sub-committeeBackground

100. Section 927 expressly empowers the Board to delegate all



or any of its powers (with only the specified exceptions) to a management sub-committee, and provides that the delegated powers are to be exercised by a majority of the members of the sub-committee. Some of the powers of the Board are exercised in situations where participation by a sub-committee would be inconvenient. An example is the individual assessment of smaller claims.

Proposed amendment

101. The proposed amendment would assist the efficient operation of the Board by allowing the sub-committee to delegate a delegated power, authority or discretion of the sub-committee to a member of the sub-committee or of the Board or to an officer of the Securities Exchanges Guarantee Corporation (SEGC) (proposed subsection 927A(1)).

102. The delegation must be in writing signed by a majority of the members of the sub-committee and may be varied or revoked (subsections 927A(2) and (3)). A delegation continues in force even if there is a change in the membership of the subcommittee (proposed subsection 927A(4)). A power, authority or discretion exercised by a person under a delegation is taken to have been exercised by the Board (subsection 927A(5)). A delegation of a power, authority or discretion does not prevent its exercise by the Board or management sub-committee that made the delegation (subsection 927A(6)).

103. Section 109ZE has effect in relation to a delegation subject to section 927A (subsection 927A(7)). Section 109ZE makes certain provisions regarding the effect of the delegation of powers, eg, that the powers that may be delegated do not include that power to delegate.

104. Certain words and phrases used in the proposed section are defined in subsection 927A(8).

Proposed Section 928A - Interpretation - borrowing

105. Proposed section 928A provides that a reference to borrowing money includes a reference to obtaining credit. This amendment relates to proposed section 930A.

Section 930 - Property constituting Fund

Background

106. Section 930 lists the property which constitutes the National Guarantee Fund.

Proposed amendment

107. The proposed amendment, by adding paragraph (fa), includes in the list of property which constitutes the Fund, money paid into the Fund under proposed subsection 930B(2).

108. A further proposed amendment would omit paragraph 930(j) and substitute a paragraph which would make money paid to the SEGC for the purposes of a claim under Divisions 6, 6A and 6C part of the Fund.

109. This provision would include in the Fund the purchase price paid to the SEGC by a buying dealer making a claim under section 950 in respect of default by the selling dealer, the collateral paid to the SEGC by a lender claiming in respect of a borrower's failure to return securities under proposed section 954G and amounts received from a participating exchange which has exercised its rights of subrogation under proposed paragraph 954ZB(1)(c).

Proposed Section 930A - Power to borrow etc. for purposes of the Fund

110. Section 929 requires the SEGC to hold the assets of the Fund in trust for the purposes set out in the Law.

111. The SEGC has requested that it be empowered to borrow and to give security over Fund assets so as to allow the SEGC

greater flexibility to determine the optimum time to liquidate assets which may be required to meet claims. Occasions may arise when it may be more desirable to borrow funds for a prompt pay-out of a claim rather than liquidate Fund assets.

112. Proposed subsection 930A(1) empowers the SEGC to borrow on such terms and conditions as the Board of the SEGC thinks appropriate if the Board considers that it is in the interests of the sound financial management of the Fund. Proposed subsection 930A(2) empowers the SEGC to give security, including security over the assets of the Fund, in relation to a borrowing under proposed subsection 930A(1).

113. Because an exchange, rather than the SEGC, may have established relations with banks and other lending institutions, proposed subsection 930A(3) empowers the SEGC to give security over the assets of the Fund in relation to the participating exchange's obligations to repay a loan when such loan by the participating exchange was used to lend money to the SEGC.

Proposed Section 930B - Money borrowed and paid to SEGC

114. Money borrowed by the SEGC which is paid to the SEGC under proposed subsection 930A(1) is to be paid into the National Guarantee Fund (subsection 930B(2)).

115. For the purposes of Division 4 (Levies where Fund less than minimum amount), if money has been borrowed to meet a claim on the SEGC, and the money has been paid into the Fund but the claim has not been paid out of the Fund, the amount in the Fund is reduced by the amount of any borrowed moneys (proposed subsection 930B(3)). This provision will ensure that the Board retains its flexibility in assessing whether or not to determine that a levy is payable.

116. If, for example, the Board makes an assessment that it is likely to recover from a defaulting dealer only a small proportion of the amount of a claim, it may then levy without waiting for the borrowed funds to be paid out of the Fund in satisfaction of the claim.

Proposed Section 930C - Money borrowed and not paid to SEGC

117. When money is borrowed under subsection 930A(1) and is not paid to the SEGC, but is payable at the direction of the SEGC (for example where the SEGC establishes a line of credit with a financial institution), the SEGC may direct that it be paid only for the purposes listed in section 932. Subsection 932(1) provides a list of the allowable payments out of the National Guarantee Fund.

Section 932 - Payments out of Fund

Subsection 932(1)

Background

118. Subsection 932(1) lists the payments which the Board may pay out of the Fund.

Proposed Amendment

119. The proposed amendment would insert paragraphs 932(1)(ba) and (da) which would enable the Board to pay from the National Guarantee Fund:

- . money payable under proposed section 972A, which will provide a discretion to pay amounts in respect of dividends, rights etc which a claimant would have received if a default had not occurred in respect of the transfer of securities; and
- . principal, interest or other amounts due in respect of money borrowed to the extent that interest and profits from the investment of the Fund did not cover these payments (see section 935).

Subsections 932(2) and (3)

Background

120. Subsection 932(2) defines "claim" in paragraphs 932(1)(a)

and (b) as a claim under Division 6, 7 or 8 of Part 7.10 or a claim that is a transferred claim in relation to a joining exchange. Subsection 932(3) provides that amounts payable out of the Fund in connection with claims under Division 6 (Contract guarantees) or 7 (Unauthorised transfers) have priority over amounts payable in connection with claims under Division 8 (Claims in respect of insolvent members).

#### Proposed Amendments

121. The proposed amendment to subsection 932(2) inserts references to proposed Divisions 6A (Securities loans guarantees), 6B (Claims in respect of net obligations) and 6C (Transfer delivery service guarantees).

122. The proposed amendment to subsection 932(3) will ensure that amounts payable in connection with claims under proposed Divisions 6A, 6B and 6C will also be paid in priority to those payable under Division 8.

#### Section 935 - Interest and profits from investment of Fund

##### Background

123. Section 935 provides that the interest and profits from investment of the Fund are to be applied to pay the Fund's administrative expenses and all premiums payable in respect of contracts of insurance or indemnity entered into under section 982. Interest and profits not immediately required for this purpose are to be paid into the Fund.

##### Proposed amendment

124. It is proposed that the SEGC will also be required to pay the principal, interest and other amounts payable in respect of money borrowed under proposed section 930A from the interest and profits accruing from investment of the Fund and only to the extent that the interest and profits are insufficient, will these amounts be paid from the Fund itself (proposed paragraph 932(1)(da)).

Section 938 - Levy on transactionsBackground

125. Subsection 938(2) empowers the SEGC, where the amount in the Fund is less than the minimum amount, to make a determination that a levy on reportable transactions is payable. The amount of the levy is payable by a leviable dealer in relation to a reportable transaction (subsection 938(5)). The terms "leviable dealer" and "reportable transaction" are defined in subsection 938(1).

Proposed Amendments

126. The proposed amendments include in the definition of "leviable dealer", the borrower under a guaranteed securities loan (subsection 938(1)).

127. The definition of "reportable transaction" is to be omitted from section 938 and a definition of "leviable transaction" substituted. Briefly, leviable transactions are reportable transactions as presently defined and guaranteed securities loans. The definition includes the necessary link with the jurisdiction.

128. The phrase "leviable transaction" will replace "reportable transaction" in subsections 938(2), (3) and (5).

Proposed Section 948A - Effect of using a transfer delivery serviceBackground

129. Certain provisions in Division 6 of Part 7.10 refer to the supply of settlement documents (a term which is defined in subsection 920(1)). An example is section 950 which relates to a claim against the NGF by a buying dealer when the selling dealer has not supplied to the buying dealer settlement documents in relation to the purchase.

130. The Exchange has introduced a transfer delivery service which permits the selling broker to deliver securities to the Exchange in one city, for the securities to be registered into the name of the Exchange's clearing nominee (TDS nominee), and for the Exchange to supply comparable settlement documents to the buying broker in another city on the same day. The procedure is explained more fully in the introduction to proposed Division 6C below.

#### Proposed Amendment

131. Proposed section 948A provides that where, for the purposes of discharging an obligation to transfer securities under an agreement for the sale or purchase of securities (or under a replacement agreement of such an agreement), a dealer transfers securities to the TDS nominee in accordance with the transfer delivery service provisions of a participating exchange, the obligation to supply settlement documents in relation to the sale or purchase is taken, for the purposes of the application of Division 6, to be discharged by the transfer of securities by the dealer to the TDS nominee. Proposed section 924 defines transfer.

132. An ineffective transfer out of the TDS nominee is dealt with in Division 6C (Transfer delivery service guarantees).

#### Section 949 - Claim by selling dealer in respect of default by buying dealer

##### Background

133. Subsection 949(3) provides that if the business rules of an Exchange subsidiary purport to authorise that subsidiary to make a claim on behalf of a dealer, the subsidiary is entitled to make that claim. This provision was drafted at a time when the business rules governing the operation of the Exchange's clearing house were rules of the various Exchange subsidiaries. As a consequence of the general conversion of business rules of Exchange subsidiaries into national business rules, the provision which authorises the claim to be made on behalf of a dealer is now a national business rule (Rule

4.40), and the body authorised by the Rule to make the claim is the Exchange rather than an Exchange subsidiary.

Proposed amendments

134. The proposed amendments omit the phrase "Exchange subsidiary" from subsections 949(3), (4) and (5) and substitute "Exchange body" (which is defined in proposed subsection 949(7) to mean the Exchange or an Exchange subsidiary). A corresponding amendment is made to the phrase "that subsidiary" (subsections 949(3) and (4)).

Section 950 - Claim by buying dealer in respect of default by selling dealer

Background

135. Subsections 949(2), 951(2) and 952(2) make provision for a dealer or client to make a single claim in respect of a number of transactions with the one dealer but provide that such a claim is to be treated by the Board of the SEGC as if it consisted of a separate claim in respect of each transaction.

Proposed Amendment

136. Proposed subsections 950(1A) and (1B) insert similar provisions in section 950 which relates to claims by buying dealers in respect of defaults by selling dealers.

Proposed Section 950A - Effect of novation, under business rules, of agreement for purchase

Background

137. The Exchange is proposing to introduce a system of netting which would involve netting of payment obligations and netting of delivery obligations. The proposal is explained in the introduction to Division 6B below.



Proposed Amendment

138. Section 950A(1) applies where a dealer agrees to buy securities from another dealer and the purchase agreement is a reportable transaction which is novated so that the seller is obliged to transfer securities under a replacement agreement. For the purposes of the application of Part 7.10 (other than section 980) and making a claim under section 950 in respect of the purchase, the novation is to be disregarded subject to subsections 950A(3) and (4).

139. If the buyer's obligation to pay consideration under the purchase has been replaced, by the novation process, with an obligation to pay an amount under a replacement agreement, and that obligation is to be taken into account for the purposes of the provisions of the business rules relating to netting of payment obligations, then the buyer is taken to have supplied consideration for the purchase (subsection 950A(3)). Under subsection 950A(4) if the replacement agreement is terminated, the purchase agreement is taken to be terminated.

140. In effect proposed section 950A modifies the application of section 950 where the obligation to pay consideration is to be taken into account under a payment netting system so that the consideration will then be payable to an exchange subsidiary. In these circumstances the buying dealer will be taken to have supplied consideration to the selling dealer for the purposes of section 950.

Section 953 - Cash settlement of claim where settlement documents unobtainableBackground

141. Where the SEGC allows a claim by a buying dealer or a buying client under subsections 950(2) or 952(3) the Board may decide to pay to the claimant an amount equal to the pecuniary loss suffered by that claimant where it is not reasonably practicable for the Board to provide settlement documents. Such a situation may arise where an orderly market does not

exist in the relevant securities or there are insufficient securities being offered for sale on the stock market.

#### Proposed Amendment

142. The proposed amendment to the concluding words of the section requires the Board to pay the claimant the actual pecuniary loss where the preconditions contained in the section are satisfied. The amendment makes this provision consistent with proposed comparable provisions in other Divisions of this Part, eg subsections 954G(3), 954S(3) and 954Z(3).

#### Proposed Division 6A - Securities loans guarantees

##### Introduction

143. In accordance with recommendations of the Group of Thirty, the Exchange is seeking to introduce a fixed rolling settlement system for securities transactions, under which settlements would routinely take place on the fifth business day after trading (T + 5). The Exchange proposes to introduce the T + 5 system after the commencement of these amendments.

144. When broker-broker settlement is required to take place at a fixed time after trade, brokers need access to securities borrowing facilities on, or prior to, the settlement day for a variety of reasons. A broker may not have securities ready for delivery on the settlement day for reasons beyond his or her control. For example, the selling client may fail to deliver settlement documents to the broker on time or the sale may be a short sale permitted by the Law and the business rules.

145. Where the trade is sufficiently large, the broker may use a private lending arrangement with an institution (or an intermediary for an institution) to acquire securities as needed.

146. Private lending arrangements are not cost-effective in respect of small "retail" trades. Unless an adequate

securities lending scheme is in place, defaults in respect of small retail trades may be high and the requirement for T + 5 may not often be honoured.

147. To facilitate T+5 settlement the Exchange proposes to establish a scheme for retail securities lending. It is proposed that the Exchange will enter into contractual arrangements with one or more financial institutions, under which the institutions will agree to make securities available to the Exchange which will then make the securities available for loan to brokers.

148. The Exchange will arrange for securities from a securities lending pool to be on-lent to brokers pursuant to standard lending arrangements reflected in the business rules. One of the requirements of the lending arrangement will be the payment of collateral by the borrowing broker, equivalent to 105% of the value of the securities on loan.

149. As it is envisaged that the Exchange will borrow securities from institutional lenders as a principal and then on-lend to brokers, the Exchange is thereby exposed to a risk of loss should a borrowing broker not pay collateral or other money due in respect of the loan, or not return the securities pursuant to the borrowing arrangements.

150. The transferee to whom the borrower directs the lender to transfer the borrowed securities may also suffer loss where it does not receive valid securities through the transfer delivery service because the system allocates to the borrowing broker's buyer some invalid securities delivered into the transfer delivery service by an unrelated person on the same day. Proposed new Division 6C, discussed below, is designed to allow a claim in these circumstances, as well as in relation to other transfer delivery service problems.

151. The extension of potential liability for the Fund will be offset, to a degree, by a reduction in the Fund's exposure to reportable transactions as a consequence of the reduction of the interval of time between transactions and settlement under the T + 5 fixed settlement regime.

152. It should be noted that these amendments apply only to the exposure of a participating exchange under a 'retail' securities lending scheme. Larger, 'wholesale' loans will not be supported by National Guarantee Fund coverage.

Proposed Section 954A - Interpretation - general definitions

153. This new section includes a number of definitions for the purposes of the proposed Division 6A.

154. The proposed amendment includes definitions of such terms as "claim", "compliance period", "excluded amount" and "security benefit".

155. It also provides cross-references to the definitions of "borrower", "guaranteed securities loan" and "lender" in section 954B.

156. The term "excluded amount" is defined to mean an amount paid as a fee or charge, or by way of interest or a penalty, in respect of the loan. A claim cannot be made in respect of non-payment of such amounts (see proposed subsection 954D(1)).

157. The term "security benefit" is also defined in proposed section 954A as property (other than securities) or money transferred or paid to a person because he or she is or was the holder of a security. It also includes rights that a person has as the holder of a security. Such rights may be existing or future, contingent or not (subsection 954A(2)).

Proposed Section 954B - Interpretation - guaranteed securities loan and related concepts

158. The proposed section defines a "guaranteed securities loan", "lender", "borrower" and "borrowed securities" for the purposes of Part 7.10.

159. An agreement is a "guaranteed securities loan" if it is an agreement under which:

- . a participating exchange (the lender) is to transfer securities (the borrowed securities) to or as directed by a person or partnership that is a member of the lender (the borrower); and
- . the borrower is later to transfer to, or as directed by, the participating exchange such securities and security benefits as the agreement requires, to restore as nearly as practicable the position of the lender.

160. The agreement must also be of a kind that according to the business rules of the lender is to be guaranteed under proposed Division 6A.

161. An agreement may contain additional obligations to those mentioned in subsection 954B(1) and still be a guaranteed securities loan (subsection 954B(3)). This provision is intended to avoid any uncertainty that a securities loan may not also require, for example, the payment of a loan fee.

Proposed Section 954C - Effect of using a transfer delivery service

162. The Exchange has introduced a transfer delivery service which permits the selling broker to deliver securities to the Exchange in one city, for the securities to be registered into the name of the Exchange's clearing nominee (TDS nominee), and for the Exchange to supply comparable settlement documents to the buying broker in another city on the same day. The procedure is explained more fully in the introduction to proposed Division 6C below.

163. Proposed section 954C applies where a party (either a lender or a borrower) to a guaranteed securities loan, or a replacement agreement in relation to a guaranteed securities loan is obliged under the loan to transfer securities and, for the purpose of wholly or partly discharging the obligation, that party elects to bring about a transfer by transferring securities to the TDS nominee in accordance with the transfer delivery service provisions. In these circumstances, for the

purposes of Division 6A, the obligation to transfer the securities is taken to be discharged to the extent of the number of securities transferred to the TDS nominee.

164. An ineffective transfer out of the TDS nominee is dealt with in Division 6C (Transfer delivery service guarantees).

Proposed Section 954D - Claim by lender in respect of borrower's failure to discharge obligations

165. Proposed section 954D will entitle the lender under a guaranteed securities loan to make a claim against the Fund if, at the end of the compliance period, the lender has transferred the borrowed securities in accordance with the agreement but the borrower has not discharged completely (apart from any obligation regarding an excluded amount which is defined in proposed section 954A) its obligation to transfer or pay securities or security benefits or some other amount.

166. The term "compliance period" is defined in proposed subsection 954A(1) as the period prescribed by the business rules of the exchange, or if no period is prescribed, a period that is reasonable having regard to the obligation and all the circumstances of the loan.

167. A lender may make a single claim in respect of a number of obligations which may or may not be under the same guaranteed securities loan (proposed subsection 954D(2)) but each claim is to be treated by the SEGC as a separate claim in respect of each of the obligations to which it relates (subsection 954D(3)).

Proposed Section 954E - Effect of novation, under business rules, of guaranteed securities loan

168. The Exchange is proposing the introduction of a system of netting by novation which is explained in the introduction to Division 6B below.

169. Section 954E applies where a guaranteed securities loan is novated as described in section 924A. Section 954E has effect for the purposes of making a claim under section 954D in respect of the loan and for the purposes of the application of Part 7.10 (other than section 980) in relation to the claim. For these purposes and subject to subsection (3) and (4), the novation is to be disregarded.

170. Under subsection 954E(3) if an obligation to pay an amount under the loan is replaced by an obligation to pay an amount under a replacement agreement and that obligation under the replacement agreement is to be taken into account for the purposes of the business rules relating to a payment netting service, the obligation to pay that amount under the loan is taken to be discharged. Under subsection (4) if the replacement agreement is terminated, the loan agreement is taken to be terminated.

171. Proposed section 954E will have the effect that if an obligation of a borrower to pay an amount under a guaranteed securities loan is to be taken into account in a payment netting system, then a claim in respect of a failure to pay that amount is not available under section 954D. A claim may however be made under proposed Division 6B.

#### Proposed Section 954F - How and when claim to be made

172. This proposed section generally follows subsections 954(4) and (5) in Division 6 (Contract guarantees), and proposed sections 954Q in Division 6B (Claims in respect of net obligations) and 954Y in Division 6C (Transfer delivery guarantees).

173. The proposed section provides that a claim must be in writing and served on the SEGC within 6 months after the claimant became entitled to make the claim (subsection 954F(1)). Unless the SEGC Board otherwise determines, a claim made later is barred (subsection 954F(2)).

Proposed Section 954G - How claim in respect of securities or non-money security benefits is to be satisfied

174. Subject to proposed section 954J, the SEGC must allow a claim in respect of an obligation under a guaranteed securities loan to transfer securities or security benefits other than money if the Board is satisfied that the criteria set out in proposed section 954G are met.

175. These criteria are that:

- . the claimant is entitled to make the claim; and
- . the obligation is still undischarged to some extent (subsection 954G(1)).

176. Specific provision is also made in proposed section 954K to prevent recovery in more than one jurisdiction.

177. If the SEGC allows the claim and the claimant has repaid the collateral or any other amount required to be paid by the claimant under the loan, as directed by the borrower, or for the purposes of the claim paid such amount to the SEGC, then the SEGC must satisfy the claim by transferring securities or security benefits of the same kind and number as the outstanding items (subsection 954G(2)).

178. Proposed subsection 954G(3) applies if the SEGC allows the claim and the claimant has not paid the amounts payable under the loan to the borrower or the SEGC. It also applies if the lender has paid those amounts and the Board is satisfied that it is not reasonably practicable for the SEGC to obtain securities or securities benefits of the same kind and number as the outstanding items within the "pre-cash settlement period" (defined in proposed subsection 954G(5)). In these circumstances the SEGC must instead pay the claimant the amount of the claimant's actual pecuniary loss.

179. Under subsection (4), in working out the amount of the actual pecuniary loss suffered in respect of the failure to discharge the obligation, regard may be had to the cost to the



claimant of any securities or security benefits of the same kind as the outstanding items that the claimant obtained because the obligation was not discharged.

Proposed Section 954H - How claim in respect of an amount of money is to be satisfied

180. Subject to the nexus provisions of proposed section 954J, the SEGC must allow a claim in respect of an obligation under a guaranteed securities loan to pay a security benefit that is an amount of money or to pay some other amount, if the Board is satisfied that the criteria set out in proposed section 954H are met.

181. These are:

- . that the claimant is entitled to make the claim; and
- . that the obligation is still undischarged to the extent of a particular amount (section 954H(1)).

182. If the SEGC allows a claim it must pay to, or as directed by, the claimant an amount equal to the amount by which the borrower's obligation is undischarged (subsection 954H(2)).

Proposed Section 954J - Nexus with this jurisdiction

183. This new provision is comparable to section 961A (Division 7 - Unauthorised transfer), section 966A (Division 8 - Claims in respect of insolvent members) and proposed sections 954U (Division 6B - Claims in respect of net obligations) and 954ZB (Division 6C - Transfer delivery service guarantees).

184. For the purposes of an appropriate jurisdictional nexus, this proposed section provides that a participating exchange may not make a claim in a particular jurisdiction in respect of a guaranteed securities loan unless the borrower was carrying on a securities business in that jurisdiction on the day on which the loan was made or if the borrower was not so carrying on such a business, the last securities business that

the borrower carried on before the day on which the loan was made, was carried on in that jurisdiction.

#### Proposed Section 954K - Preventing double recovery

185. This proposed section is comparable to subsection 954(2A) (Division 6 - Contract guarantees), section 961B (Division 7 - Unauthorised transfer) and section 965 (Division 8 - Claims in respect of insolvent members) and proposed sections 954V (Division 6B - Claims in respect of net obligations) and 9542C (Division 6C - Transfer delivery service guarantees).

186. This proposed section would prevent recovery under more than one Law. It provides that where the SEGC has allowed a claim under section 954D of the Law of one jurisdiction, it must not allow a claim that relates to the same failure to discharge the obligation under that section of the Law of another jurisdiction.

#### Proposed Division 6B - Claims in respect of net obligations

##### Introduction

187. The ASX is proposing to adopt a system of netting of security delivery obligations.

188. In general terms, delivery netting is the procedure of setting-off a broker's obligations to supply a certain number of securities of a listed entity against its right to receive a certain number of the same securities in settlement of a variety of trades due to take place on the one day. The aim is to reduce the movement of documents when a series of transactions relating to the same securities must be settled on the same day. The Exchange already arranges netting of money obligations calculated by the Exchange and paid daily to or by the Exchange.

189. Netting of cash obligations is already done through the Exchange's Broker-Broker Settlement System.

190. The Exchange has advised that it is proposing to introduce netting with novation - that is, an exchange subsidiary will be interposed between the transferor and the transferee in most Exchange transactions. The transferor broker's obligation to deliver securities would then be owed to the exchange subsidiary (which in turn would owe such an obligation to the transferee) and would be discharged by net delivery to another broker in accordance with a delivery order produced by the Exchange.

191. The transferee broker's obligation to pay would be owed to the Exchange subsidiary and would be discharged by payment of the net amount due from the broker to the Exchange as shown in the Settlement Statement (of all transactions settled that day) which is produced by the Exchange.

192. Netting arrangements will be implemented by amendments to the business rules.

193. Division 6B will provide a right to claim against the NGF if the netting rules apply and there is a failure to pay a net amount or to transfer a net number of securities.

#### Proposed Section 954L - Interpretation

194. This proposed section includes the definitions of "claim" and "dealer". A "claim" is defined to mean a claim under proposed Division 6B against the SEGC. A "dealer" in relation to a participating exchange means the participating exchange or a member organisation of the participating exchange.

#### Proposed Section 954M - Effect of using a transfer delivery service

195. This proposed section is similar to proposed sections 948A (Division 6 - Contract guarantees) and 954C (Division 6A - Securities loans guarantees).

196. The Exchange has introduced a transfer delivery service which permits the selling broker to deliver securities to the Exchange in one city, for the securities to be registered into

the name of the Exchange's TDS nominee, and for the Exchange to supply comparable settlement documents to the buying broker in another city on the same day. The procedure is explained more fully in the introduction to proposed Division 6C below.

197. Proposed section 954M applies where a person or partnership is, under business rules relating to netting of delivery obligations, obliged to transfer securities. If, for the purpose of wholly or partly discharging that obligation, the person delivers securities to the TDS nominee in accordance with the transfer delivery service provisions of a participating exchange, then for the purpose of Division 6B, that obligation is taken to be discharged to the extent of the number of securities transferred to the TDS nominee. Proposed section 924 defines what constitutes a transfer.

198. An ineffective transfer out of the TDS nominee is dealt with in Division 6C (Transfer delivery service guarantees).

Proposed Section 954N - Claim in respect of failure to pay net amount in respect of transactions

199. Proposed section 954N will apply where the business rules of a participating exchange provide for the netting of the amounts payable by a dealer to other dealers. Where a dealer fails to discharge an obligation to pay the net amount calculated in accordance with those business rules by the end of the period specified in the business rules, the person or partnership to which the net amount is payable is then entitled to make a claim under proposed subsection 954N(1) (subject to establishing the required nexus with the jurisdiction contained in proposed section 954U).

200. If a broker subsequently ceases to be a member organisation of the participating exchange, the entitlement to make a claim is unaffected (proposed subsection 954N(2)).

Proposed Section 954P - Claim in respect of failure to transfer net number of securities in respect of transactions

201. Proposed section 954P applies where the business rules of a participating exchange:

- . provide for the netting of a dealer's delivery obligations;
- . oblige dealers to transfer a netted amount of securities calculated in accordance with those business rules to another dealer or dealers nominated under the rules within a specified period; and
- . at the end of that period, a dealer has failed to discharge all or part of that obligation (subsection 954P(1)).

202. If the participating exchange has not remedied the default, then the person or partnership to which the securities should have been transferred may make a claim (proposed subsection 954P(2)).

203. If the participating exchange has remedied the default by transferring securities of the same kind and number as the outstanding securities to the person or partnership to which the default securities should have been transferred, then the participating exchange may make a claim in respect of its action in remedying the default (proposed paragraph 954P(3)(b)). Further, the participating exchange is subrogated to all the rights and remedies of the person or partnership to whom the securities should have been transferred (proposed paragraph 954P(3)(a)) and that person is not entitled to claim under proposed subsection 954P(2) (proposed paragraph 954P(3)(c)).

204. Entitlement to claim is not affected by a dealer ceasing to be a member organisation after the obligation arose (proposed subsection 954P(4)).

205. Subsection (5) provides that for the purposes of section 954P a total number of marketable securities of particular kind may be zero. This ensures that section 954P will apply where a dealer's delivery obligations are processed through a delivery netting system even if no netting of those delivery obligations actually occurs (eg where the dealer has only one transaction in a particular security on a particular day).

Proposed Section 954Q - How and when claim to be made

206. This proposed section is comparable to subsections 954(4) and (5) in Division 6 (Contract guarantees) and proposed sections 954F in Division 6A (Securities loans guarantees) and 954Y in Division 6C (Transfer delivery service guarantees).

207. The proposed section provides that a claim must be in writing and served on the SEGC within 6 months after the claimant became entitled to make the claim (proposed subsection 954Q(1)). Unless the SEGC Board otherwise determines, a claim made later is barred (proposed subsection 954Q(2)).

Proposed Section 954R - How claim under subsection 954N(1) is to be satisfied

208. Proposed subsection 954R(1) requires the SEGC to allow a claim under proposed section 954N(1) (for failure to pay a net amount) if it is satisfied that the claimant is entitled to make the claim and that the obligation remains undischarged to any extent, ie an amount is still outstanding.

209. If the SEGC allows the claim, it must pay the claimant the amount outstanding as described in proposed paragraph 954R(1)(b) (proposed subsection 954R(2)).

Proposed Section 954S - How claim under subsection 954P(2) is to be satisfied

210. Proposed section 954S provides for the manner in which claims under proposed subsection 954P(2) are to be satisfied. The requirement to allow the claim is subject to proposed

section 954V which prevents double recovery.

211. Proposed subsection 954S(1) requires the SEGC to allow a claim under subsection 954P(2) if the Board is satisfied that the claimant is entitled to make the claim and the obligation to the claimant to transfer a particular number of securities of a particular kind remains undischarged to any extent. These are then referred to as "outstanding securities".

212. The primary obligation on the SEGC if it allows the claim is to transfer to the claimant securities of the same kind and number as the outstanding securities (proposed subsection 954S(2)).

213. If the Board is satisfied that it is not reasonably practicable for the SEGC to obtain equivalent securities within the "pre-cash settlement period" (defined in subsection 954S(5)) the SEGC must pay to the claimant the actual pecuniary loss suffered by the claimant (proposed subsection 954S(3)).

214. In working out the amount of the actual pecuniary loss, regard may be had to the cost to the claimant of obtaining replacement securities (subsection 954S(4)).

Proposed Section 954T - How claim under subsection 954P(3) is to be satisfied

215. Subject to section 954V, the SEGC must allow a claim under subsection 954P(3) (ie by the participating exchange which has remedied a default) if it is satisfied that:

- . the participating exchange is entitled to make the claim;
- . the participating exchange has paid or transferred to the SEGC any money or property it has obtained because of the right of subrogation provided by proposed paragraph 954P(3)(a) in relation to the default (proposed paragraph 954T(1)(b)).

216. This money or property paid to the SEGC pursuant to proposed paragraph 954T(1)(b) then forms part of the Fund (subsection 954T(4)).

217. If the SEGC allows the claim, then it must pay the participating exchange its actual pecuniary loss because of its actions to remedy the default (proposed subsection 954T(2)).

218. In working out the actual pecuniary loss, regard may be had to the cost to the participating exchange of obtaining replacement securities (subsection 954T(3)).

Proposed Section 954U - Nexus with this jurisdiction

219. This provision is comparable to section 961A (Division 7 - Unauthorised transfer), section 966A (Division 8 - Claims in respect of insolvent members) and proposed sections 954J (Division 6A - Securities loans guarantees) and 954ZB (Division 6C - Transfer delivery service guarantees).

220. So as to provide an appropriate jurisdictional nexus, this proposed section provides that a person or partnership may not make a claim in a particular jurisdiction in respect of a failure by another (the defaulter) to discharge an obligation to pay an amount or transfer securities unless the defaulter was carrying on a securities business in that jurisdiction on the day on which the obligation arose. If the defaulter was not so carrying on such a business in any jurisdiction, the last securities business that the defaulter carried on before that day must have been carried on in that jurisdiction.

Proposed Section 954V - Preventing double recovery

221. This proposed section is comparable to subsection 954(2A) (Division 6 - Contract guarantees), section 961B (Division 7 - Unauthorised transfer) and section 965 (Division 8 - Claims in respect of insolvent members) and proposed sections 954K (Division 6A - Securities loans guarantees) and 954ZC (Division 6C - Transfer delivery service guarantees).



222. This proposed section would prevent double recovery under the Law of two or more jurisdictions. It provides that where the SEGC has allowed a claim under proposed subsection 954N(1) of the Law of one jurisdiction, it must not allow a claim under the corresponding subsection of the Law of another jurisdiction that relates to the same failure to pay an amount (subsection 954V(1)).

223. Similarly, if the SEGC has allowed a claim under proposed section 954P of the Law of any jurisdiction, it must not allow a claim or another claim, under that provision of the Law of another jurisdiction that relates to the same failure to transfer securities (proposed subsection 954V(2)).

#### Proposed Division 6C - Transfer delivery service guarantees

##### Introduction

224. The Exchange has introduced a service entitled the FAST Interbroker Delivery Service to improve the efficiency of interbroker delivery of FAST securities.

225. FAST is the acronym for Flexible Accelerated Security Transfer System. The principal features of the FAST scheme are that securities within the scheme are able to be held in uncertificated form and transfer of those securities may be made without supporting share certificates.

226. This transfer delivery service, for example, permits a selling broker to deliver securities in (say) Hobart which will be "received by" a buying broker in (say) Perth on the same day. This is achieved by the selling broker delivering securities to the Exchange in Hobart and the Exchange instructing its office in Perth to deliver out an equivalent quantity of securities to the buying broker in Perth. Normally the securities delivered by the selling broker will be registered into the name of the Exchange's clearing nominee.

227. Although designed principally for same day settlement interstate, the service may also be used for settlement of intrastate transactions. This has the advantage of minimising

the document flow within the settlement system.

228. An essential feature of the service is that the buying broker will obtain different securities from those delivered by the selling broker.

229. The proposed amendments are necessary because the operation of Division 6 of Part 7.10, providing contract guarantees in relation to sales and purchases of securities, is, as it stands, not clear when applied to transfer delivery service transactions.

230. For example, where securities are delivered directly from the selling broker to the buying broker without using the transfer delivery service and the selling broker has improperly or incorrectly stamped the transfer so that the documents handed over on settlement are not sufficient to discharge the obligations of the seller, the buying broker may have a claim against the Fund under section 950.

231. Where the transfer delivery service is used, however, the defective delivery will flow into a pool of delivered securities and the buying broker to whom that defective delivery is allocated is likely to be a broker other than the one who bought from the broker responsible for the defective delivery (the defaulting broker).

232. Arguably the buying broker who contracted with the defaulting broker has no claim against the Fund under section 950 if he or she has received valid settlement documents through the transfer delivery service and it then cannot perhaps be said that "settlement documents in relation to the purchase have not been supplied to the claimant under the agreement for the purchase" (paragraph 950(2)(c)). The buying broker to whom the defective delivery has been allocated might have no claim because, arguably, the selling dealer with whom that buying broker contracted has supplied valid settlement documents under the agreement between them by delivery into the transfer delivery service. If these arguments were both sustained, a transaction which should give rise to a claim against the Fund would not do so because of the mechanics of

the operation of the transfer delivery service.

233. The transfer delivery service at present depends on the operation of the business rules to confer authority on the Exchange to make a claim under section 950 on behalf of the buying broker. It is desirable, to avoid any possible doubt as to the effectiveness of the business rule, to provide specifically for claims against the Fund in respect of losses incurred through the operation of the transfer delivery service. This is proposed to be achieved by the introduction of a new Division 6C.

234. Division 6C would also allow claims by the Exchange for losses incurred in operating its securities lending scheme, where those losses arise as a result of the operation of the transfer delivery service. In most, if not in all cases, securities loans under the securities lending scheme proposed by the Exchange will be made and returned through the transfer delivery service. The problem (described above in relation to sales and purchases) which arises because of allocation within the transfer delivery service may also arise in relation to a securities loan or a loan return.

#### Proposed Section 954W - Interpretation

235. This proposed section includes the definition of "claim", "claimable obligation", "discharge" and "purchase obligation".

236. A "claimable obligation" is defined as:

- (a) an obligation to transfer securities under a purchase agreement where the purchase is a reportable transaction for the purposes of Division 6; or
- (b) an obligation under a guaranteed securities loan; or
- (c) an obligation to transfer a net number of securities as ascertained under the business rules of a participating exchange; or

- (d) an obligation to transfer securities under a replacement agreement in relation to a guaranteed securities loan or an agreement of the kind referred to in paragraph (a) that has been novated.

237. The term "discharge" in the case of a purchase obligation is defined to mean the discharge of the whole of the obligation. In the case of other obligations, it is defined to mean the discharge of the whole or a part of the obligation.

238. The term "purchase obligation" is defined to mean an obligation to transfer securities under a reportable transaction for the purposes of Division 6.

Proposed Section 954X - Claims in respect of default by TDS nominee

239. The section applies where a person or partnership who is obliged to transfer securities of a particular kind to, or as directed by, another person or partnership under a claimable obligation, elects to bring about the transfer by transferring the securities to the TDS nominee in accordance with the transfer delivery provisions. If, in these circumstances, the TDS nominee purports to transfer securities of a particular kind and number to, or as directed by, the transferee and the purported transfer out of the TDS nominee is ineffective to transfer those securities then the transferee or the participating exchange may make a claim in respect of the TDS nominee's default. What constitutes a transfer is described in proposed section 924.

240. For a claim to be made subsection 954X(1) further requires that in relation to a purchase obligation, the transferee must have paid or be ready, willing and able to pay the consideration for the purchase to the transferor (proposed paragraph 954X(1)(f)).

241. If the participating exchange has not transferred to the transferee securities of the kind and number which would remedy the default by the TDS nominee, the transferee (even if it is the participating exchange) will have a right to claim

in respect of the TDS nominee's default in these circumstances (proposed subsection 954X(2)).

242. However, if the participating exchange remedies the default of the TDS nominee by supplying equivalent securities to, or as directed by, the transferee, then the participating exchange may make a claim against the National Guarantee Fund and is subrogated to all the rights and remedies of the transferee in relation to the purported transfer of securities by the TDS nominee (proposed paragraphs 954X(3)(c) and (d)). The transferee is not entitled to claim if the participating exchange has remedied the default (proposed paragraph 954X(3)(e)).

243. If the participating exchange is the transferee and it has obtained equivalent securities to remedy the default, the participating exchange may make a claim against the Fund (paragraphs 954X(3)(a) and (d)).

244. Whether or not the participating exchange has remedied the default, the requirement for a connection with the jurisdiction specified in proposed section 954ZB must be fulfilled.

245. As in other Divisions, a claimant may make a single claim in respect of 2 or more defaults (subsection 954X(4)) but the SEGC is to treat the claim as if it were a separate claim in respect of each of the defaults to which it relates (subsection 954X(5)).

246. Entitlement to make a claim in respect of an obligation to transfer a net amount of securities is not affected by a broker ceasing to be a member organisation of the participating exchange after the obligation arose (subsection 954X(6)).

#### Proposed Section 954Y - How and when claim to be made

247. The proposed section is comparable to subsections 954(4) and (5) in Division 6 (Contract guarantees), and proposed sections 954F in Division 6A (Securities loans guarantees) and

954Q in Division 6B (Claims in respect of net obligations).

248. It provides that a claim must be in writing and served on the SEGC within 6 months after the claimant became entitled to make the claim (subsection 954Y(1)). Unless the Board of the SEGC otherwise determines, a claim made later will be barred (subsection 954Y(2)).

Proposed Section 954Z - How claim under subsection 954X(2) is to be satisfied

249. The proposed section provides that the SEGC must allow a claim under proposed subsection 954X(2) (ie a default by the clearing nominee which the participating exchange has not remedied) if the Board is satisfied that:

- . the claimant is entitled to make the claim (proposed paragraph 954Z(1)(a)) and
- . the claimant has paid the transferor or SEGC the consideration (in the case of a purchase obligation) (proposed paragraph 954Z(1)(b)).

250. A claim in respect of the same default must not already have been allowed in another jurisdiction (section 954ZC).

251. The primary obligation on the SEGC if it allows a claim is to transfer to, or as directed by, the claimant equivalent securities (proposed subsection 954Z(2)).

252. If the Board is satisfied that it is not reasonably practicable for the SEGC to obtain equivalent securities within the "pre-cash settlement period" (defined in subsection 954Z(5)), the SEGC must instead pay to the claimant the actual pecuniary loss suffered by the claimant in respect of the TDS nominee's default (subsection 954Z(3)).

253. In working out the amount of the actual pecuniary loss suffered in respect of the TDS nominee's default, regard may be had to the cost to the claimant of any replacement securities the claimant obtained (subsection 954Z(4)).

Proposed Section 954ZA - How claim under subsection 954X(3) is to be satisfied

254. Provided that the SEGC has not allowed a claim for the same default in another jurisdiction (section 954ZC) the SEGC must allow a claim under proposed subsection 954X(3) (ie a claim by the participating exchange which has remedied the TDS nominee's default) if it is satisfied that:

- . the claimant is entitled to make the claim (paragraph 954ZA(1)(a));
- . in relation to a purchase obligation, the transferee has paid the consideration for the purchase to the transferor (paragraph 954ZA(1)(b)); and
- . the claimant has paid or transferred to the SEGC any money or property it has obtained because of the rights of subrogation (proposed paragraph 954ZA(1)(c)). Such money or property then forms part of the Fund (proposed subsection 954ZA(4)).

255. If the SEGC allows the claim the SEGC must pay the amount that is, when the claim is allowed, the actual pecuniary loss suffered by the claimant because it remedied the TDS nominee's default (subsection 954ZA(2)).

256. In working out this actual pecuniary loss, regard may be had to the cost to the claimant of obtaining the replacement securities (subsection 954ZA(3)).

Proposed Section 954ZB - Nexus with this jurisdiction

257. This new provision is comparable to section 961A (Division 7 - Unauthorised transfer), section 966A (Division 8 - Claims in respect of insolvent members) and proposed sections 954J (Division 6A - Securities loans guarantees) and 954U (Division 6B - Claims in respect of net obligations).

258. So as to provide an appropriate jurisdictional nexus, this proposed section provides that a person or partnership

may not make a claim under subsection 954X(2) or (3) unless the person or partnership was carrying on a securities business in the jurisdiction on the day of the purported transfer or if the person or partnership was not so carrying on such a business (in any jurisdiction), the last securities business that the person or partnership carried on before the day on which the purported transfer was made was carried on in the jurisdiction (paragraph 954ZB(b)).

259. In the case of the participating exchange, the exchange must have carried on business in the jurisdiction on the day of the purported transfer (proposed paragraph 954ZB(a)).

#### Proposed Section 954ZC - Preventing double recovery

260. This proposed section is comparable to subsection 954(2A) (Division 6 - Contract guarantees), section 961B (Division 7 - Unauthorised transfers), section 965 (Division 8 - Claims in respect of insolvent members) and proposed sections 954K (Division 6A - Securities loans guarantees) and 954V (Division 6B - Claims in respect of net obligations).

261. This proposed section would prevent double recovery under more than one Law. It provides that if the SEGC has allowed a claim under section 954X of the Law of one jurisdiction, it must not allow a claim that relates to the same purported transfer under the corresponding section of the Corporations Law of another jurisdiction (proposed section 954ZC).

#### Proposed Section 959 - How and when claim may be made

##### Background

262. Section 959 (in Division 7 which deals with unauthorised transfers) now provides that a claim must be in writing and served on the SEGC within 6 months after the day on which the claimant first became aware that the claimant had suffered loss as a result of the unauthorised execution.

263. The SEGC has requested that a more definite limit be put on the time in which a claimant may make a claim to allow the



claim process to be brought to a definitive close. However, those who have suffered loss through an unauthorised execution of a transfer of securities may not become aware of this for some time after the transfer.

Proposed Amendment

264. The proposed amendment is to repeal the section and substitute a new section 959.

265. Proposed subsection 959(4) allows the SEGC to publish in each State and Territory in a daily newspaper circulating in that State or Territory, a notice that is in a prescribed form and naming a particular dealer.

266. The notice may require that all claims in respect of unauthorised executions by the dealer during the period specified in proposed subsection (5), must be served on the SEGC before a day specified in the notice in accordance with proposed subsection (6).

267. Proposed subsection (5) requires that the period to which the notice relates must start and end before the first day on which the notice is published (or if each publication of the notice occurs on the same day, the period must start and end before that day).

268. Proposed subsection 959(6) provides that the last application day before which claims must be served, must be at least 3 months after the last day on which the notice is published (or if each publication of the notice occurs on the same day, the last application day must be at least 3 months after that day).

269. When the SEGC has published such a notice, claims must be served on it within the time specified in the notice (proposed subparagraph 959(1)(b)(i)) but if no notice is published, the claim must be served on the SEGC within 6 months after the day on which the claimant first became aware that he or she had suffered loss as a result of the unauthorised execution (proposed subparagraph 959(1)(b)(ii)).

270. As in the present section 959, proposed section 959 requires that the claim be in writing (proposed paragraph 959(1)(a)) and provides that unless the Board otherwise determines, a claim not served within the time limits is barred (proposed subsection 959(3)).

271. As in the comparable provision (subsection 969(4) under Division 8 - Claims in respect of insolvent members), the SEGC, members of its Board and employees will have qualified privilege in respect of the publication of a notice under proposed subsection (4) (proposed subsection 959(7)). Where the Law provides that a person has qualified privilege in respect of, for example, a notice, the person has qualified privilege in a proceeding for defamation or is not, in the absence of malice, liable to an action for defamation, in respect of that notice (subsection 89(1)). "Malice" includes ill-will or any other improper motive (subsection 89(2)).

#### Section 961A - Nexus between dealer and this jurisdiction

##### Background

272. Section 961A (in Division 7 - Unauthorised transfer) deals with claims made under sections 957 and 958. So as to provide an appropriate jurisdictional nexus, it provides that a claim may not be made under sections 957 or 958 of the Law of a particular jurisdiction unless on the day of the unauthorised execution the dealer was carrying on a securities business in that jurisdiction or if the dealer was not so carrying on such a business on the day, the last securities business that the dealer carried on before that day was carried on in that jurisdiction.

##### Proposed amendment

273. The amendment inserts in paragraph 961A(b) a requirement that the dealer was not carrying on a securities business in any other jurisdiction on the day of the unauthorised execution. The amendment makes this provision consistent with the nexus provisions in proposed Divisions 6A, 6B and 6C and the proposed amendment to section 966A.

Section 966A - No claim unless nexus between dealer and this jurisdiction

Background

274. This section requires an appropriate nexus between the dealer and the jurisdiction to enable a claim to be made under the Law of that jurisdiction in respect of property entrusted to or received by a dealer who subsequently became insolvent (Division 8).

275. So as to provide an appropriate jurisdictional nexus, it provides that a claim cannot be made under Division 8 of the Law of a jurisdiction unless on the day the dealer became insolvent the dealer was carrying on a securities business in that jurisdiction or if the dealer was not so carrying on such a business on the day, the last securities business that the dealer carried on before that day was carried on in that jurisdiction.

Proposed amendment

276. The amendment inserts in paragraph 966A(b) a requirement that the dealer was not carrying on a securities business in any other jurisdiction on the day of the unauthorised execution. The amendment makes this provision consistent with the nexus provisions in proposed Divisions 6A, 6B and 6C and mirrors the proposed amendment to section 961A.

Division 9 of Part 7.10 (Heading)

277. The heading of this Division is to be changed from "Claims under Division 6, 7 and 8" to "General provisions relating to claims".

Proposed Section 970A - Claimant may be required to exercise right of set-off

Background

278. It is possible that a person claiming in respect of a

defaulting dealer also has an obligation to that broker eg the claimant may be both a seller to the defaulting dealer and a buyer from that dealer, and may not have paid to the dealer the consideration for the purchase.

279. It would be inappropriate for the SEGC to be obliged to pay the full amount of the claim with respect to the sale to the defaulting dealer and pay no regard to the obligation of the claimant to that dealer.

Proposed Amendment

280. Proposed section 970A empowers the SEGC to refuse to allow a claim until the claimant has exercised a right to set-off a liability of the claimant to the defaulter against the liability of the defaulter to the claimant. That right may be under an agreement or otherwise.

Proposed Section 970B - Effect of set-off on claim

281. Proposed section 970B assists in working out the obligations of the SEGC in respect of a claim when the defaulter's liability to the claimant has been reduced by the exercise of a right of set-off or the operation of an agreement which provides for automatic set-off of liabilities.

282. In these circumstances proposed section 970B sets out the effect on the obligations of the SEGC in each of five situations. They are:

- . if the SEGC proposes to satisfy the claim by paying an amount, and
  - the set-off reduction consists of money (subsection 970B(2));
  - the set-off reduction consists of securities (subsection 970B(3));
- . if the SEGC proposes to satisfy the claim by transferring securities of a particular kind, and

-the set-off reduction consists of securities of that kind (subsection 970B(4)); or

-the set-off reduction consists of securities that are not of that kind (subsection 970B(5)); or

-the set-off reduction consists of money (subsection 970B(6)).

283. In each case, in general terms, the SEGC is required to reduce the amount of the payment or the number of securities by the amount or value of the set-off reduction.

284. In proposed paragraphs 970B(3)(c) and 970B(5)(c), the Board is required to work out the value of the securities which constitute the set-off reduction. If the value or number (in the case of paragraph 970B(6)(c)) cannot be determined by agreement, it is to be determined by arbitration (section 977).

#### Section 972 - Interest

##### Background

285. Interest at 5% per annum or such other rate as is prescribed is payable on the value of a claim under Division 6, 7 and 8 from the day it arose until the claim is paid or would have been paid had the Fund been sufficient (subsection 972(1)). Interest is not payable on costs and disbursements incidental to the claim. The definition of claim in subsection 920(1) is to be amended to mean a claim under Divisions 6, 6A, 6B, 6C, 7 or 8.

##### Proposed Amendment

286. The proposed amendment would allow the SEGC to determine for the purposes of subsection 972(1) a rate of interest payable on claims under Divisions 6, 6A, 6B, 6C, 7 or 8, within a specified range. The upper limit would be the rate at the time of making the determination fixed in the Rules of Court of the Federal Court of Australia for the purposes of

paragraph 52(2)(a) of the Federal Court of Australia Act 1976. This provision relates to interest on a judgment. Order 35 rule 8 of the Federal Court Rules now provides that the interest on a judgment debt is 17% per annum. The lower limit would be 5% per annum. (Proposed paragraph 972 (1A)(b)).

287. The SEGC will be required to publish a notice of the rate it has determined in the Gazette (proposed subsection 972(1B)).

Proposed Section 972A - Discretion to pay amounts not received etc. because of failure to transfer securities

Background

288. It is possible that a claimant under Divisions 6, 6A, 6B or 6C may have suffered not only an immediate loss as a result of the default of the other party but, after the default, may have failed to receive an amount that would have been paid or property that would have been transferred to the claimant as holder of the securities, had the default not occurred.

Proposed Amendment

289. Proposed section 972A applies if the Board is satisfied that a person or partnership (the defaulter) has failed to discharge an obligation to transfer securities to another person or partnership (the entitled entity).

290. For the purposes of proposed section 972A the Board must also be satisfied that:

- . the entitled entity has made a claim in respect of that failure and has received securities or money in satisfaction of the claim; or
- . the entitled entity would have been entitled to make a claim but for the fact that a participating exchange remedied the default; or
- . where the entitled entity is a participating exchange it would have been entitled to make a claim under

proposed Division 6C had it not obtained replacement securities.

291. In these circumstances, if the Board is satisfied that

- had the defaulter transferred the securities when due, an amount would have been paid, or property would have been transferred to the entitled entity as the holder of the securities but the entitled entity has not received and is not entitled to receive that amount or property (or the equivalent thereof), and,
- where the entitled entity has been paid a compensatory amount out of the Fund this amount does not compensate it for the loss of that amount or property,

the Board may determine in writing that there be paid to the entitled entity a specified amount that the Board considers fair and reasonable in all the circumstances.

The SEGC must pay to the entitled entity an amount equal to the amount specified in the Board's determination.

#### Section 973 - Application of Fund in respect of certain claims

##### Background

292. Paragraph 973(1)(a) empowers the SEGC to buy securities for the purpose of complying with certain provisions which require it to supply settlement documents or securities.

##### Proposed Amendment

293. The proposed amendment inserts additional references to the relevant provisions in proposed Divisions 6A, 6B and 6C in paragraph 973(1)(a).

294. The amendment also omits subsection 973(3) and substitutes a new subsection 973(3). The proposed subsection requires the SEGC to sell any securities purchased in relation

to a claim as soon as practicable after making a decision to satisfy the claim by paying an amount to the claimant instead. The proposed subsection generally follows the current subsection but refers to the list of provisions in paragraph 973(1)(a) rather than listing them. A new subsection 973(4) ensures that "securities" in this section includes non-money security benefits ("security benefit" is defined in proposed section 954A).

Section 977 - Arbitration of amount of cash settlement of certain claims

Background

295. Subsection 977(1) provides that where certain sections of the Law require the SEGC to pay a person the amount that was the actual pecuniary loss in respect of a particular matter (paragraph 977(1)(a)) but the SEGC and the person cannot agree on the amount (paragraph 977(1)(b)), then the amount is to be determined by arbitration in accordance with section 977.

Proposed Amendment

296. The proposed amendments to subsection 977(1) are designed to include references to the provisions in proposed Divisions 6A, 6B and 6C which empower the Board to pay an amount rather than supply return documents or replacement securities. The term "a cash settlement provision" is introduced into paragraph 977(1)(a). The term "cash settlement provision" is defined in proposed subsection 977(7) as being section 953, subsection 954G(3), 954H(2), 954R(2), 954S(3), 954T(2), 954Z(3) or 954ZA(2), section 960 or subsection 964(1) or (2).

297. A further proposed amendment will add subsection 977(1A) which requires that a dispute regarding the value or number of securities in calculating the effect of set-off (proposed section 970B) be determined by arbitration.



Section 979 - Power of Board to require production of securities etc.

Background

298. This section empowers the SEGC to require the production of documents necessary to establish a claim or to exercise its subrogation rights. This extends to enabling criminal proceedings to be taken against a person. Failure to comply with a requirement to produce may lead to disallowance of a claim.

299. Proposed sections 970A, as described above, entitles the SEGC to refuse a claim until the claimant has exercised a right to set-off. Proposed section 970B assists in working out the obligations of the SEGC where a right to set-off is exercised. The SEGC therefore needs to know whether there is a right of set-off, whether it has been exercised and the amount and nature of any set-off reduction.

Proposed Amendment

300. The proposed amendment inserts subsection 979(1A) which empowers the Board for the purpose of the set-off provisions (proposed sections 970A and 970B) to require a person to give the SEGC specified information relating to the existence or exercise of rights of set-off. Failure to comply will entitle the SEGC to disallow the claim (subsection 979(2)).

Section 980 - Subrogation of SEGC to Claimant's Rights etc.

Background

301. Section 980 provides, inter alia, that the SEGC is subrogated to the claimant's rights after allowing claims under particular listed sections. Thus subsection 980(1) refers to various claims under Division 6.

Proposed Amendment

302. The proposed amendment inserts new subsections (1A) to (1G) after subsection 980(1). The new subsections give the SEGC particular rights of subrogation after allowing claims under section 950 in respect of a novated agreement, proposed Division 6A (securities loans guarantees), section 954D (in respect of an obligation under a guaranteed securities loan that had been novated), subsection 954N(1) (in respect of failure to pay net amount in respect of transactions), proposed subsections 954P(2) or (3) (in respect of failure to transfer net number of securities in respect of transactions), or proposed subsections 954X(2) or (3) (in respect of a default by the TDS nominee in connection with the transfer delivery service).

303. A proposed amendment inserts references to Divisions 6A, 6B and 6C in subsection 980(5) which provides that except as provided in that section nothing in Part 7.10 affects a right or remedy that a claimant has against a person other than SEGC.

Section 983 - Instalment PaymentsBackground

304. Subsection 983(2) defines "claim" for the purposes of subsection 983(1).

Proposed Amendment

305. The proposed amendment inserts references to Divisions 6A, 6B and 6C in the definition of "claim".

Proposed Section 983A - Power of Commission to modify effect of claims DivisionsBackground

306. This is a new section which is comparable to section 1084 (which relates to Divisions 2 to 6 of Part 7.12 - Offering Securities for Subscription or Purchase) and section 1113

(which relates to Divisions 1-3 of Part 7.13 - Transfer of Marketable Securities).

307. It is likely that further refinements and developments to clearance and settlements systems for securities will occur in the future. Such refinements and developments may require adjustments to the Divisions of Part 7.10 relating to claims.

308. The Commission has the discretion to modify the statutory provisions with respect to title to and transfer of securities (section 1113 and proposed section 1113A). The NCSC used its equivalent discretion to assist in the introduction of the pilot program of the FAST System.

309. There is at present no discretionary power to modify the National Guarantee Fund provisions. It is very likely, however, that modifications will be needed to adapt the language of Part 7.10 to developments in clearance and settlement procedures.

#### Proposed Amendment

310. Proposed section 983A would do this by empowering the Commission to declare that the provisions of a claims Division (defined in subsection 983A(6) as Divisions 6, 6A, 6B, 6C, 7 or 8) are to have effect in relation to particular transactions or class of transactions either generally or as otherwise provided as if specified modifications were made to the provisions (subsection 983A(1)). A declaration may relate to transactions entered into before or after the making of the declaration (subsection 983A(2)). The declaration must be gazetted (subsection 983A(4)).

**SCHEDULE 2 - AMENDMENTS OF THE CORPORATIONS LAW RELATING TO FUNDRAISING**

Introduction

311. Schedule 2 comprises a number of amendments to the fundraising provisions of the Law. These amendments are designed to clarify aspects of the operation of the Law which have given rise to concern since the Law commenced operation on 1 January 1991. They are essentially technical in nature, and do not alter the general thrust of the Government's fundraising reforms.

312. The major amendments deal with:

- (a) the application of the fundraising provisions to prospectuses for secondary sales;
- (b) the application of the prospectus provisions to trading of securities on the stock exchange;
- (c) the operation of the various defences to civil liability in respect of misstatements in, and omissions from, prospectuses; and
- (d) the obligation to keep books of accounts in relation to unit trusts, and other prescribed interest schemes.

(a) Application of prospectus provisions to secondary sales

313. The prospectus provisions of the Law are largely based on provisions which intended only to apply to primary offers of securities and secondary offers which are in the nature of a primary offer. Broadly speaking, a primary offer of securities involves an offer by a body corporate to issue new securities in itself. A secondary offer of securities involves an offer of existing (already issued) securities by a third party. It is now generally accepted that many of the prospectus provisions and in particular section 1018(1) apply to secondary transactions. This result has been reinforced by various amendments made to section 1018 in the course of the

passage of the Corporations Bill 1988 through Parliament and in particular the introduction of secondary trading exemptions for listed securities in subsection 1018(2) and (5).

314. As a result of comments received on the Exposure Draft Bill and in light of the Companies and Securities Advisory Committee's report on enhanced disclosure (referred to above), which was released during the exposure period for the Bill, the proposed amendment to subsection 1018(1) would not be proceeded with at this stage. It will be further considered in the context of consideration of that Committee's report.

315. Given the history of the fundraising provisions, some of them do not apply sufficiently clearly in regulating secondary offers of securities. These amendments are intended to clarify the application of the fundraising provisions to secondary sales of securities.

(b) Stock Market Trading

316. There has been some concern that, notwithstanding the specific exemptions, the prospectus provisions could apply to the trading of securities on the stock exchange. In particular, it has been argued that section 1030 which deems documents offering securities which have been issued for the purpose of onsale to be a prospectus, could apply to offers made on the Stock Exchange Automated Trading System (SEATS). Amendments are proposed in this Bill to make it clear that a prospectus is not required for on-market offers of quoted securities.

(c) Defences in relation to prospectus liability

317. A number of potential technical difficulties with the operation of the defences against civil liability in connection with false or misleading statements in, or omissions from prospectuses have been identified since the commencement of the Law. The Bill contains amendments aimed at overcoming these difficulties.

(d) Keeping of accounts for unit trusts

318. There has been some concern that a minor drafting change to subparagraph 1069(1)(e)(iii) in the Law, on one view, apparently now precludes trustees or representatives for prescribed interest arrangements from discharging their obligations to keep proper books of accounts by causing the management company to keep those accounts. Prior to 1 January 1991, it was the usual practice for trustees to do so. Pending the outcome of the present review of the regulation of prescribed interests and similar collective investment schemes which is being conducted by the Australian Law Reform Commission and the Companies and Securities Advisory Committee, an amendment is proposed which will make it clear that trustees are able to continue to cause the management company to keep the books of account.

Section 9 - DictionaryDefinition of "minimum subscription"

319. The definition of "minimum subscription" is to be amended to remove references to "offer to the public" test by omitting from the definition the words "to the public" and "or for which the public are invited to subscribe".

Insertion of new definitions

320. Four new terms are to be introduced into section 9:

- "excluded prospectus" is to be defined to mean a prospectus in relation to a primary offer or invitation for securities which is an excluded offer or excluded invitation.
- "primary prospectus" is to be defined to mean a written notice or other instrument inviting applications to subscribe for securities or offering securities for subscription and includes a document that is taken because of paragraph 1030(1)(a) to be a primary prospectus.

- "secondary prospectus" is to be defined to mean a written notice or other instrument inviting offers to buy securities or offering securities for purchase but excludes a document that is taken because of paragraph 1030(1)(a) to be a primary prospectus in relation to the securities.
  
- "seller" is to be defined to mean the person inviting offers to buy securities, or offering securities for purchase.

321. The above definitions are consequential upon amendments to the prospectus provisions in Part 7.12 of the Law which are designed to clarify the application of those provisions to the secondary sale of securities of a corporation and miscellaneous technical amendments.

#### Section 96 - Statement in a prospectus

322. This provision is to be repealed. There is a view that the provision enables the type of information required to be included in prospectuses by virtue of section 1022 of the Law to be simply incorporated by reference. In August this year, the ASC announced that it was of the view that the scope of section 96 was no greater than that of the previous corresponding provisions, namely subsections 107(4) and 108(2) of the Companies Act and Codes. Those were confined in their application to the determination of liability in respect of untrue statements in a prospectus.

323. Provision has been made along the lines of section 96 in proposed section 994 (see below) which is limited in its application to the prospectus liability provisions in Part 7.11 of the Law. These amendments do not and are not intended to restrict the ASC exercising its discretionary powers under section 1084 of the Law to permit issuers to incorporate material by reference in a prospectus by modifying the application of other provisions of the Law.

Section 244 - Statutory meeting and statutory report

324. Section 244 requires the holding of a meeting of shareholders for various purposes, after a company's initial issue of shares pursuant to a prospectus. As a result of the broad definition of prospectus in section 9, section 244 appears to apply in respect of the first document offering or inviting applications for shares in a company irrespective of whether that document was required to be lodged or registered under Part 7.12 Division 2 of the Law. In contrast, the corresponding provisions in section 239 of the Companies Act and Codes only applied in relation to the first prospectus which made offers to the public. The proposed amendment has the effect of limiting section 244 to prospectuses regulated under Part 7.12 Division 2 of the Law.

Proposed section 994 - Interpretation - Statement in a prospectus

325. This proposed provision to be contained in new Division 1 of Part 7.11, is based upon section 96 which is to be repealed (see above). For the purposes of determining civil or criminal liability in respect of a prospectus under Part 7.11 of the Law, a statement shall be taken to be in a prospectus if it is contained in a report or memorandum that appears on the face of, or is issued with, the prospectus or is incorporated by reference in it.

Section 996 - False or misleading statement in, or omission from, prospectus

326. Section 996 which is based on section 108 of the Companies Act and Codes provides, inter alia, that a person will be guilty of an offence for authorising or causing the issue of a prospectus containing a false or misleading statement or from which there is a material omission.

327. As currently drafted, concerns have been expressed that the provision applies to any document offering securities including those which may constitute excluded offers or excluded invitations.



328. The proposed amendment contained in proposed subsection (1A) provides that subsection 996(1) does not apply in relation to a statement or omission that is material only in respect of an excluded offer or excluded invitation (see above in relation to fundraising, under heading, 'Summary of the Principal Features of the Bill').

Section 1006 - Civil liability for false or misleading statement in, or omission from, prospectus

Subsection 1006(2)

329. This subsection is to be amended to apply only to persons against whom an action may be brought for the purposes of an action under section 1005 in respect of the issue of a primary prospectus (as opposed to a secondary prospectus - see next paragraph) in respect of which there is a material statement that is false or misleading or from which there is a material omission.

Paragraph 1006(2)(e)

330. This provision, as it is currently worded, appears to impose liability on experts (as defined in section 9) whose statements appear in prospectuses, irrespective of whether they have given consent under section 1032 of the Law to the issue of the prospectus.

331. Paragraph 1006(2)(e) is to be amended so that it only applies to experts who have given such consent.

Proposed subsection 1006(2A)

332. This proposed new subsection is based on subsection 1006(2). Like subsection 1006(2), it will apply for the purposes of identifying persons who are civilly liable for a prospectus which has a material misstatement or omission. However, while subsection 1006(2) applies in respect of primary prospectuses, this proposed subsection will apply in respect of secondary prospectuses. Under it, actions may be brought against the following persons:

- . the seller;
- . if the seller is a corporation, a person who was a director of the corporation at the time of the issue of the prospectus;
- . experts;
- . a person named with his or her consent in the prospectus as an auditor, banker, solicitor, stockbroker, sharebroker or underwriter of the seller or for or in relation to the sale of securities; and
- . other persons named with their consent in the prospectus as having performed a function in a professional, advisory or other capacity not mentioned above.

Sections 1007 to 1011

Introduction

333. These sections set out defences for the persons named in section 1006 as being civilly liable in respect of false or misleading statements in, or omissions from, a prospectus. A number of amendments are to be made to the sections, mainly to effect two purposes:

- to extend the sections to persons named in proposed subsection 1006(2A) in respect of secondary prospectuses; and
- to extend certain defences which extend only to false or misleading statements in a prospectus, to also cover omissions from a prospectus.

Section 1007 - No liability to person with knowledge of matter

334. Section 1007 is to be amended to include a reference to proposed new subsection 1006(2A) the effect of which will be that a person referred to in that subsection will not be liable if the person who suffered loss or damage knew that the statement was false or misleading or was aware of the omitted matter.

Section 1008 - Directors not liable in certain circumstances

335. Section 1008 provides specific defences for directors who would otherwise be liable under section 1005.

Subsection 1008(1)

336. Subsection 1008(1) is to be replaced by a new subsection which has the effect of:

- . extending the defences to persons who are directors of a seller corporation at the time of the issue of a secondary prospectus (persons referred to in paragraph 1006(2A)(b); and
- . limiting the application of the defences set out in section 1008 to actions under section 1005 in respect of a materially false or misleading statement in, or a material omission from a prospectus. The defences which relate to lack of knowledge of the issue of a prospectus or the false or misleading nature of the prospectus would not be appropriate in relation to other breaches of section 1005, which deals with any contravention of Part 7.11 or 7.12.

Subsection 1008(2)

337. Subsection 1008(2) is to be amended to clarify that the defence contained therein applies only to a person referred to in paragraph 1006(2)(c) of the Law, i.e., a person who authorised or caused himself or herself to be named and is named in a primary prospectus as a director or as having agreed to become a director either immediately or after an interval of time. The defence, which relates to the withdrawal before the issue of the prospectus of a consent to become a director, can have no sensible application to persons who are, directors at the time of issue (persons referred to in paragraph 1006(2)(b)).

Subsections 1008(4) and (5)

338. The defences set out in subsections 1008(4) and (5) are to be expanded to include defences for the purposes of an action under section 1005 in respect of a material omission from a prospectus. Currently, those defences apply only in respect of false or misleading statements, and do not apply in relation to omissions (cf. subsection 1006(1)).

339. Subsection 1008(4) is to be amended to include the defence that after the issue of the prospectus and before any allotment, issue or sale under the prospectus, the person on becoming aware of any omission from the prospectus withdrew the person's consent to the issue of the prospectus and gave reasonable public notice and explanation of that withdrawal.

340. Subsection 1008(5) is to be omitted. A comparable set of defences for directors which also apply in respect of omissions from prospectuses will be provided in proposed section 1008A (see below).

Proposed section 1008A - Directors not liable where they have reasonable grounds for believing prospectus to be correct

341. As noted above, existing subsection 1008(5) does not provide defences for directors in respect of omissions from prospectuses. In addition, it is arguable that in order to avoid liability under that provision in respect of any particular false or misleading statement it is necessary to make out the relevant defence in respect of every false or misleading statement in the prospectus. Proposed section 1008A overcomes both these difficulties.

342. Proposed subsection 1008A(1) is based on subsection 1008(1) but expressly provides that the defences in section 1008A apply in respect of omissions. It is also applicable to directors of a corporation which has issued a secondary prospectus.

343. Proposed subsection 1008A(2) is based on existing paragraph 1008(5)(b). It provides a defence for directors in

respect of defective statements (either false or misleading statements or omissions) made by or contained in reports of experts. The elements required to be proved in existing subparagraphs 1008(5)(b)(ii) are clarified in proposed paragraph 1008A(2)(d).

344. Proposed subsection 1008A(3) is based on existing paragraph 1008(5)(c). It provides a defence for directors in respect of defective statements made by an official person or is contained in a copy of or extract from a public official document.

345. Proposed subsection 1008A(4) is based on existing paragraph 1008(5)(a). It provides a defence for directors in respect of defective statements in prospectuses other than those relating to experts, official persons and public official documents dealt with in proposed subsections 1008A(2) and (3).

#### Section 1009 - Liability of experts

346. Section 1009 sets out defences for persons referred to in paragraphs 1006(2)(e), (g) and (h). It is to be amended as a consequence of the introduction of a regime for secondary prospectuses and to make miscellaneous technical corrections.

#### Subsection 1009(1)

347. Subsection 1009(1) currently defines "expert" for the purposes of section 1009 as including persons referred to in paragraphs 1006(2)(g) and (h). The subsection is to be repealed in consequence of other amendments proposed to be made to section 1009.

#### Subsection 1009(2)

348. Subsection 1009(2) limits the liability of persons referred to in paragraph 1006(2)(e), (g) or (h) in an action under section 1005 in respect of the issue of a primary prospectus to matters relating to their areas of special expertise. This subsection is to be amended to include

equivalent persons, referred to in proposed paragraphs 1006(2A)(c), (e) or (f) in respect of secondary prospectuses.

Paragraph 1009(2)(a)

349. Section 1006(2)(e) effectively imposes liability on an expert, not only when the prospectus contains a statement made by them but also when it contains a statement based on a statement made by them. Paragraph 1009(2)(a) appears to have the effect of excluding all liability for the latter kind of statement. It is to be amended so that persons referred to in paragraphs 1006(2)(e), (g) and (h) and proposed (2A)(c), (e) or (f) will also be liable for materially false or misleading statements in statements based on their statements.

Paragraphs 1009(2)(ba) and (b)

350. Proposed paragraph 1009(2)(ba) will make a person referred to in paragraph 1006(2)(e) or proposed paragraph (2A)(c) liable in respect of an omission of any material matter from a statement in a prospectus purporting to be made by the person in the capacity referred to in one of those paragraphs, or based on a statement made in that capacity. The proposed paragraph will complement paragraph 1009(2)(b), which deals generally with omissions of any material matter for which a person referred to in paragraph 1006(2)(g) or (h) or proposed paragraph (2A)(e) or (f) is responsible in the person's relevant capacity.

Subsection 1009(3)

351. Subsection 1009(3) is to be amended to provide that the defences in the subsection which are applicable to an expert in paragraph 1006(2)(e) are also to apply to an expert referred to in proposed paragraph 1006(2A)(c). Further, the defence in paragraph 1009(3)(c), currently available in respect of false or misleading statements, is to be extended so that it will also apply to omissions from statements made by experts.

Subsection 1009(4)

352. Subsection 1009(4) provides defences for persons referred to in paragraph 1006(2)(g) or (h) (auditors, bankers, solicitors and others with a professional, advisory or other role). It is to be amended to also apply to equivalent persons (as listed in proposed paragraphs 1006(2A)(e) and (f)) in relation to secondary prospectuses and to extend the defence to situations involving omissions of any material matters from a prospectus.

Section 1010 - Liability of persons named in prospectus etc.

353. Subsections 1010(1) and (2) are to be amended to provide that the defence in section 1010 applies in relation to the persons referred to in proposed paragraphs 1006(2A)(d), (e) and (f).

Section 1011 - No liability for mistake etc. if reasonable precautions taken

354. Subsection 1011(1) is to be amended to also provide the defences available under that subsection to persons referred to in proposed paragraph 1006(2A)(a) (the seller) or (d) (stockbrokers, sharebrokers and underwriters) in respect of a secondary prospectus.

Subparagraph 1017A(3)(b)(iii) and paragraph 1017A(4)(b)

355. Subparagraph 1017A(3)(b)(iii) and paragraph 1017A(4)(b) provide for exemptions from the general requirement to register a prospectus where certain securities are issued by a listed corporation (or an approved unlisted corporation) to employees of the corporation. These exemptions are to be broadened to cover the case where the securities are issued to employees of a body corporate that is related to the corporation. This means that offers to employees of the subsidiaries of the listed corporation will also have the benefit of the exemption from registration.

Paragraph 1018(5)(b)

356. At present no listing rules have been prescribed for the purposes of subsection 1018(5)(b)(i) and (ii). This has resulted in concern that the exemption in subsection 1018(5) is as a result generally unavailable. The provision is to be amended, for the purposes of dispelling such doubt, to make it clear that the exemption for quoted securities provided by subsection 1018(5) is available even if no listing rules have been prescribed for that provision.

Proposed subsections 1018(7A), (7B) and (7C)

357. The grandfather exemption in subsection 1018(2) is only available where securities have been continuously "listed for quotation" since immediately before the commencement of the Law. One point of uncertainty is whether it is available in relation to securities of a class which immediately before that commencement 'or at some stage since' was or has been temporarily suspended from quotation.

358. In order to clarify this situation, proposed subsection 1018(7A) is being inserted which will provide that for the purposes of subsection 1018(2), issued securities are not to be regarded as not being a class of continuously listed securities merely because at any stage prior to the relevant offer or invitation, the quotation of the securities was temporarily suspended. However, the exemption will not be available if the corporation is removed from the official list of a stock exchange and later readmitted to that list (proposed subsection (7B)).

Section 1020 - Forms of application for securities to be attached to prospectus

359. Section 1020 currently provides that a person must not issue a form of application for securities of a corporation unless the form is attached to a prospectus and a copy of both the form and the prospectus have been lodged with the ASC. The provision currently applies to primary offers only.



360. The section is to be amended so that it will also apply to secondary trading of securities for which a form of offer to buy will be required.

Section 1021 - Specific provisions applicable to all prospectuses

361. Section 1021 prescribes content requirements applicable to all prospectuses.

Subsection 1021(5)

362. Subsection 1021(5) currently provides that a prospectus must contain a statement that no securities will be allotted or issued on the basis of the prospectus later than 6 months after the date of issue of the prospectus. The provision currently applies to primary offers only.

363. The subsection will be amended so that the life of the prospectus specified therein will apply to both primary and secondary prospectuses.

Subsection 1021(6)

364. Subsection 1021(6), which requires a prospectus to contain particulars of the interests of certain persons involved with the promotion or formation of a company, is to be amended so as to specify that that provision will apply only in respect of a primary prospectus.

Proposed subsection 1021(6A)

365. Proposed subsection 1021(6A) will provide that, in relation to a secondary prospectus, where the seller is not a corporation, the secondary prospectus must include an address in Australia for the purposes of proposed section 1029A (see below).

Subsection 1021(8)

366. The subsection is to be amended to extend the list of classes of prospectuses in respect of which the Corporations Regulations might prescribe additional content requirements, to include both primary and secondary prospectuses.

Subsection 1021(9)

367. It is proposed to repeal this subsection which is to be replaced by proposed section 1022A (see below).

Subsection 1021(13)

368. Subsection 1021(13) currently provides that a prospectus must be signed by every director and every person who is named in it as a proposed director, or by a person who is authorised to sign on their behalf.

369. The subsection is to be amended to specify that the requirement specified therein will apply to a primary prospectus only. The equivalent provision in respect of secondary prospectus will be proposed subsection 1021(13A).

Proposed subsection 1021(13A)

370. Proposed subsection 1021(13A) will require a seller of securities of a corporation to sign the secondary prospectus in relation to which the securities are offered for purchase or for which invitations for offers to buy the securities are made.

Section 1022 - General provisions applicable to all prospectuses

371. Section 1022 requires specific information to be included in a prospectus and requires the prospectus to contain such information as investors and their professional advisers would reasonably require and reasonably expect to find in a prospectus for the purpose of making an informed investment decision.

372. Subsection 1022(2) provides a guide to the preparers of a prospectus about the information which should be included. They should include all relevant information which is known to them, or of the advisers involved in compiling the prospectus, or which is reasonable for any of those persons to obtain. In nominating the relevant persons, the section currently refers to those listed in subsection 1006(2). Clearly a person making a secondary offer could not be expected to have or necessarily be able to obtain information known to the directors of the corporation which issued the securities. Consistent with the proposed amendment to confine the application of subsection 1006(2) to primary prospectuses, paragraph 1022(2)(a) is to be confined to such prospectuses.

373. Proposed paragraph 1022(2)(ba) will require the inclusion in a secondary prospectus of such information as is known to persons referred to in proposed paragraph 1006(2A)(a) to (f).

Proposed section 1022A - Conditions requiring waiver of requirement etc. void

374. This proposed provision is based upon subsection 1021(9), which will be repealed. Subsection 1021(9), which repeats subsection 98(6) of the Companies Act and Codes, renders void any condition binding an applicant for securities to waive compliance with, among other things, any of the prospectus content rules. Under the Law, those rules appear in two sections, namely sections 1021 and 1022. However, subsection 1021(9) only applies in relation to the largely formal prospectus content requirements set out in section 1021 and not the more substantive requirements set out in section 1022. It is proposed to remedy this situation by repealing subsection 1021(9) and enacting a provision which will apply to both sections 1021 and 1022 in respect of both primary and secondary prospectuses.

Sections 1023 - Special provisions applicable to prospectuses in relation to debentures

375. Section 1023 requires, among other things, a corporation which issues debentures to give a written acknowledgement of

indebtedness within 2 months to investors. It will be amended so that it applies only in relation to a primary prospectus in relation to debentures of a corporation.

Section 1024 - Supplementary prospectuses

376. Section 1024 requires the lodgement of a supplementary prospectus with the ASC where, during the lifetime of a prospectus that has been lodged with the ASC, there is a significant change affecting any matter that should be included in the prospectus. The supplementary prospectus is to contain particulars of the change or new matter.

Paragraph 1024(1)(b)

377. As currently worded, paragraph 1024(1)(b) seems to be confined in its operation to primary offers. It is proposed to amend the paragraph so that it also extends to secondary offers.

Subsection 1024(3) and paragraph 1024(4)(a)

378. Subsections 1024(3) and (4) provide for the situation where the person who lodged the prospectus is not aware of a significant change affecting any matter required under subsection 1022(1) to be included in the prospectus or a significant new matter arises, the inclusion of information in respect of which would have been required had it arisen when the prospectus was being prepared. In such a case, a person who is named in the prospectus or otherwise authorises or causes the issue of the prospectus, and is aware of the change or new matter, is required to give notice of the change or new matter to the person who lodged the prospectus.

379. By including cross-references to the persons referred to in proposed subsection 1006(2A), the proposed amendments will extend these requirements to secondary prospectuses.

Subsection 1024(7)

380. This subsection lists those references in the Law to a 'prospectus' which are to be deemed to include a reference to a supplementary prospectus. The subsection will be amended to omit the reference to section 96, which is to be repealed, and to insert references to proposed new sections 994 and 1029A and subsection 1021(13A).

Section 1025 - Certain notices etc, not to be publishedSection 1026 - Certain reports referring to debentures not to be published

381. Sections 1025 and 1026 regulate the publication of advertisements and other reports in respect of offers of securities. It is proposed that they be amended to make it clear that they only apply in relation to primary offers of securities. Secondary offers of securities are to be regulated by proposed section 1027A (see below).

Proposed section 1027A - Application of sections 1025, 1026 and 1027 to sales of securities

382. Proposed section 1027A facilitates the regulation of advertising and the publication of other reports in respect of secondary offers of securities. The provision enables the making of regulations to modify the effect of sections 1025 and 1027 to apply in relation to such offers.

Section 1029 - Documents to be kept by corporations

383. Section 1029 currently requires certain documents in respect of which a prospectus has been lodged with the ASC, to be kept by a corporation at the registered office of the corporation in Australia for a period of at least 6 months after lodgement of the prospectus.

384. Section 1029 will be amended so that it applies only to a corporation in respect of which a primary prospectus has been lodged with the ASC. Proposed section 1029A will address the

equivalent matters concerning secondary prospectuses.

Proposed section 1029A - Secondary prospectuses - documents to be kept

385. This proposed section is based on section 1029 of the Law. It will provide that the seller in relation to a secondary prospectus must cause a verified true copy of any consent required in respect of the issue of the prospectus and a verified true copy of, or statement concerning every material contract (if any) referred to in the prospectus to be deposited at the relevant address within 7 days after lodgement of the prospectus with the ASC (proposed subsection 1029A(1)). The copies of the documents so deposited must be kept at the relevant address for a minimum of 6 months after lodgement of the prospectus, during which time they may be inspected free of charge (proposed subsection 1029A(2)).

386. The relevant address, where the seller is a corporation, is the registered office of the corporation and, in any other case, is the address specified in the prospectus (proposed subsection 1029A(3)).

Section 1030 - Document containing offer of securities for sale deemed to be a prospectus

Subsection 1030(1) and paragraph 1030(1)(a)

387. Subsection 1030(1) provides that where a corporation allots or issues securities to a person for the purpose of them being offered for sale, any document by which the sale is made is deemed to be a prospectus. The proposed amendment to paragraph 1030(1)(a) will have the effect that, where subsection 1030(1) operates on a document, the document will be deemed to be a primary prospectus.

388. The subsection will also be amended to specify that section 1030 will be subject to proposed subsection 1030(1A) (see below), which will exclude screen trading on SEATS from the operation of section 1030.

Proposed subsection 1030(1A)

389. In view of the extended definition of 'document' in section 9 of the Law, there is some concern that transactions on SEATS could be subject to section 1030. In order to avoid any doubt, section 1030 is to be amended to make clear that it does not apply in relation to an offer for sale or an invitation to make an offer to buy, if the offer or invitation is made or issued at an official meeting of a stock exchange, in the ordinary course of trading on the stock market of that stock exchange. However, section 1030 will continue to apply to off market transactions in listed securities such transactions include those that, when reported to the relevant stock exchange, are, under the business rules or listing rules of that stock exchange, described as 'special'.

Subsection 1030(7)

390. The proposed amendment to this subsection is consequential upon the inclusion of proposed subsection 1030(1A).

Section 1031 - Allotment or issue of securities where prospectus indicates application for quotation on stock marketBackground

391. As it is currently worded, section 1031 only applies to a prospectus for a primary offer. Section 1031 provides that any allotment or issue of securities will be void and any application moneys must be repaid if the prospectus indicates that an application has been, or is proposed to be made, for listing of the securities, and the listing is not achieved within the specified time.

Proposed amendments

392. The section will be amended so that it has a corresponding effect in relation to a prospectus for a secondary sale, except that:

- . the liability to repay money under subsection 1031(2) if an application for listing is not made to, or granted by, the exchange within the prescribed time limits, will be imposed on the seller (and where the seller is a corporation, the seller and its directors);
- . subsection 1031(6) will apply in respect of the seller and will require the seller to keep all application moneys in a separate bank account, pending the decision of the stock exchange on whether to quote the relevant securities; and
- . subsections 1031(7) (as is to be amended) and (8) should continue to apply to directors of the corporation which originally issued the securities.

Subsection 1031(11)

393. A new term, "responsible person", will be included in subsection 1031(11). In relation to a primary prospectus, the term "responsible person" means the corporation and in relation to a secondary prospectus the term means the seller.

Section 1033 - Order to stop issue of securities

394. Section 1033 enables the ASC to make orders stopping the issue of securities to which a prospectus relates in the circumstances stipulated in subsection 1033(2). While an order is in force, Part 7.12 Division 2 applies as if the prospectus had not been lodged and no one is entitled to lodge a further prospectus in relation to the securities other than a supplementary prospectus under section 1024 (subsection 1033(7)).

395. Subsection 1033(1) and paragraph 1033(7)(b) are to be amended so that section 1033 applies to both primary and secondary prospectuses in the manner described above. However, in the case of a secondary prospectus, a person will be able to lodge a further secondary prospectus in relation to securities that are or include securities to which the



first-mentioned secondary prospectus the subject of the order relates, provided the seller is not the seller nor an associate of the seller in relation to the first-mentioned secondary prospectus.

Section 1035 - Prohibition of allotment unless minimum subscription received

Subsection 1035(1)

396. The proposed amendment is consequent upon the introduction of proposed subsection 1035(1A).

Proposed subsection 1035(1A)

397. Section 1035 prohibits the allotment of securities unless the minimum subscription has been reached. The previous corresponding provisions in subsections 110(1) to (4) of the Companies Act and Codes only applied where shares had been offered to the public. The proposed amendment will bring section 1035 broadly into line by effectively providing that it does not apply in relation to excluded issues, offers and invitations.

Section 1036 - Repayment of subscriptions

398. The proposed amendment is consequent upon the introduction of subsection 1035(1A).

Section 1038 - Restrictions on varying contracts referred to in prospectus

399. This section provides that the terms of a contract referred to in a prospectus cannot be varied before the statutory meeting unless the variation is made subject to the approval of the statutory meeting. The corresponding provisions in section 112 of the Companies Act and Codes only applied in relation to prospectuses which made offers to the public.

400. The provision is to be amended so that it will apply only to primary prospectuses other than those relating to excluded offers or invitations.

Section 1039 - Certain conditions void

401. Section 1039 provides that any condition which attempts to have the effect of waiving compliance with any requirement of Part 7.12 Division 3 is void.

402. The section is to be amended so that it applies to both applicants for, and buyers, of securities of a corporation.

Section 1040 - Securities not to be allotted or issued after 6 months

403. Section 1040 provides that the allotment or issue of securities must not be made more than 6 months after the issue of the relevant prospectus. It currently applies to primary sales only. The corresponding provisions in subsection 110(12) of the Companies Act and Codes only applied in relation to prospectuses for offers to the public.

404. Section 1040 is to be amended to make the provision also applicable to secondary sales. This will be achieved by specifying that the prospectus referred to in current section 1040 is to be a primary prospectus and by inserting a new subsection (proposed subsection 1040(2)) which will prohibit the seller in relation to a secondary prospectus from selling securities on the basis of the prospectus unless not more than 6 months has elapsed since the issue of the prospectus referred to therein.

405. In addition, the proposed amendment will have the effect of ensuring that section 1040 does not apply to excluded issues, offers and invitations.

Section 1041 - Validity of allotment or issue of securities

406. Section 1041 provides that an allotment or issue of securities of a corporation is not void or voidable merely

because it occurred more than 6 months after the issue of the relevant prospectus. The provision as currently worded does not apply to secondary sales.

407. The provision is to be amended so that it will also apply to secondary sales of securities.

Section 1042 - Liability of directors for loss or damage

408. Section 1042 currently provides that a director of a corporation who knowingly contravenes a provision of Part 7.12 Division 3 will be liable (which liability is not dependent upon a conviction of an offence in respect of the contravention) to compensate the corporation and any person to whom an allotment has been made in contravention of Division 3 for any loss, damage or costs that the corporation or the person has suffered or incurred because of the allotment.

409. As section 1042 provides a more limited right to compensation than does section 1005, it is considered that civil liability for contravention of Part 7.12 Division 3 should be regulated by section 1005 in respect of both primary and secondary transactions. Accordingly, it is proposed to repeal section 1042.

Section 1043 - Application moneys to be held in trust

410. Subsection 1043(1) provides that all moneys received from an applicant for securities of a corporation pursuant to a prospectus must be held in trust until the securities have been allotted to that applicant. The corresponding provisions in section 111 of the Companies Act and Codes only applied in relation to offers of securities to the public.

411. Subsection 1043(1) is to be amended so that it applies only in relation to primary offers other than excluded offers.

Section 1066 - Approved deedsParagraph 1066(1)(a)

412. Paragraph 1066(1)(a) provides that a deed is an approved deed if approval has been granted to it under the Corporations Law or a corresponding previous law. The amendment proposed to paragraph 1066(1)(a) is to make clear that, where approval has been given to a deed, it remains an approved deed only if the approval has not been revoked (cf paragraph 1066(1)(b)).

Subsection 1066(2)

413. Subsection 1066(2) was originally introduced to make it clear that the management company could comply with a buy-back covenant contained in a deed which ceased to be an approved deed without contravening subsection 1065(1) which prohibits the issues, offers or invitations in respect of prescribed interests without an approved deed. As it stands subsection 1066(2) has given rise to some concern about the extent of obligation on the management company to comply with covenants other than the buy-back covenant after a deed has ceased to be an approved deed.

414. Subsection 1066(2) is to be omitted and replaced by a new subsection which will make it clear that a management company is able to comply with a buy-back covenant in such circumstances without contravening subsection 1065(1) without giving rise to any implication that compliance with other covenants is optional. It should be noted that by subsection 1073(1A) failure to comply with any covenant in a deed is a contravention of the Law.

Subparagraph 1069(1)(e)(iii) and paragraph 1069(1)(f)Background

415. By subparagraph 1069(1)(e)(iii) of the Law, trust deeds for prescribed interests are required to contain a covenant binding the trustee or representative 'to keep proper books of account in relation to those prescribed interests'. The

previous corresponding provisions, subparagraph 168(1)(c)(ii) of the Companies Act and Codes, bound the trustee or representative to 'keep or cause to be kept proper books of account'. Prior to 1 January 1991, it had been the practice for trustees to cause the management company to keep the books of account. The change of wording has given rise to a suggestion that trustees must now keep the accounts themselves. Such a view of the Law has been adopted by the ASC which has, exercised its discretionary powers under subsection 1069(3) of the Law to grant trustee's relief from this perceived obligation until 31 December 1991.

416. Earlier this year, the Attorney-General asked the Australian Law Reform Commission and the Companies and Securities Advisory Committee to review the regulation of prescribed interests and other collective investment schemes. The terms of reference included consideration of what should be the powers, duties and responsibilities of managers and trustees. The Commission and the Committee are to report by 1 November 1992.

#### Proposed amendment

417. It would clearly be undesirable for trustees to be required to assume the account keeping role from 1 January 1991, which is likely to involve considerable expense while the long term position is under review. Pending the outcome of the review, the proposed amendment will make it clear that trustees will be able to continue to discharge their obligation to keep proper books of accounts by causing the management company to do so. It should be noted that where such arrangements are made, trustees are, as a matter of trust law obliged to properly supervise the management company in discharging this function.

418. For similar reasons, paragraph 1069(1)(f) will be brought into line with paragraph 168(1)(ca) of the Companies Act and Codes.

Section 1073 - Consequences of contraventionSubsection 1073(1A)

419. This subsection provides that a person must not contravene a covenant contained, or taken to be contained in a deed that is or has at any time been, an approved deed.

420. Section 1073(1A) only applies in relation to deeds which are or at any time have been an approved deed. Subsection 1069(7) deems the covenants in subsection 1069(1) to be contained in deeds which have never been approved deeds. Further, by subsection 1069(8), those covenants are deemed to be given by a deed where no deed exists and Part 7.12 Division 5 or a corresponding previous law was contravened as a result.

421. Subsection 1073(1A) is to be amended to apply in relation to the circumstances to which subsections 1069(7) and (8) apply.

Subsection 1073(2)

422. Subsection 1073(2) provides that where there is an offer or invitation in respect of prescribed interests in contravention of a provision of the Law, then any resulting contract is voidable at the option of a party other than the management company. There has been concern that the avoidance of a contract may, especially where the contravention of the Law is minor, be a disproportionate result. The proposed amendment to section 1073 seeks to ameliorate this result by providing a mechanism for the Court to affirm a voidable contract in certain appropriate cases.

423. Subsection 1073(2) is to be amended to require any avoidance of the contract to be made by notice in writing to the management company.

Proposed subsections 1073(3) and (4)

424. Proposed subsection 1073(3) provides that where such a notice is received the obligations of the parties under the contract are suspended:

- . for 21 days; and
- . during any period while the issue of whether the contract should be affirmed under proposed section 1073A is before the Court.

425. Proposed subsection 1073(4) provides that a notice under subsection 1073(2) avoiding a contract takes effect 21 days after the notice is given or where an application has been made to the Court - after that application has been finally determined.

Proposed section 1073A - Court may affirm voidable contract where breach is not material

426. Proposed section 1073A enables the Court to declare a notice under subsection 1073(2) avoiding a contract to be of no effect where the contravention of the Law was a minor or insubstantial breach of the prospectus provisions which did not, or is unlikely to, materially prejudice the person who gave the notice and in the circumstances it is just and equitable to do so.

427. Applications must be made under proposed section 1073A within 21 days of receiving a notice under subsection 1073(2) or within a longer period allowed by the Court.

Section 1079 - Restriction on written invitation or offers in respect of securities

Section 1080 - Particulars to be included in statement

428. Sections 1079 provides that subject to certain circumstances, a person must not issue written invitations to buy securities nor written offers for purchase of securities

to persons other than persons whose ordinary business is the buying or selling of securities unless the invitation or offer is accompanied by a statement in writing which complies with the section. Section 1080 specifies the contents of the statement referred to in section 1079.

429. Sections 1079 and 1080 were originally intended to provide an alternative regime for regulating secondary offers of securities. However, as the proposed amendments will provide for such regulation, the need for sections 1079 and 1080 will be negated. These sections are therefore to be repealed.



**SCHEDULE 3 - AMENDMENTS OF THE CORPORATIONS LAW RELATING TO  
REGISTRATION NUMBERS OF COMPANIES AND REGISTRABLE BODIES**

Background

430. The purpose of the Australian Company Number (ACN) and Australian Registrable Body Number (ARBN) is to provide a simple way of assisting persons dealing with companies, foreign companies or registrable companies to identify those bodies. The ACN and the ARBN are a unique nine digit identifying number for each Australian company, foreign company and other registrable body.

431. A moratorium on the use of an ACN or ARBN currently applies to the requirement for companies, foreign companies and other registrable bodies to display their ACN or ARBN on public documents or eligible negotiable instruments under subsections 219(3) and 362(4) of the Law. However, companies and bodies are still required to display their ACN or ARBN on their common seal and any document that is required by the Law to be lodged with the ASC. This moratorium expires on 31 December 1991.

432. The amendments proposed to the ACN and ARBN provisions are:

- . cash register receipts produced by an electronic machine and which set out information which is stored in the machine will not be required to contain the ACN or ARBN of the company or body issuing the receipt;
- . alternative abbreviations for ACN and ARBN (without full stops) will be available for use by companies and bodies in all official documents;
- . the definition of 'public document' has been redrafted to clarify that, other than official documents of a company, the requirement for an ACN or ARBN to appear on company documents will only apply to documents that are signed or issued in the course

of, or for the purposes of, a particular transaction or dealing. An advertising document issued by a company or on behalf of a company which is not also used as a document for undertaking some form of transaction or is not required by law to be published will not be required to contain the company's ACN or ARBN. A label or package will also not be required to set out an ACN or ARBN;

the ASC will be empowered to exempt companies or bodies that operate in transportation of persons or goods from being required to place an ACN or ARBN on documents that are used in connection with transportation where it is necessary or desirable in the interests of promoting or maintaining consistency in international practice relating to the form, content or use of transport documents.

#### Section 9 - Dictionary

433. Section 9 is amended by the inclusion of a definition of 'abbreviation' as a consequence to proposed section 99A and by the inclusion of a definition of 'public document' as a consequence to proposed section 88A.

#### Proposed section 88A - definition of public document

434. The definition of "public document" is omitted and a new definition is substituted in proposed section 88A.

435. The purpose of this amendment is to clarify which company documents of a company and a registrable body are required to contain an ACN or an ARBN. The Law requires that a company set out its ACN immediately after its name on its common seal and on every public document and negotiable instrument of the company that is signed, issued or published (section 219). A similar provision applies to registrable bodies (section 362).

436. Paragraph 88A(1)(a) of the new definition makes it clear that a document prepared by a company or published or issued on behalf of a company which is lodged, or required to be

lodged with the ASC by the Law or the ASC Law, or is signed, issued or published by a company, for the purposes of the Law, the ASC Law or any other Australian Law will be required to contain an ACN.

437. Paragraph 88A(1)(b) of the new definition focuses the requirements for the ACN to those documents of a company which are used in the course of, or for the purposes of, a particular transaction or dealing. In effect any advertising which is not required by paragraph 88A(1)(a) or 88A(1)(c) of the new definition will not be required to contain the ACN of the company unless it is used in the course of a particular transaction.

438. Paragraph 88A(1)(c) of the new definition repeats the categories of documents that will be regarded as official business documents of a company and which will be required to contain an ACN.

439. The purpose of proposed subsection 88A(2) is to ensure that a public document does not include a label or a package. Subsection 88A(3) defines the meaning of 'apply', 'label' and 'package' for the purposes of subsection 88A(2).

#### Proposed section 99A - Abbreviations containing full stops

440. This proposed provision is an interpretative provision to take account of the introduction of an alternative for various abbreviations used in the Corporations Law.

#### Section 102A - Application not to be granted unless applications also made under corresponding laws

441. This section provides that applications for registration by registrable Australian bodies or foreign companies are not to be made unless it is under the Corporations Law of each jurisdiction. An application for an exemption to the ASC in relation to transport documents will be required to comply with this section. This will not result in any practical inconvenience as an application can be made under the Law of each jurisdiction by expressing it to be made under "the

Corporations Law" in which case it will be taken to be made under the Law of each jurisdiction.

Subsection 219(3) - Publication of company's name and registration number

442. This is a consequential amendment for the introduction of proposed Division 2 of Part 4.2.

Subsection 362(4) - Publication of name, etc.

443. This is a consequential amendment for the introduction of proposed Division 2 of Part 4.2.

Subparagraph 362(2)(c)(ii) and Paragraph 362(9)(b)

444. The proposed amendments make a minor correction to the provisions by omitting "abbreviated" and substituting "abbreviation".

PART 4.2 NAMES AND REGISTRATION NUMBERS

445. A new division, proposed Division 2 headed 'Exemptions from requirements to publish registration numbers' will be inserted into Part 4.2.

Proposed section 383B - Machine-produced receipts

446. This provision exempts company receipts, which are produced by an electronic cash register or other device and which set out information which is stored in the device, from the requirement for the ACN of the company to appear on the receipt. The amendment will also exempt registrable bodies from having to include their ARBN on similar receipts.

447. The purpose of this amendment is to meet the concerns of many businesses who pointed out that having to alter cash register equipment or computer software to include the ACN would in many cases be very expensive and perhaps impossible without replacement of the registers.

448. It should be noted, however, that all companies are still required to place their name on all receipts issued by the company.

Proposed section 383C - Transport documents

449. The purpose of this provision is to facilitate the use of internationally recognised transport documents by companies operating in Australia.

450. A company or a group of companies will be able to apply to the ASC for an exemption from the requirement to include an ACN or ARBN on documents issued by the company or body (proposed subsection 383C(1)).

451. The ASC must be satisfied that such an exemption is necessary or desirable in the interests of promoting or maintaining consistency in international practices relating to the form, content or use of transport documents (proposed subsection 383C(2)).

452. Proposed subsection 383(3) sets out the requirements for such an application.

453. Proposed subsection 383(4) is a constitutional provision.

454. The ASC is empowered to ask for further information in relation to an application (proposed subsection 383C(5)) and to give an exemption subject to specified conditions. The ASC will be able to specify conditions that are necessary or desirable to ensure that the registration number of a body can easily be found out by persons to whom the company issues or publishes documents (proposed subsection 383C(6)). Proposed subsection 383C(7) gives an example of the principle by stating that a company could be required to publicly disclose its ACN at the place where the specific documents which are exempted are issued.

455. Proposed subsections 383C(9) and (10) provide for the enforcement of these provisions.

456. The ASC is empowered to revoke an exemption (proposed subsection 383C(10)) and the exemption is to take effect either on the date of application or the publication of the exemption in the Gazette whichever happens later (proposed subsection 383C(11)).

457. Proposed subsection 383C(12) defines various terms used in the provision.

#### Schedule 3 - Penalties

458. Schedule 3 which sets out the penalties applying to a contravention of the Law is amended by inclusion of a penalty for breach of proposed section 383C. The penalty for a breach of proposed section 383C is to be a penalty of \$1,000 or imprisonment for 3 months. This is the same penalty that applies to other ACN and ARBN provisions.

**SCHEDULE 4 - AMENDMENTS OF THE CORPORATIONS LAW RELATING TO  
REGISTRATION OF CHARGES**

459. This Schedule contains a series of technical amendments to Part 3.5 of the Corporations Law (which deals with the registration of charges). The amendments will:

- (a) ensure that the provisions apply to the same extent as the corresponding provisions in the Companies Act and Codes;
- (b) give appropriate recognition to the move (under the new national scheme for corporate regulation) to a computerised national register of charges; and
- (c) facilitate the operation of the provisions in respect of bodies formerly registered under the Companies Act and Codes, and in respect of bodies which transfer the place of their incorporation.

Section 9 (paragraph (b) of the definition of "company")

460. Section 273 of the Corporations Law addresses the relationship between Part 3.5 and specified State laws. The proposed amendment to the definition of "company" will ensure that section 273 addresses not only charges over property of a company, but also charges over property of a recognised company and charges over property of other bodies which are registered under the Corporations Law. The amendment will have the effect that the charges provisions in the Corporations Law will apply to the same bodies as the equivalent provisions in the Companies Act and Codes.

Subsection 261(1) (definition of "company")

461. The amendment to the definition of "company" in section 9 makes this special definition of "company" unnecessary.

Subsection 265(4)

Paragraph 265(5)(a)

Subsection 265(5)

Paragraph 265(6)(a)

Subsection 265(9)

Subsection 272(1)

Subsection 272(3)

462. The move to a national computerised register of charges, a major benefit of the new national scheme, means that references to entries being made "next to" other entries in the charges register have become inappropriate. These amendments substitute words which are more appropriate, given the computer technology involved.

Paragraph 273(1)(c)

463. This amendment corrects a grammatical error.

Paragraph 273(4)(a) and (b)

464. Subsection 273(4) is intended to allow regulations to modify the application of specified State laws dealing with chargeable instruments, so as to accommodate the approach taken in the Corporations Law to charges over the property of corporations. No regulations have yet been made under this provision. However, the regulation-making power needs to be available, not only in relation to charges over property of bodies registered in the local jurisdiction (which is the current reach of the provision), but also in relation to charges over property in that jurisdiction of bodies registered under the Corporations Laws of other Australian States and Territories. The proposed amendment achieves this extension.



Paragraph 275(2)(c)Paragraph 275(2)(d)Subsection 275(4)

465. These amendments make clear that the "previous law" referred to in section 275 (which deals with the application of the Corporations Law charges provisions to charges of a company incorporated under the former cooperative scheme) are references to the previous law of the local jurisdiction.

Section 276

466. This amendment repeals existing section 276 and replaces it with 3 sections, each of which deals with a situation where the status of a body changes, and addresses the consequences of that change for the operation of the charges provisions.

Proposed section 275A - Charges of bodies to which section 365B applies

467. As mentioned above, section 275 deals with the application of the Corporations Law charges provisions to a company which had been registered under the previous law of the local jurisdiction. Proposed section 275A is a counterpart provision which addresses the application of the Corporations Law charges provisions to bodies other than companies (i.e. foreign companies and registrable Australian bodies) which had been registered under the previous law of the jurisdiction. The proposed section applies the Corporations Law charges provisions to such a body as if the Corporations Law had always been in operation and the body had always been registered under the Corporations Law. As a safeguard against unintended consequences, subsection 275A(3) provides that nothing in the operative provision makes a person guilty of a contravention of the Corporations Law in respect of an act or thing done, or an omission made, before the commencement of the Corporations Law on 1 January 1991.

Proposed section 276 - Charges of Division 3 company

468. A "Division 3 company" is a body which comes to be registered as a company, having previously existed as a "non-company" (i.e. a foreign company or a registrable Australian body). An example of a Division 3 company would be a company incorporated in another country which transferred its place of incorporation to Australia.

469. The proposed section deals with the application of the Corporations Law charges provisions to charges given by a Division 3 company which, at the time when the body becomes a company, are already registered under a Corporations Law of another jurisdiction.

470. For example, an overseas body may have registered charges in an Australian State in respect of property located in Australia. If the body was subsequently to become a Division 3 company under the Corporations Law of another State, proposed section 276 will have the effect that those charges will be deemed to have been registered under the Corporations Law of that other State.

471. Proposed section 276 is similar to existing section 276, but it incorporates a number of technical changes in recognition of the national administration of the charges provisions by the Australian Securities Commission.

Proposed section 276AA - Charges of Division 4 company

472. A "Division 4 company" is a company incorporated in one Australian jurisdiction which transfers its place of incorporation to another jurisdiction. As with proposed section 276, proposed section 276AA has the effect that charges registered in the former jurisdiction but not in the new jurisdiction are deemed to have been registered in the new jurisdiction.

Section 276A

473. This amendment makes it clear that the reference in section 276A to the Corporations Law of another jurisdiction includes a reference to the Regulations made pursuant to that Law.

SCHEDULE 5 - MISCELLANEOUS SUBSTANTIVE  
AND TECHNICAL AMENDMENTS

Section 9 (paragraph (a) of the definition of "clients'  
segregated account")

474. The proposed amendment to the definition of "clients' segregated account" clarifies that the account can be maintained, whether in Australia or elsewhere with an Australian bank.

Section 85A - Persons etc

475. This amendment substitutes "Law" for "law".

Paragraph 224(1)(d) - Vacation of Office

476. Paragraph 224(1)(d) is to be amended to remove an erroneous reference to subsection 229(2). The paragraph as amended reflects paragraph 222(1)(d) of the Companies Act 1981, and will ensure that, where a director is prohibited from taking part in the management of a body corporate because of having been convicted of a particular offence (as enumerated in subsection 229(3)), that director's office is also thereby vacated.

Subsection 240(4) - Secretary

477. Subsection 240(4) is to be amended to provide that a company's secretaries need not all be Australian residents, but that a company must have at least one secretary who is resident in Australia. The provision as amended will reflect subsection 236(4) of the Companies Act 1981.

Paragraph 318(2)(d) - Contravention of Part 3.6

478. The proposed amendment to paragraph 318(2)(b) is to correct a typographical error, so that the provision will henceforth refer as intended to the defrauding of "members or creditors", rather than as at present "members of creditors".

Section 369 - Use of Words "Limited" and "No Liability"

479. The proposed amendment omitting the word "company" from the section reflects the fact that bodies corporate may be duly incorporated with limited liability or no liability under Australian laws which are not "Australian company laws" - for example, co-operatives legislation. As a result of this amendment, such bodies will be able to give notice of the fact of their limited liability or no liability status by the inclusion of the relevant words at the end of their names, as they are generally required to do by the legislation under which they are incorporated. The other amendment to this section merely corrects a grammatical error.

Section 408B - Application of Parts 3.6 and 3.7

480. The proposed amendments to section 408B clarify the effect of that section, that where a prescribed corporation, such as a bank, is controlled by a company, Parts 3.6 and 3.7 apply to that prescribed corporation (subject to any contrary provision in Part 4.5) in the same way as they apply to any other entity which is controlled by a company. The section does not apply Parts 3.6 and 3.7 to a parent entity which is a prescribed corporation but is not a company.

Section 874 - Court may freeze certain bank accounts of dealers and former dealers

481. The proposed amendment to paragraph 874(1)(b) makes it clear that the provision applies where there has been a failure to comply with Part 7.6 or a corresponding previous law.

482. The proposed amendment to subsection 874(3) ensures that the Court has power to freeze accounts held with an Australian bank abroad.

Proposed Section 955A - Extended application of Division to non-marketable securities

483. Proposed section 955A is a consequential amendment resulting from the insertion of proposed section 1113A.

484. Where a declaration has been made under proposed subsection 1113A(1) in relation to a non-marketable security (that is a security that is not a marketable right or a marketable security within the meaning of Division 3 of Part 7.13) Division 7 of Part 7.10 will apply to that non-marketable security by virtue of proposed section 955A, as if it were a security as defined in subsection 955(1). Subsection 955(1) defines "securities" to mean marketable securities or marketable rights within the meaning of Division 3 of Part 7.13.

485. Proposed section 955A will also provide that the Commission may modify the operation of Division 7 of Part 7.10 in relation to such non-marketable securities.

Section 995 - Misleading or deceptive conduct

486. Subsection 995(4) provides that nothing in Part 7.11 or 7.12 limits the generality of subsection (1). This should read subsection (2). The amendment corrects this reference. Subsection (1) was omitted by the Corporations Legislation Amendment Act 1990.

Section 1030 - Document containing offer of securities for sale deemed to be prospectus

487. Subsection 1030(3) is to be amended to correct a reference in that provision to "Act" so that the amended reference will read "Law".

Proposed Section 1113A - Power of Commission to extend application of Division 3

488. Proposed section 1113A will empower the ASC to declare in writing that Division 3 of Part 7.13 applies to particular

securities (as defined in section 92) or a class of securities that are neither marketable rights nor marketable securities within the meaning of Division 3 of Part 7.13.

489. The securities which may be the subject of a declaration will thereby obtain the benefits of Division 3 of Part 7.13 which contains provisions designed to facilitate the processing of marketable securities and rights to marketable securities.

490. Given the development of increasingly sophisticated securities, it is considered that such a provision is necessary to allow the Australian financial markets to keep abreast of developments. Given the inherent delays in the legislative process, it is felt that it is desirable that proposed section 1113A be used to facilitate the marketing of new products where appropriate to ensure that Australian markets remain competitive. The ASC is considered to be an appropriate body for determining whether a particular security should gain the benefits of Division 3 of Part 7.13. In particular the ASC is in the best position to determine whether the consumer and the market are adequately protected if a particular security is to be the subject of a declaration.

491. In addition, by virtue of proposed section 955A, Division 7 of Part 7.10 will apply to those securities. This Division deals with claims on the NGF by owners of securities or by transferees who have suffered loss arising from unauthorised execution of transfers of those securities by transferor dealers.

Section 1224 - Power of Court to restrain dealings with futures broker's bank accounts

Paragraph 1224(1)(c)

492. The proposed amendment makes the wording of this provision relating to clients' segregated accounts consistent with that used in section 9 (the definition) and section 1209.

Subsection 1224(1)

493. The definition of a segregated client's account in section 9 and the provisions of section 1209 envisage that a futures broker can open such an account with an Australian bank abroad. The proposed amendment ensures that the Court has power to restrain dealings with such accounts even if not held in Australia.



**SCHEDULE 6 - COMMENCEMENT AND APPLICATION OF CHANGES TO THE  
CORPORATIONS LAW RESULTING FROM THIS ACT**

494. A Division is inserted into Part 9.10. which provides transitional provisions in relation to certain amendments contained in the Bill.

Paragraph 1363(j)

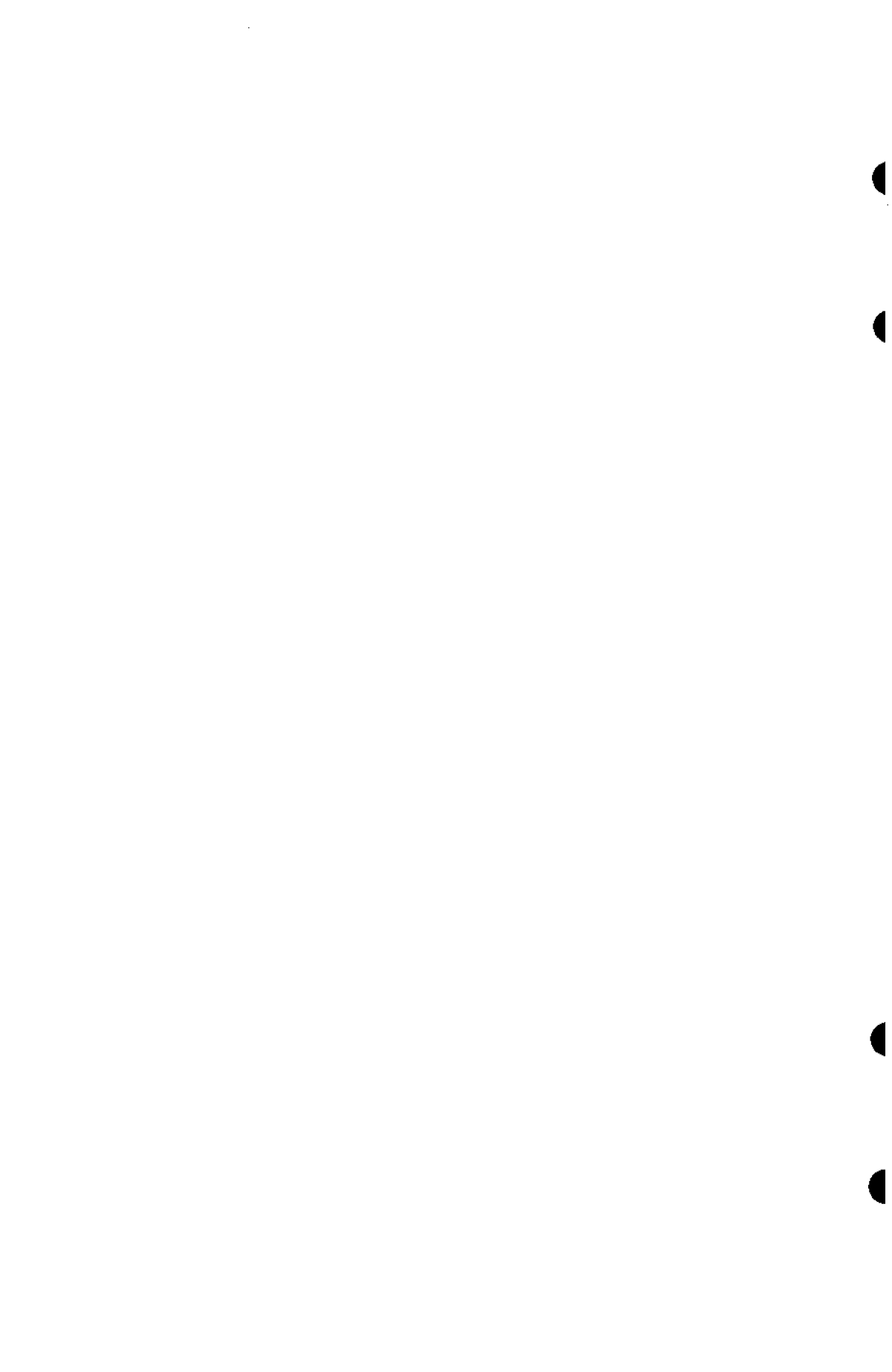
495. This paragraph, which relates to the commencement of section 276A, is to be deleted because of the amendment to that section which is to be effected by Schedule 4. The commencement of section 276A is now addressed in proposed subsection 1368(3).

Section 1368 - Commencement of certain changes

496. This new provision which provides for certain changes to the Law contained in the Bill will, when enacted, be taken to have commenced on 1 January 1991.

Section 1369 - Application of certain changes

497. This new provision applies in relation to claims relating to unauthorised transfers which occurred before the commencement of the changes to the National Guarantee Fund provisions and in relation to a prospectus issued before the commencement of the changes to the prospectus provisions contained in this Bill.

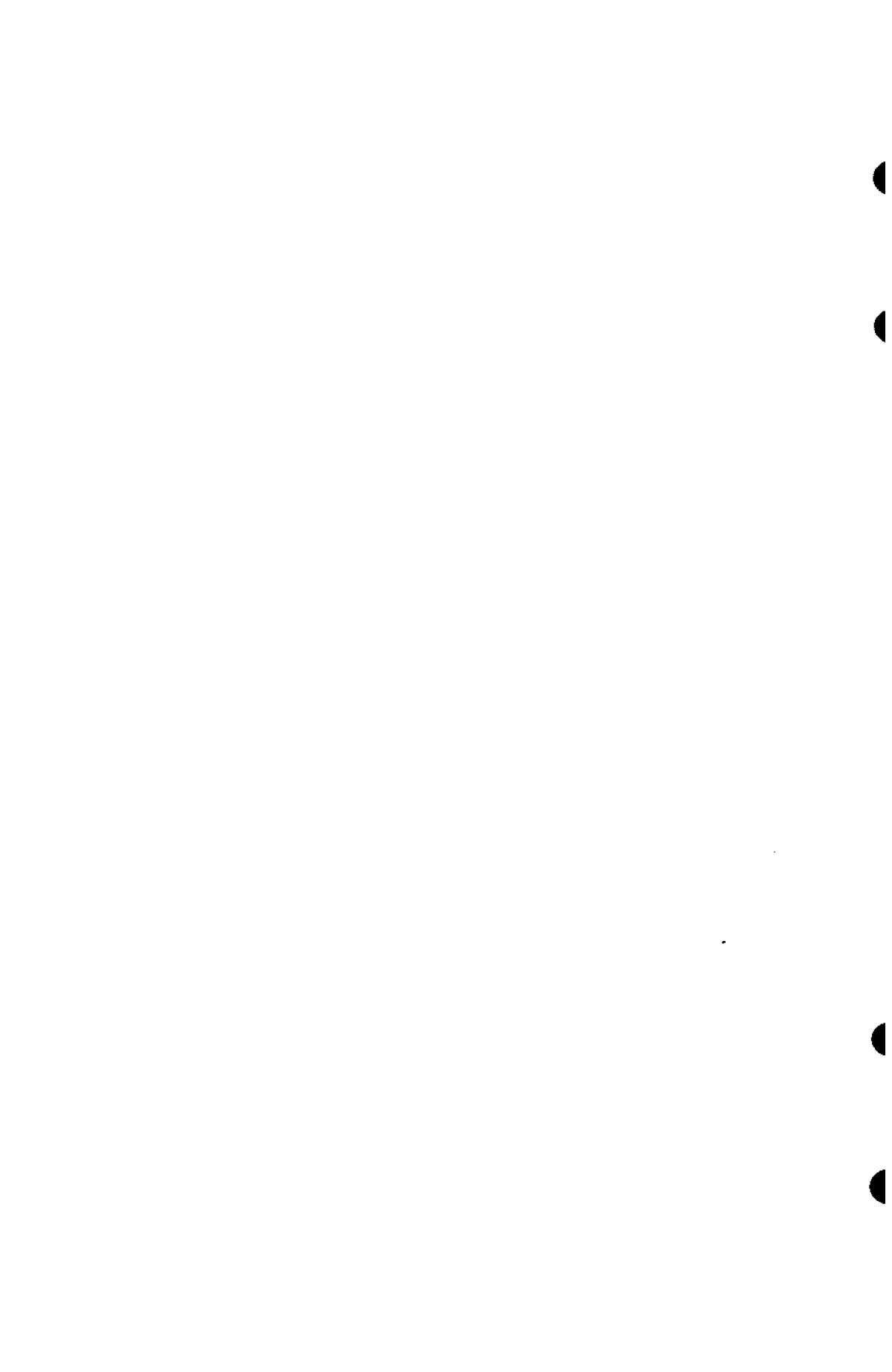


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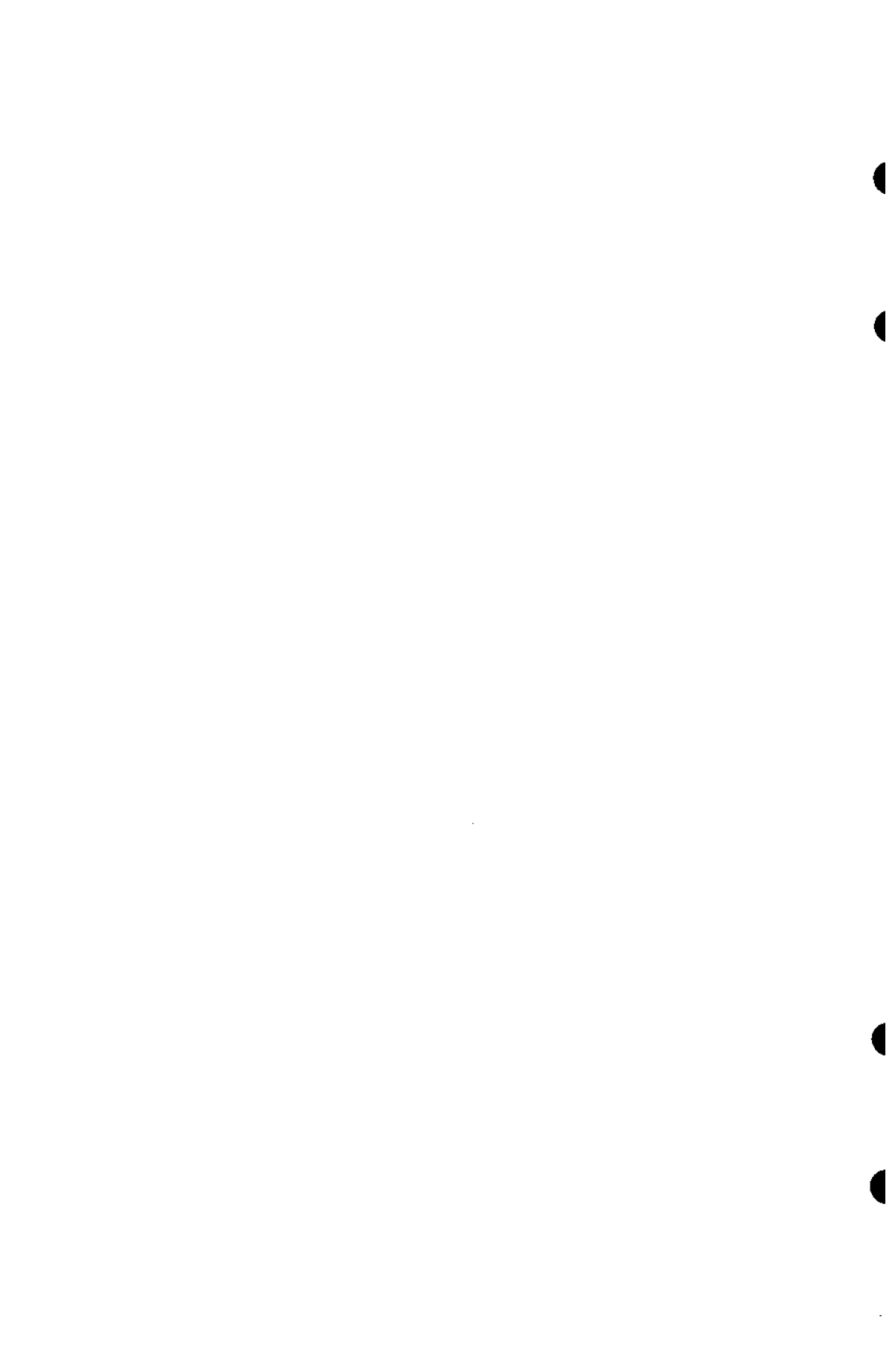


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