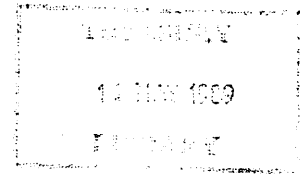


CORPORATIONS BILL 1988
SUPPLEMENTARY EXPLANATORY MEMORANDUM

1989



THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

SENATE

CORPORATIONS BILL 1988

SUPPLEMENTARY EXPLANATORY MEMORANDUM

Amendments and New Clauses to be Moved on
Behalf of the Government

(Circulated by authority of the Honourable
Lionel Bowen, MP, Deputy Prime Minister
and Attorney-General)

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CORPORATIONS BILL 1988 - AMENDMENTS AND
INSERTION OF NEW CLAUSES

OUTLINE

The Corporations Bill ("the Bill") was introduced into the House of Representatives by the Attorney-General on 25 May 1988. It contains the substantive provisions necessary for the regulation of companies and of the securities and futures industries in Australia. It is part of a package of bills to replace the existing co-operative scheme under which the Commonwealth shares regulatory responsibilities with the States and the Northern Territory. The Bill was introduced together with the Australian Securities Commission Bill and the Close Corporations Bill.

2. The Bill was debated, amended and passed by the House of Representatives in late September 1988. It was introduced into the Senate on 14 October 1988, and referred to a Joint Select Committee of both Houses of Parliament for examination on 17 October 1988. Over the course of its examination, the Committee received and considered 61 written submissions and a large number of letters providing individual views. It also held 12 public hearings between 30 January and 2 March 1989.

3. The Committee's report was tabled on 13 April 1989. In the report, the Committee made a number of recommendations for changes to the Bill. The vast majority of the amendments to the Bill to be moved on behalf of the Government spring from the Government's acceptance of recommendations made by the Committee.

4. Some of the significant amendments to be moved effect the following changes:-

- . amendments will be made to cl.158, to ameliorate the current requirement under the Bill for a company which ceases to have substantial trading activities to commence action to wind itself up;
- . more categories of prospectuses will be subject to lodgment with or pre-vetting by the Australian Securities Commission;
- . the test for whether an offeror may compulsorily acquire shares in the target will be altered, by replacing the requirement under the Bill for the offeror to acquire 75% of the outstanding shares with the requirement (currently in the Companies (Acquisition of Shares) Act 1980) that 75% of the offerees accept the offer; and
- . the ASC will be empowered to seek information as to the beneficial ownership of shares in the company, at the request of the company or a shareholder, provided the requesting party pays the prescribed fee and the ASC is satisfied that it would not be unreasonable to require the information to be provided.

Financial Impact Statement

5. The amendments will not have a significant financial impact. Although it is difficult to quantify the additional costs of the proposals, it is clear that the amendment which requires more categories of prospectuses to be pre-vetted by the ASC will entail some additional expenditure by the ASC. However, this will be somewhat offset by the amendment enabling the ASC to seek information as to the beneficial ownership of shares on behalf of the company or a shareholder on payment of the prescribed fee, because the fee will largely be determined on a "user pays" basis. The other proposals are largely expenditure neutral.

ABBREVIATIONS

6. The following abbreviations are used in this supplementary explanatory memorandum:

- ASC - Australian Securities Commission
- ASC Bill - Australian Securities Commission Bill 1988
- CA - Companies Act 1981
- CASA - Companies (Acquisition of Shares) Act 1980
- CB - Corporations Bill 1988
- FIA - Futures Industry Act 1986
- NCSC - National Companies and Securities Commission
- SIA - Securities Industry Act 1980

NOTES ON AMENDMENTS TO CLAUSESAMENDMENTS TO CHAPTER 1 - INTRODUCTORYASSOCIATES OF BODIES CORPORATEAmendments (1) and (2): Cl.11 - Associates of bodies corporate

7. These amendments amend cl.11 so as to remove the extension of the definition of 'associate' in relation to a body corporate to include executive officers. The reason behind including executive officers in the definition was that under the present co-operative scheme legislation there is an anomaly, in that general managers are not deemed to be associates whereas company secretaries who arguably are less involved in management are deemed to be associates.

8. However, it is considered that, given the broad definition of 'executive officer', this change may have involved significant extra administrative costs for companies in ascertaining the shareholdings of their management staff and publicising such information where the substantial shareholding provisions apply. To avoid this cost, the words "executive officer" have been removed from paras.(a) and (c) of the definition of associate of a body corporate.

9. Of course, if a member of the management staff were in fact acting 'in concert' with the body corporate in relation to a shareholding, that person would be deemed to be an associate of the body corporate by cl.15(1).

EXCLUDED ISSUES, OFFERS AND INVITATIONS

10. The Bill adopts the approach of requiring that all issues, offers and invitations with respect to securities other than those which are specifically excluded, are to be made pursuant to a prospectus. This replaces the "offer to the public" test used in the CA. The range of exclusions from the requirement to issue a prospectus are set out in cl.66. Clause 66(1) deals with excluded issues and cl.66(2) deals with excluded offers and excluded invitations. Except for cl.66(1)(g), 66(1)(h)(ii) and 66(1)(k), the provisions of cl.66(2) parallel those of cl.66(1).

11. The Joint Select Committee has recommended a number of changes to cl.66 which would have the effect of requiring a prospectus to be issued in cases where the Bill presently does not require one. These amendments implement the recommendations of that Committee. The effect of the individual amendments is set out below.

Amendment (3): Cl.66 - Excluded issues, offers and invitations

12. This amendment inserts a new cl.66(1A) which is an interpretation provision applying only to cl.66. It contains the following definitions.

"class"

13. This new definition is inserted consequent upon the insertion of the new cls.66(3) and 66(4) by Amendment (14).

"listed corporation"

14. This new definition is inserted consequent upon the amendments to cls.66(1)(g) and 66(1)(h) by Amendments (7) and (8).

"prospectus"

15. This definition is a restatement of the definition in existing cl.66(3). The definitions for cl.66 are being consolidated in cl.66(1A). Minor drafting corrections have been made to para.(b) of this definition.

Amendment (4) : Cl.66 - Excluded issues, offers and invitations

16. Clause 66(1)(b) excludes from the prospectus requirements the issue of securities to persons whose ordinary business is to buy or sell securities, whether as principal or agent. This clause is intended to exclude the issue of securities to professional investors.

17. Pursuant to Recommendation 18(i) of the Joint Select Committee, this amendment deletes cl.66(1)(b).

18. The Committee recommended the deletion of this exemption because of:

- . disquiet that retirees and pensioners whose sole source of income are proceeds of investment of superannuation and insurance payments might be covered by this provision; and
- . arguments that the exemptions for amounts exceeding \$500,000 (cls.66(1)(a) and (2)(a)) and for limited numbers of offerees are sufficient to cover the position of institutional investors, making this exclusion redundant.

19. Amendment (10) correspondingly deletes cl.66(2)(b).

Amendment (5) : Cl.66 - Excluded issues, offers and invitations

20. Clause 66(1)(e) excludes from the prospectus requirements the issue of securities where those securities have been offered to not more than 25 persons over a period of 12 months.

21. Pursuant to Recommendation 18(iv) of the Joint Select Committee, this amendment excludes the offer of prescribed interests from this exemption.

22. The Committee apparently accepted the view put to it by the NCSC that because of the special variable nature of prescribed interest schemes which can be offered to investors, there is a greater chance of fraudulent promotions than with share schemes.

23. Amendment (11) correspondingly amends cl.66(2)(e).

Amendment (6) : Cl.66 - Excluded issues, offers and invitations

24. Pursuant to Recommendation 18(ii) of the Joint Select Committee this amendment reduces from 25 to 20, the maximum number of offerees to which offers may be made over 12 months for the purposes of the limited offerees exception in cl.66(1)(e).

25. The Committee bases this recommendation on the recommendation of the Securities Information Review Committee in its interim report Reforming the Law Relating to Offers of Securities. Whatever number is chosen for this exception is necessarily arbitrary. This amendment tips the balance slightly more towards investor protection by further reducing the incentive for fraudulent promoters to seek to operate within this exemption.

26. Amendment (12) correspondingly amends cl.66(2)(e).

Amendment (7) : Cl. 66 - Excluded issues, offers and invitations

27. Clause 66(1)(g) excludes from the prospectus requirement the issue of securities pursuant to the exercise of an option.

28. Pursuant to Recommendation 18(v) of the Joint Select Committee, this amendment restricts this exception to the issue of securities by a listed corporation pursuant to the exercise of an option.

29. The NCSC recommended this amendment to the Committee. It argued that the cl.66(1)(g) exclusion assumes that all information relevant to an informed decision to exercise the option will have been provided in the prospectus under which the option was obtained. However, as the time between the issue and exercise of the option becomes longer, this is less likely as the prospectus information becomes out of date. Listed companies are subject to the disclosure requirements of the Stock Exchange Listing Rules as well as the informed scrutiny of the market. Holders of options over the shares of unlisted companies do not have similar protection.

Amendment (8) : Cl.66 - Excluded issues, offers and invitations

30. Clause 66(1)(h)(ii) exempts from the prospectus requirement the issue of shares upon the conversion of a convertible note.

31. Pursuant to Recommendation 18(vi) of the Joint Select Committee, this amendment restricts this exemption so that it only applies to the shares of a listed corporation.

32. This amendment was recommended to the Committee by the NCSC which stated that there seems to be no logical grounds for a distinction in the exception provisions between convertible notes and options. The reasons for distinguishing between the issue of listed and unlisted shares upon the conversion of convertible notes are similar to those in regard to the issue of shares pursuant to the exercise of an option stated under Amendment (8).

Amendment (9) : Cl.66 - Excluded issues, offers and invitations

33. Clause 66(1)(j)(i) exempts from the prospectus requirement the issue of debentures to existing holders of debentures. The literal wording of this provision would permit the issue of debentures to holders of debentures and to holders of convertible notes, and the issue of convertible notes to holders of debentures and holders of convertible notes.

34. Pursuant to Recommendation 18(vii) of the Joint Select Committee, this amendment makes it clear that:

- (a) the offering of convertible notes to existing debenture holders is not exempt; and
- (b) the offering of debentures to existing convertible note holders is not exempt.

35. The amendment omits cl.66(1)(j) and inserts in its place new cls.66(1)(ja), (1)(jb) and (1)(j). Clause 66(1)(ja) exempts the issue of debentures to existing debenture holders. Clause 66(1)(jb) exempts the issue of convertible notes to existing convertible note holders. The proposed cl.66(1)(j) which exempts the issue of debentures by an excluded corporation corresponds to existing cl.66(1)(j).

36. This amendment was recommended to the Committee by the NCSC on the ground that '[i]t is necessary to prevent avoidance by the creative use of convertible notes, which fall within the definition of "debenture"'.

37. Amendment (13) correspondingly amends cl.66(2)(h).

Amendment (10): Cl. 66 - Excluded issues, offers and invitations

38. This amendment corresponds to Amendment (4).

Amendment (11): Cl. 66 - Excluded issues, offers and invitations

39. This amendment corresponds to Amendment (5).

Amendment (12): Cl. 66 - Excluded issues, offers and invitations

40. This amendment corresponds to Amendment (6).

Amendment (13): Cl. 66 - Excluded issues, offers and invitations

41. This amendment corresponds to Amendment (9).

Amendment (14): Cl. 66 - Excluded issues, offers and invitations

42. This amendment omits the existing cl.66(3) and replaces it with new cl.66(3) and 66(4). The interpretation provision in existing cl.66(3) is restated in proposed cl.66(1A) (see Amendment (3)).

43. The numerical limit in the limited offerees exclusion (cls. 66(1)(c) and (2)(c)) applies only where the offer relates to securities of the same class. In accordance with Recommendation 18(iii) of the Joint Select Committee, this amendment prevents corporations from issuing securities of different classes so as to evade the intention of this exclusion.

44. The proposed cl.66(3) provides that for the purposes of the limited offerees exclusion, a share will be taken as being in the same class as any other share, and a debenture will be taken as being in the same class as any other debenture. As a result, a corporation will be able to offer to 25 (or 20 if Amendment (6) is adopted) persons, shares of any type over 12 months; and it will also be able to offer to 25 (or 20) persons debentures of any type over the same period without being required to issue a prospectus.

45. The proposed new cl.66(4) similarly limits the scope for any creative avoidance schemes involving the issue of units of shares or convertible notes. It provides that for the purposes of cl.66(3), a unit of a share will be taken as a share, and a convertible note or units thereof will be taken to be both a share and a debenture.

AMENDMENTS TO CHAPTER 2 - CONSTITUTION OF COMPANIES

COMPANIES CEASING TO BE TRADING OR BANKING CORPORATIONS

Amendments (15) and (16): Cl.158: Company to take action

46. Clause 158 places an obligation on a company to take steps to wind itself up if trading activities cease to be a substantial part of the company's activities.

47. In response to concerns of the Joint Select Committee on Corporations Legislation about the right of the ASC to wind up non-trading corporations (cl.156), the Attorney-General's Department proposed a separate regime for companies to remain within the Corporations Legislation during periods when they cease trading activities. This regime involved the ASC placing such companies on a dormant company register. The Committee endorsed this proposal.

48. On reflection, the Government proposes instead to resolve the problem of dormant companies directly at its root by amending the test in cl. 158 so that a company is not required to be wound up unless it has ceased to be a trading corporation or, in the case of a company that has ceased to be a banking corporation, the company is not a trading corporation.

49. The Government accepts the need for a more flexible regime to deal with companies which cease trading and considers this approach will be simpler for companies than a separate dormant company regime. It will relieve such companies from having to make an election to go onto the dormant company register whenever they ceased trading activities and from having to do anything (such as lodging a new activities statement) in order to recommence trading. The approach recognises that a company will continue to be a trading corporation under the Constitution, notwithstanding that it may cease trading activities for a period.

50. The failure of companies to trade for a significant period of time will be picked up when those companies fail to comply with the requirement to provide an annual return or an annual activities statement. The failure to provide such a return or statement will give the ASC grounds to have the company would up.

AMENDMENTS TO CHAPTER 6 - ACQUISITION OF SHARES

REGISTRATION OF PART A STATEMENTS AND OFFERS

Amendment (17): Cl.644 - Registration of Part A statements and offer

51. This amendment deletes cl.644(2) and (3) and inserts new sub-clauses, which have the effect of continuing pre-vetting of Part A statements in all cases, reinstating the same pre-vetting procedure as currently applies under CASA. The amendments are designed to implement the recommendations of the Joint Select Committee on pre-vetting of Part A statements.

52. The effect of the new cl.644(3) is that the ASC will be precluded from registering the copies of the Part A statement and offer unless it is satisfied that the documents comply with the requirements of the Act and do not contain any material information that is false or misleading.

53. Proposed new cl.644(3A) (which is to the same effect as existing para 644(2)(b)) precludes the ASC from registering the copies unless, in relation to reports which are included in the statement, there are notices signed by the makers of the reports consenting to their inclusion in the form and context in which they appear in the statement.

DISSENTING SHAREHOLDERS

Amendment (18): Cl.701 - Provisions relating to dissenting shareholders

54. This amendment deletes cl.701(2)(c)(i) and substitutes a new sub-paragraph. The new sub-paragraph has the same effect as CASA s.42(2)(b) and s.42(3)(b).

55. The effect of the amendment is that the compulsory acquisition procedure under cl.701 is not available unless either 75% of the offerees have disposed of their holdings to the offeror (as is currently the case under CASA s.42) or 75% of the persons registered as shareholders at the time the Part A statement was served are not so registered one month after the end of the offer period.

56. The test presently embodied in cl.701(2)(c)(i) would have permitted a compulsory acquisition where 75% of the target shares have passed to the offeror during the takeover period. This test was originally considered to be more certain than the test currently contained in CASA, which has been criticised because it is frequently difficult (especially where there is active market trading during the takeover period) to ascertain what proportion of offerees and deemed offerees have in fact accepted the offer. However, the Joint Select Committee recommended that the "75% of offerees" test be reinstated in place of cl.701(2)(c)(i), because it considered cl.701(2)(c)(i) could lead to confusion.

57. The amendment does not affect the separate requirement in cl.701(2)(b) that before the offeror can compulsorily acquire shares the offeror must have attained 90% of the total number of shares during the takeover period.

POWER TO OBTAIN INFORMATION ABOUT BENEFICIAL OWNERSHIP OF SHARES

58. Under Part 6.8 of the Corporations Bill, as introduced, the capacity (which exists under CA s.261) of a company or a shareholder of a company with not less than 5% of the voting shares to trace the beneficial ownership of shares was removed. Only the ASC was given power to obtain information from persons holding voting shares in the company or a relevant interest in those shares as to any beneficial ownership of the company's shares. The reason for the change was that the tracing provisions contained in CA s.261 were open to abuse.

59. The Joint Select Committee recommended that:

- (a) the company's powers under CA s.261 be restored; and
- (b) that the ASC be required to use its powers to seek information as to beneficial ownership on request from the company or a shareholder provided the ASC considered it would not be unreasonable to seek such information and the requesting party paid the prescribed fee.

60. Because of the considerable overlap between these two recommendations, these amendments have been prepared only to implement recommendation (b). It is considered that that recommendation meets the twin objectives of enabling companies and shareholders to obtain information about beneficial ownership of shares, and providing a mechanism for preventing the abuses which have arisen in the use of CA s.261.

Amendment (19) : Cl.718 - Primary Notice

61. This amendment amends cl.718 by the addition of cl.718(2), (3) and (4). In addition to the ASC's power to give a holder of voting shares in a corporation a primary notice (cl.718(1)), the ASC will be required to issue such a notice at the request of the corporation or a shareholder unless it considers that, in all the circumstances, issue of such a notice would be unreasonable (proposed cl.718(4)).

62. This amendment restores the rights conferred by CA s.261 for the company and substantial shareholders to request information about the beneficial ownership of shares in the company, except that such requests must be made through the ASC. The ASC will be entitled to refuse to request the information if it considers it would be unreasonable in all the circumstances to request the information.

Amendments (20) and (21) : Cl.719 - Secondary notice

63. These amend cl.719(1) and add cl.719(2) as a result of the proposed amendments to cl.718.

64. As introduced, the Bill empowered the ASC to issue a secondary notice (defined in cl.717) if it received in response to the primary notice information that another person:

- (a) had a relevant interest in any of the shares; or
- (b) had given any instructions in relation to any of them.

65. Because of the amendment to cl.718 which enables the ASC to issue a primary notice on request from the corporation or a shareholder, some consequential amendments are required to cl.719. If information is received in response to a primary notice that another person has a relevant interest in the shares or has given instructions in relation to them:

- (a) where the primary notice was issued by the ASC at the request of the corporation or a member, the ASC will be required to issue the secondary notice unless it considers that it would be unreasonable in the circumstances to do so (cl.719(1)(a) and (2)); and
- (b) where the primary notice was issued by the ASC without any request from the corporation or a member, the ASC will be able to issue the secondary notice if it sees fit (cl.719(1)(b)).

Amendment (22) : Cl.719A - Withdrawal of request under subsection 718(2)

66. This amendment inserts a new clause dealing with the situation where a person withdraws a request made by the person to the ASC to issue a notice. Where the person withdraws the request, the Commission is no longer required to issue a primary or secondary notice, as the case may be.

Amendment (23) : Cl.720 - Commission may provide information obtained pursuant to a notice

67. This amendment deletes the current cl.720 and inserts a new cl.720. It is consequential to the amendment to cl.718.

68. The amended clause will require the ASC to pass information received pursuant to a primary or secondary notice to the person who or company which requested the issue of the notice, unless it considers it unreasonable to do so (proposed cl.720(b)). It leaves the ASC with a discretion whether or not to give the information to the company if the notice was issued by the ASC other than pursuant to a request.

Amendments (24) to (27) : Cl.721 - Request by person to whom notice given

69. These amendments amend cls.721(1)(a) and (b) and 721(2). They are also consequential to the amendment to cl.718.

70. Under the amended proposed cl.721(1) a person who receives a primary or secondary notice may, within 2 business days, lodge a request with the ASC, giving special reasons why the information requested by the notice should not be given (cl.721(1)(a)). The receiver may request that the information not be passed on under cl.720 or only in a particular form (cl.721(1)(b)).

71. The amended proposed cl.721(2) follows the previous cl.721(2) but has been re-drafted to provide for the situation where the company or a shareholder has requested the ASC to issue the notice. In view of that, the ASC will issue a certificate (rather than a notice as under the previous cl.721(2)) if it is satisfied as to the special reasons.

Amendment (28) : Cl.722 - Compliance with notices

72. This amendment makes a minor drafting correction, in connection with the amendments to cl.718.

Amendment (29) : Cl.723 - Consequences of Commission's decision on a request

73. This amendment substitutes a new clause 723 and is necessary as a consequence of the amendment to cl.721. The clause has been re-drafted to provide for the situation where the ASC has issued a certificate pursuant to proposed cl.721.

INTERIM ORDERS MADE BY THE PRESIDENT OF THE PANEL

Amendments (30) to (32) : Cl.735 - Miscellaneous provisions relating to orders by Panel

74. These amendments implement a recommendation of the Joint Select Committee, that the President of the Panel be empowered to make interlocutory and other orders under the Bill.

75. Cl.735 is to be amended by altering cl.735(2) and inserting cl.735(2A) and (2B). The amendment to cl.735(2) specifies that the President may make interim orders. Proposed new cl.735(2A) deems that an interim order made under cl.735(2) shall be taken for the purposes of cl.734 to have been made under cl.734(2). Among other things, this enables the interim order to be varied (cl.734(3)). Proposed new cl.735(2B) deems that, where the President makes an interim order under cl.735(2), cl.734 applies as if the President constituted the Panel.

COMMISSION MAY PUBLISH REPORT ABOUT APPLICATION TO PANEL OR COURT

Amendment (33) : Cl.736A - Commission may publish report about application to Panel or Court

76. This amendment gives effect to a minority recommendation of the Joint Select Committee. Proposed cl.736A enables the ASC to publish a notice in any way it considers appropriate notifying:

- . that it has made an application to the Panel or the Court, as the case may be;
- . the name of the company involved; and
- . the name of any other person to whom the application relates.

77. Nothing in this section limits by implication a function or power of the ASC, the Panel or any other person or body (cl.736A(3)).

AMENDMENTS TO CHAPTER 7 - SECURITIESAGREEMENTS WITH UNLICENSED PERSONS

78. These amendments affect the operation of clauses 798 to 804 inclusive. These provisions deal with the enforceability of agreements between non-licensed dealers or advisers and their clients. The provisions were designed to prevent the enforcement of a contract by a person who either advises or deals in securities and does not have a licence but who should be licensed.

79. The Joint Select Committee considered that it would be unreasonable for the client of an unlicensed dealer or adviser to have the right to rescind agreements upon discovery of the adviser's or dealer's lack of a licence, because this would expose the dealer or adviser to excessive liability and may give the client an easy way out of purchases of securities which may prove disappointing.

80. In such cases, the Committee considered it more appropriate that the unlicensed dealer or adviser be simply required to refund any commission received under the agreement.

81. However the NCSC, in its Review of Licensing in the Securities and Futures Industries, recommended the inclusion of these provisions because it considered that they would constitute a very important investor protection measure. In addition, clearly they constitute a very effective sanction against unlicensed dealing, which is generally prohibited by the legislation.

82. To reconcile these competing objectives, these amendments retain the general right of a client of an unlicensed dealer or adviser to rescind agreements made with the dealer or adviser, except where the dealer or adviser has made a declaration to the client that he or she is unlicensed before the agreement is made. If the client enters into an agreement in full knowledge that the person is unlicensed, the client will not be able to rescind the agreement.

83. The Joint Select Committee also recommended that the ASC should be empowered to take action to recover commission paid to an unlicensed dealer or adviser on behalf of a client. These amendments also give effect to that recommendation.

Amendment (34): Cl.798 - Client may give notice of rescission

84. This amendment alters cl.798, by inserting new cls.798(3A) and (4). A person will not be entitled to issue a notice rescinding an agreement with an unlicensed dealer or investment adviser if, within a reasonable period before the agreement was entered into, the dealer or investment adviser advised the person that he or she did not hold a licence (cl.798(3A)) or that his or her licence was suspended (cl.798(4)).

Amendment (35): Cl.804 - Recovery of commission paid to non-licensee

85. Proposed cl.804(2) permits the ASC to bring an action under cl.804(1) on behalf of the client to recover any commission or other fee the client has paid to the non-licensed dealer or adviser under the agreement, where the ASC considers it to be in the public interest to do so.

LIMITATION PERIOD FOR ACTIONS UNDER CLAUSE 1005

Amendment (38): Cl.1005 - Civil liability for contravention of this Part or Part 7.12

86. This amendment amends the requirement prescribed in cl.1005(2) for actions under cl.1005(1) or cl.1013(1)(d) to be commenced within 3 years. As a result, such actions may be commenced within the normal limitation period, 6 years.

INSIDER TRADING

Amendment (39): Cl.1013 - Liability for insider trading

87. This amendment gives effect to a recommendation of the Joint Select Committee.

88. Clause 1013 has been amended to empower the ASC to take action on behalf of a corporation to recover the profit arising out of insider trading in that corporation's securities (cl.1013(3)). This is separate to any criminal action that the ASC may bring against the person in default.

REGISTRABLE PROSPECTUSES

89. Clause 1017A specifies those classes of prospectuses which will not require registration and hence will not be subject to the process of pre-registration examination (pre-vetting) under cl.1020A.

90. The Joint Select Committee has recommended a number of amendments to this clause which would have the effect of requiring more classes of prospectuses to be registered. These amendments implement the Committee's recommendations.

Amendments (46) and (47) : Cl.1017A - Registrable prospectuses

91. These amendments are consequent upon the insertion of proposed cls. 1017A(3) and 1017A(4). They omit the definition of 'declared institution investor' and replace it with a definition of 'exempt recipient', and omit the definition of 'listed unit trust'.

92. The proposed definition of exempt recipient includes those classes of persons referred to in cl.1017A(3)(b)(iii) (except cl.1017A(3)(b)(iii)(G)) and cl. 1017A(4)(b) (except cls.1017A(4)(b)(i) and (4)(b)(viii)).

Amendment (48) : Cls.1017A(3) and 1017A(4)

93. This amendment replaces the existing cls.1017A(3) and 1017A(4) with new similarly numbered clauses.

94. The proposed and the existing cl.1017A(3) sets out which classes of prospectuses, in relation to shares or debentures are exempt from registration. Similarly the proposed and the existing cl.1017A(4) sets out which classes of prospectuses, in relation to prescribed interests are also exempt from registration.

95. The effect of the proposed cl.1017A(3) differs from the existing clause in two respects. First, the existing cl.1017A(3)(a) exempts from registration prospectuses in relation to shares or debentures of a corporation if the corporation is a listed corporation.

96. In accordance with Recommendation 18(xi) of the Joint Select Committee, the proposed cl.1017A(3)(a), only exempts prospectuses in relation to shares or debentures that are in a class of shares or debentures of a corporation that are listed for quotation on a stock market of a stock exchange. Thus, the prospectuses in respect of shares or debentures for which applications for official quotation have been made but not approved will require registration. Further, the off market issue of securities by a listed corporation will also require a registered prospectus unless it is exempt under cl.1017A(3)(b).

97. Secondly, in accordance with the Joint Select Committee's Recommendation 18(viii), the exemption in cl.1017(3)(b)(ii) for offers by unlisted corporations of debentures to existing debenture holders is removed. This proposal recognises that such issues are already exempt from the requirement to prepare a prospectus under cl.66(1)(j) and (2)(h).

98. As a consequence of the narrower application of the proposed cl.1017(3)(a), the proposed cl.1017(3)(b) applies generally to prospectuses for shares or debentures rather than only to those for unlisted corporations. In all other respects, the effect of the proposed cl.1017A(3) is the same as the existing one. Clause 1017(3)(b)(ii) together with the new definition of exempt recipient corresponds to the existing exemptions under cl.1017A(3)(b)(iii)(A) to (3)(b)(iii)(F). The exemption in proposed cl.1017A(3)(b)(iii) for some employee share schemes corresponds to the exemption under existing cl.1017A(3)(b)(iii)(G).

99. The proposed cl. 1017A(4) exempts a narrower range of prospectuses in respect of prescribed interests from the registration requirements than the existing clause. In accordance with Recommendations 18(ix) and (x) of the Joint Select Committee, the following prospectuses will not be exempt:

- . prospectuses for offers of prescribed interests under a listed unit trust (cl.1017A(4)(a) is deleted); and
- . prospectuses for the issue of prescribed interests to existing holders of prescribed interests under the same approved deed (cl.1017A(4)(b)(i) is deleted).

100. The effect of the proposed cl.1017A(4) is otherwise similar to that of the existing clause.

101. While the Joint Committee did not give any specific reasons for its recommendations regarding cl.1017A(4), these amendments are consistent with the Committee's general support for pre-vetting of prospectuses. The NCSC did submit to the Committee that amendments should be made along these lines on the basis of its general concern that unit trust prospectuses require greater investor protection.

'GRANDFATHER' EXEMPTION FOR SECONDARY TRADING IN ISSUED
SECURITIES IN A CLASS LISTED FOR QUOTATION AT THE COMMENCEMENT
OF PART 7.12

Amendment (40) : Cl. 1016 - Holding Companies etc

102. This is a consequential amendment.

Amendment (41) : Cl. 1018 - Prospectus in relation to
securities

103. This amendment inserts new cls.1018(1A), (1B) and (1C). It implements the Joint Select Committee's Recommendation 19, that the legislation include 'a grandfather clause' to exempt from the prospectus requirement all securities currently listed.

104. The effect of proposed cl.1018(1A) is to exclude from the prospectus requirement in cl.1018(1), secondary trading in securities that are in a class of securities which have been continuously listed from immediately prior to the commencement of cl.1018 to immediately after the offer is made or invitation issued in respect of the securities.

105. Clause 1018(1B) is an interpretation provision defining 'issued securities' and 'listed securities' for the purpose of cl.1018(1A). The definition of 'issued securities' has the effect of applying cl.1018(1A) to securities irrespective of whether they were issued before or after the commencement of cl.1018. Clause 1018(1C) is also an interpretation provision, providing that cl.1018(1A) does not apply to offers or invitations to which cl.1030 relates, ie, offers or invitations with respect to securities which have been issued for the purpose of resale.

106. The exemption for listed securities in cl.1018(2) only applies to securities where a prospectus has been issued at some stage. The ASX advised the Joint Select Committee that a substantial number of securities currently listed on the Exchange obtained official quotation without a prospectus. The Committee is apparently of the view that given that these securities have already been traded on the exchange, the present holders of these securities should not need to prepare a prospectus, or compel the corporation which issued the securities to prepare one, before they can legally be offered for sale.

LOOSE-LEAF FORM OF APPLICATION FOR DEBENTURES

Amendment (42): Cl.1016 - Holding companies etc.

107. This amendment is consequent upon Amendment (43).

108. Clause 1016 applies to holding companies the provisions of Part 7.12 - Offering Securities for Subscription or Purchase.

109. The adaption of cl.1020 in c.1016(3) is amended to bring it into line with the amendment made to cl.1020 by Amendment (43).

Amendment (43): Cl.1020 - Forms of application for securities

110. Clause 1020 so far as relevant provides that a person shall not issue a form of application for the issue of securities of a corporation unless the form is attached to a copy of a prospectus.

111. Pursuant to Recommendation 18(viii) of the Joint Select Committee, this amendment enables application forms for debentures to be issued either attached to the prospectus or simply accompanying the prospectus. Application forms for other securities must not be issued unless they are attached to a prospectus.

112. The rationale for these amendments is that with continually fluctuating interest rates and the fact that prospectuses have a life of 6 months, it is unrealistic to require that the application form be invariable and valid for the entire 6 months life of the prospectus.

113. These amendments will enable interest rates for any particular offering to be specified on the application form rather than in the body of the prospectus. It will be possible to replace the applications forms with ones specifying new rates as interest rate fluctuations require.

Amendment (44): Cl 1025 - Certain notices etc not to be published

114. This amendment is consequent upon Amendment (43).

115. Clause 1025 requires certain material to be included in an advertisement for securities, including a statement to the effect that securities will only be issued upon the receipt of a form of application attached to a prospectus (cl.1025(2)(e)). Amendment (44) amends cl.1025(2)(e) to bring it in line with the amendment to cl.1020.

Amendment (45) : Cl.1047 - Register of debenture holders and copies of trust deeds

116. This amendment is consequent upon Amendment (43).

117. Clause 1047(2) so far as relevant requires a foreign corporation which issues debentures pursuant to a form attached to a prospectus to keep a register of debenture holders. Amendment (45) consequentially amends cl.1047(2) to bring it into line with the amendment to cl.1020.

TIME LIMIT FOR REGISTRATION OF PROSPECTUS

Amendment (49): Cl.1020A - Registration of prospectuses

118. Clause 1020A provides that where a registerable prospectus is lodged, the ASC shall register it unless it appears that the prospectus does not comply with the law or it contains a mis-statement or there is an omission.

119. The Joint Select Committee recommended that this provision be amended to include a time limit, to be prescribed by regulation, within which the ASC shall register prospectuses (Recommendation 18(xiii)).

120. This amendment has the effect of requiring the ASC to register a prospectus within the time to be prescribed by regulation (unless it appears to be defective within the meaning of cls.1020A(a) or (b)), but imposes an overriding requirement that the ASC shall register the prospectus as soon as possible.

121. This is to avoid the tendency for the prescribed period to become the standard period, rather than the outer limit. This would be undesirable and could undermine the purpose of the present provision to require the ASC to devote adequate resources and adopt efficient procedures in registering prospectuses.

122. The essential purpose of this amendment is to promote commercial efficiency and certainty.

STOP ORDERS

Amendment (50): Cl.1033 - Order to stop issue of securities

123. Clause 1033 gives the ASC the power to make orders stopping the issue of securities to which a prospectus relates where any of the grounds set out in cl.1033(2) are satisfied. Clauses 1033(2)(a), (2)(b) and (2)(c) relate to cases of contravention of the legislation, misleading or deceptive statements or material misrepresentations in the prospectus. Clauses 1033(2)(d), (2)(e), (2)(f) and (2)(g) concern questions going to the merit of the investment including whether unconscionable consideration has been paid, the likelihood of insufficient financial resources and the likelihood that the business of the corporation will not be conducted in a financially responsible manner or not in the best interests of investors.

124. Pursuant to a Joint Select Committee Recommendation this amendment deletes cls.1033(2)(d), (2)(e), (2)(f) and (2)(g).

125. The Joint Select Committee took the view that judgments about the merits of an investment should be made by the market and this judgment should not be displaced by that of a regulatory agency. The Committee was also concerned that a consequence of the ASC having the power to stop an issue on its merits may be that investors may gain a false sense of security about an issue, whereas the failure to issue a stop order should not be able to be interpreted as an endorsement of an issue.

126. It is considered that the remaining criteria, which will allow the ASC to issue stop orders in respect of prospectuses which are substantially misleading or which contravene the legislation, will be sufficient for the ASC to prevent serious malpractice. This amendment will ensure that the ASC will not be involved in reviewing the merits of an investment opportunity.

APPROVED DEEDS RELATING TO PRESCRIBED INTERESTS

Amendment (51): Cl.1067 - Approvals

127. Clause 1067(1) requires the ASC to approve a trust deed unless it is of the opinion that the deed does not comply with the requirements of the Bill 'and of the regulations (if any)'. The words 'if any' appear to give rise to the implication that regulations will not necessarily be prescribed setting out additional content requirements for trust deeds.

128. Pursuant to Joint Select Committee Recommendation 21, this amendment deletes the words 'if any'.