Summary of recommendations

Chapter 3 — What is a collective investment scheme?

1. The existing definition of 'prescribed interests' in the Corporations Law should be the basis of the definition of 'collective investment scheme' to which the regulatory regime recommended in this report should apply (para 3.5).

2. The expression 'prescribed interests' should be replaced by 'collective investment schemes' (para 3.5).

3. Common funds of statutory trustee companies that contain any money that is not a private client contribution should be regulated by the collective investment provisions of the Corporations Law (para 3.6).

4. The existing inclusions and exclusions of partnerships and limited partnerships from the scope of the prescribed interests provisions should be maintained under the collective investment provisions of the Corporations Law (para 3.7, 3.22).

5. The collective investment provisions of the Corporations Law should not apply to employee participation schemes (para 3.8).

6. The collective investment provisions of the Corporations Law should not apply to retirement village schemes (para 3.9).

7. Bonds issued by the Commonwealth or a State or Territory government, or by statutory authorities or corporations owned by them, should be excluded from the definition of 'collective investment scheme' in the Corporations Law (para 3.10).

8. Deposits with an Australian bank that are regarded by the RBA as part of the bank's banking business should be excluded from the definition of 'collective investment scheme' in the Corporations Law (para 3.11).

9. Deposits with building societies or credit unions regulated under the uniform local Financial Institutions Codes should be excluded from the definition of 'collective investment scheme' in the Corporations Law (para 3.12).

10. If, within eighteen months of the release of this report, the *Life Insurance Act 1945* (Cth) is not amended to impose on life insurers the same requirements as to the level and kind of disclosure as are imposed on offerors of collective investment schemes, investment linked life insurance policies should be brought within the definition of collective investment schemes and regulated under the Corporations Law (para 3.15).

11. Products offered by friendly societies should be exempted from the application of the collective investment provisions of the Corporations Law, provided the disclosure and marketing laws for friendly societies' investment products are, within a reasonable time, brought into line with those imposed on the offerors of collective investment schemes (para 3.16).

12. Superannuation schemes, ADFs, DAs and PSTs regulated under the Superannuation Industry (Supervision) Bill 1992 (Cth), when eventually enacted, should not be regulated by the collective investment provisions of the Corporations Law (para 3.17).

13. Arrangements declared as joint ventures by the ASC should not be regulated by the collective investment provisions of the Corporations Law (para 3.19).

14. Schemes where the only 'investors' are bodies corporate related to each other should not be regulated by the collective investment provisions of the Corporations Law (para 3.20).

15. Franchise arrangements should not be regulated by the collective investment provisions of the Corporations Law (para 3.21).

16. Shares, debentures and notes should not be regulated by the collective investment provisions of the Corporations Law (para 3.23, 3.24).

17. The regulation of investment companies should be referred to the Review for examination (para 3.25).

18. Schemes the minimum initial subscription for which is at least $500 000 should not be regulated by the collective investment provisions of the Corporations Law (para 3.28).

19. Schemes that are structured so that they cannot accept from all their investors more than $100 000 in total should not be regulated by the collective investment provisions of the Corporations Law (para 3.29).

20. The Corporations Law s 1084 should continue. The ASC should be able to modify, including by exclusion, the application of the collective investment provisions of the Corporations Law to schemes or classes of schemes (para 3.30).

21. The ASC should report annually to the Parliament on the number and kind of exemptions it granted during the year (para 3.30).

Chapter 4 — Establishing a collective investment scheme

22. The Corporations Law should not prescribe a particular legal form for collective investment schemes (para 4.2).

23. Obligations should be imposed on scheme operators directly by the Corporations Law, not by way of prescribed covenants. The covenants in the Corporations Law and regulations should be repealed (para 4.4).

24. A person dealing with the operator of a collective investment scheme should be entitled to assume that the scheme's constitution is being complied with (para 4.6).

25. There should be no requirement for the constituting document of a collective investment scheme to be approved by the ASC (para 4.8).

26. Each collective investment scheme should have to be registered by the ASC and given a unique registration number (para 4.9).

Chapter 5 — Disclosure

27. The prohibition on misleading and deceptive conduct imposed by the Corporations Law s 995 should specifically extend to all forms of advertising or disclosure material, including writing, films and other media, in respect of collective investment schemes (para 5.7).

28. The Corporations Law should provide that the front cover or front page of a prospectus of a collective investment scheme must display prominently the name of the scheme operator and the registration number of the scheme. Advertisements should also have to display that information (para 5.8).

29. The Corporations Law s 1022 should be modified, as it applies to collective investment schemes, to require prospectus issuers to provide information as to the nature of the risks of participating in the scheme, as well as the extent of the risks of participating in the scheme (para 5.11).

30. Prospectuses for collective investment schemes should have to include:

- a list of the kinds of investments authorised by the scheme's constitution
- how the operator's fees and charges are to be worked out
- if the prospectus suggests that another entity will or may assume a liability in relation to the scheme, for example, by way of guarantee — the circumstances in which the liability will arise
- the scheme's management expense ratio over the previous five years (or for the years the scheme has been in existence if it is less than five years old), that is, the ratio of total fees and expenses to the value of the assets in the scheme
- details of the scheme's internal dispute resolution procedures (para 5.14).

31. Limited offers of collective investment schemes should not automatically be exempted from the prospectus requirements of the Corporations Law (para 5.18).

32. Prospectuses issued for collective investment schemes should have to be lodged, but not registered, with the ASC (para 5.19).

33. The Corporate Law Reform Bill (No 2) 1992 [1993] (Cth) should provide that prospectuses issued for collective investment schemes have a life of 13 months (para 5.21).

34. The operator of a collective investment scheme should be required to give investors an annual report on scheme activities and set of audited accounts ((para 5.25).

35. Annual reports of collective investment schemes should have to include

- the unit price at the start and end of the reporting period, and the percentage change in price between the start and end of the period
- if the scheme is unlisted, an explanation of how the price of interests in the scheme is calculated
- the highest and lowest values of units during the last reporting period
- the size and nature of each investment that constitutes more than 5% of the funds of the scheme
- the investment policy of the scheme and its performance against that policy
- any significant changes to the scheme's state of affairs, including any material change in investment policy, in the reporting period
- details of any notices lodged with the ASC as part of the proposed enhanced disclosure regime
- the scheme's management expense ratio over the previous five years (or for the years the scheme has been in existence if it is less than five years old), that is, the ratio of total fees and expenses to the value of the assets in the scheme
- details of any purchase by the operator of existing or new interests in the scheme
- the procedure by which investors may apply for redemption of their interests, whether there is any obligation on the scheme operator to make redemption offers, and if so, the nature of that obligation
- details of the scheme's internal dispute resolution procedures
- details of any change of directors of the scheme operator (para 5.27)
- how many redemption or buy back opportunities were provided to investors in the previous 2 years and, where redemption requests or buy back acceptances were not met in full, to what extent they were able to be met (para 7.13, 7.21).

36. A scheme operator should be required to make its annual audited accounts available upon request to investors in schemes for which it is operator (para 5.28).

37. Operators of collective investment schemes should be required to prepare half yearly reports for their schemes, in accordance with the principles in the Corporations Law Reform Bill (No 2) 1992 [1993] (Cth). These report should be lodged with the ASC but need not be circulated to investors. They should have to include the following information for the previous six months:

- details of any change of directors of the scheme operator
- details of any purchase by the operator of existing or new interests in the scheme (para 5.31)

- how many redemption or buy back opportunities were provided and, where redemption requests or buy back acceptances were not met in full, to what extent they were able to be met (para 7.13, 7.21).

38. The Australian Accounting Standards Board should examine

- which accounting standards should apply to half yearly reports of collective investment schemes
- whether an accounting standard should be developed for collective investment schemes and the nature of any such standard (para 5.32).

39. The measures proposed in the Corporate Law Reform Bill (No 2) 1992 [1993] (Cth) for continuous disclosure by companies should also apply to listed and unlisted collective investment schemes (para 5.35).

Chapter 6 — Financial controls

40. The Corporations Law should not prescribe a minimum liquidity requirement for collective investment schemes (para 6.5).

41. Scheme operators should not be allowed to borrow, on behalf of the scheme, an amount more than 10% of the gross assets of the scheme unless the name of the scheme includes the word 'geared', or some other word approved by the ASC that indicates that it may have liabilities for borrowings, and the maximum permitted level of borrowing of the scheme is disclosed in any prospectus issued by the scheme operator (para 6.10).

42. The relevant assumptions and discount rates used in valuations of the assets of a collective investment scheme, and the other instructions given to valuers, should be disclosed to investors in the annual report (para 6.15).

43. The methods, for example, discounted cash flow, that valuers should be allowed to use when valuing assets of collective investment schemes should be the subject of a review by the ASC and industry representatives (para 6.15).

44. Scheme operators should be required to provide the ASC with an annual certificate prepared by an external auditor stating that, in the auditor's opinion, the operator is giving effect to the compliance measures imposed by the Commission as a condition of the operator's licence. A copy of the certificate should be included in the scheme's annual report (para 6.17).

45. External auditors of collective investment schemes should be required to report to the ASC where they have any reasonable grounds to suspect a breach of the law or of a scheme constitution (para 6.19).

46. The external auditor of a collective investment scheme should only be able to resign or be removed in accordance with the procedure under the Corporations Law s 329 (para 6.19).

Chapter 7 — Withdrawing from a collective investment scheme

47. The existing statutory buy back obligation imposed on management companies should be repealed (para 7.9).

48. A scheme operator should be able to purchase new interests in its scheme on the same basis as other investors (para 7.11).

49. A scheme operator should be allowed to purchase existing interests in its own scheme from investors at a price calculated in accordance with the scheme's constitution, but only after making a written offer to all investors. The offer must indicate the amount of money that the operator is prepared to spend in this offer. Purchases must be made on a pro rata basis where acceptances exceed the amount specified by the operator (para 7.12).

50. The annual and half yearly reports of a collective investment scheme should set out prescribed information about recent buy back offers (para 7.13).

51. Fully liquid schemes that provide redemption facilities must make the facility available to all investors on the same terms (para 7.17).

52. Operators of less than fully liquid schemes should only be allowed to provide redemption facilities on the following basis:

- the offer must be made to all investors in the same terms
- the operator must lodge notice of the redemption offer with the ASC
- the operator must meet redemption requests only from the liquid assets of the scheme that are on hand at the close of the offer period
- redemption requests must be paid out at a price calculated in accordance with the scheme's constitution
- if the liquid assets are insufficient to meet all redemption requests, the operator must redeem on a pro rata basis (para 7.21).

53. The annual and half yearly reports of a collective investment scheme should set out prescribed information about recent redemptions (para 7.21).

Chapter 8 — Termination, winding up and voluntary administration of a scheme

54. The exclusion of the rule against perpetuities in the Corporations Law should be extended to all collective investment schemes (para 8.3).

55. A provision in the constitution of a collective investment scheme that would terminate the scheme if the scheme operator is removed should be ineffective (para 8.4).

56. Investors in a collective investment scheme should be able to terminate a collective investment scheme, for any reason, by the vote of the holders of more than 50% of the value of the interests in the scheme (other than interests held by the scheme operator or its associates) (para 8.5).

57. Investors should be able to terminate an insolvent scheme by special resolution of three quarters of the investors (other than the scheme operator and its associates) voting on the resolution, provided that an external auditor has certified that the scheme is insolvent (para 8.6).

58. The court should have the power to terminate a scheme whenever it is of the opinion that it would be just and equitable to do so (para 8.7).

59. The court should have the power to terminate an insolvent scheme on application by a creditor, the scheme operator, a director of the scheme operator, a liquidator or provisional liquidator of the scheme operator or the ASC. An applicant should first be required to obtain leave of the court by establishing a prima facie case that the scheme is insolvent (para 8.8).

60. If the purpose for which a scheme was established has been accomplished, or is no longer capable of being achieved, the scheme operator should be permitted to advise investors and the ASC that the scheme will be terminated in 28 days unless the operator receives a requisition from investors or the ASC for a meeting of investors to consider a resolution that the scheme not be terminated but that the constitution of the scheme be amended appropriately (para 8.9).

61. It should be an offence for a scheme operator to continue a scheme, including by taking new contributions, without a court order if the scheme has terminated (para 8.10).

62. Matters that are common to the winding up of all collective investment schemes should be included in the Corporations Law (para 8.11).

63. The court should have a wide power to give directions in relation to the winding up of a scheme (para 8.11).

64. A registered liquidator should be appointed, either by the court or by the scheme operator, to a scheme that has been terminated. The liquidator should be able to continue the business of the scheme if this is for the better winding up of the scheme (para 8.12).

65. The voluntary administration procedure in the Corporations Law Pt 5.3A should be adapted to permit an administrator to be appointed to deal with the affairs of an insolvent scheme (para 8.13).

66. The liquidator of a scheme operator should not become the liquidator of the operator's schemes unless the court so orders (para 8.14).

Chapter 9 — Compliance

67. At least half of the board of the operator of a collective investment scheme should be non-executive directors. A director is non-executive if he or she is not, or has not been during the previous three years, an employee or executive officer of the scheme operator or of an entity related to the operator and does not hold any shares in the operator or an entity related to the operator (para 9.10).

68. The Corporations Law should provide that if the operator of a collective investment scheme holds property of the scheme it will do so on trust for the scheme investors (para 9.14).

69. The Corporations Law should provide that if a scheme operator holds scheme assets it must identify them in such a way that they are clearly property of a particular collective investment scheme (para 9.15).

70. Application forms for interests in a collective investment scheme should direct that cheques be drawn in favour of the scheme operator on account of the particular scheme (para 9.15).

Chapter 10 — The scheme operator

71. Only companies incorporated under the Corporations Law may apply for a scheme operators licence (para 10.2).

72. Responsibility for a collective investment scheme should lie with the operator. The Corporations Law should state clearly a set of obligations for scheme operators and their officers which may not be modified or excluded by a scheme's constitution (para 10.6).

73. The Corporations Law should impose an obligation on the operator of a collective investment scheme to act honestly in respect of the scheme (para 10.7).

74. The Corporations Law should impose an obligation on the operator of a collective investment scheme to exercise its powers and perform its duties as operator in the best interests of investors rather than in its own, or anyone else's, interest, if that interest is not identical to the interests of the scheme investors (para 10.8).

75. It should be an offence for an operator to make payments out of the scheme property on account of expenses or charges, either for itself or for anyone else, except in accordance with the scheme's constitution (para 10.9).

76. A scheme operator should not be able to recover from scheme assets the cost of hiring an investment manager or an investment adviser (para 10.10).

77. The Corporations Law should impose an obligation on operators of schemes in which the investors do not retain title to the scheme's assets, to keep the scheme's assets separate from their own assets (para 10.11).

78. The Corporations Law should impose on scheme operators an obligation to treat the holders of interests of the same class equally and to treat the holders of interests of different classes fairly (para 10.12).

79. The Corporations Law should provide that a scheme operator must not make improper use of information that it gets as operator of a particular scheme, or of its position as operator, to gain an advantage for itself or for any other person or to cause detriment to the investors in the scheme (para 10.13).

80. The Corporations Law should provide that where there is a conflict between the duty an officer of the operator owes to the operator and a duty he or she owes to investors, the duty to investors should prevail. Officers should be given statutory protection from claims by the operator or its shareholders arising from any loss they suffered in consequence of officers complying with their paramount duties to investors (para 10.17).

81. The Corporations Law should impose on officers of scheme operators the duty to act honestly in all matters relating to the scheme (para 10.18).

82. The Corporations Law should impose on officers of scheme operators the duty to exercise their powers and discharge their duties in respect of the scheme with the degree of care and diligence that a reasonable person in a like position would exercise in similar circumstances (para 10.19).

83. The Corporations Law should impose on officers of scheme operators the duty to act in the interests of investors and not in the interest of themselves, the operator or any other person where those interests are not identical (para 10.20).

84. The Corporations Law should prohibit an officer of a scheme operator from making improper use of information gained by virtue of his or her position as officer, to gain an advantage for himself or herself or for another person, or to cause detriment to the investors in the scheme (para 10.21).

85. The Corporations Law should impose on officers of scheme operators the duty to take all reasonable steps to ensure that the operator complies with all its obligations (para 10.22).

86. The principles in the Corporations Law Part 3.2A, adapted for collective investment schemes, should regulate transactions where a scheme operator, its associates, or any other related party could receive a financial benefit from dealings involving scheme assets. Various transactions should be exempted. A non-exempt related party transaction should be permitted only if it is agreed to by a prior resolution of a simple majority of disinterested investors, provided they have been fully informed about the transaction and its likely impact upon the scheme (para 10.25).

87. The Corporations Law should prohibit any person from accepting any payment or other benefit in relation to retirement from office of the operator or any of its officers, including employees, unless it has been approved by the votes of the holders of more than 50% of the value of the voting interests of the scheme (para 10.26).

88. Scheme operators should be required to have at all times capital equal to 5% of the value of the assets of all schemes operated by the operator, subject to a minimum of $100 000 and a maximum of $5m. It should be an offence for a scheme operator to have, for a period of 14 consecutive days, a capital level below that required (para 10.31).

89. The law should prohibit scheme operators from guaranteeing or providing any indemnity in respect of loans, whether the loan is to another member of the corporate group or not (para 10.32).

90. Scheme operators should be required to have a scheme operators licence, issued by the ASC (para 10.35, 10.36).

91. The ASC should keep a register of licensed operators of collective investment schemes (para 10.41).

92. The ASC should have to consider whether the compliance measures summarised in an application for a scheme operators licence are reasonably likely to detect in advance and prevent contraventions of the law or of the scheme's constitution (para 10.43).

93. If the ASC considers that the measures disclosed in the summary, or that are otherwise known to it, are not reasonably likely to detect in advance and prevent contraventions of the law or of the scheme's constitution, it may refuse to grant a licence or grant a licence subject to conditions relating to compliance measures (para 10.43).

94. The law should set out a non-exhaustive list of compliance factors that the ASC must take into account in considering an applications for a scheme operators licence (para 10.44).

95. In considering whether proposed compliance measures are reasonably likely to detect in advance and prevent a potential breach of the law, the ASC should take into account who will have the legal title to the scheme's assets and, if an external custodian is to have legal title, the arrangements between the proposed custodian and the operator (para 10.45).

96. If the ASC does not refuse to grant a scheme operators licence, it must notify the applicant that it will issue a licence subject to the conditions contained in the notice. The conditions must relate to compliance (para 10.46).

97. The directors of the applicant for a scheme operators licence must, before the licence is granted, certify that they have examined the conditions of the licence, that they are satisfied that the compliance measures specified in the conditions are

reasonably likely to detect in advance and prevent contraventions of the law or of the scheme's constitution and that the applicant is able to give effect to them if the licence is granted (para 10.47).

98. A scheme operator must comply with the conditions imposed on its licence. Failure to do so should be a contravention of the Corporations Law but not an offence (para 10.48).

99. The ASC may change the conditions of an operator's licence at the request of the operator or on its own initiative (para 10.49).

100. The Corporations Law should provide that the ASC must reject an application for a scheme operators licence if the applicant is externally administered or one of its officers is an insolvent under administration (para 10.52).

101. The Corporations Law should provide that the ASC must refuse to grant a scheme operators licence if any officer of the applicant has been convicted of serious fraud in the past five years, has not been released from prison for more than five years after serving a sentence for a conviction for serious fraud or is otherwise prohibited from managing a corporation (para 10.53).

102. An applicant for a scheme operators licence should be required to disclose to the ASC in its application any conviction for serious fraud and the circumstances in which it arose and any civil penalty for an act of dishonesty to which it has been subjected (para 10.53, 10.54).

103. The Corporations Law should provide that the ASC must refuse to grant a scheme operators licence if any officer of the applicant has been subject to a civil penalty for an act of dishonesty in the five years before the application is made or is otherwise prohibited from managing a company (para 10.54).

104. The Corporations Law should provide that the ASC must refuse to grant a scheme operators licence unless at least half of the applicant's directors are non-executive (para 10.55).

105. The Corporations Law should provide that a company may not retire as the operator of a collective investment scheme until a replacement operator has been appointed (para 10.57).

Chapter 11 — The investor

106. The operator of a collective investment scheme should be required to maintain a register of investors (para 11.3).

107. Investors in a collective investment scheme should have access to material contracts referred to in a scheme prospectus. The ASC should, however, have power to permit the scheme operator to deny access where appropriate (para 11.3).

108. Investors in a collective investment scheme should have a statutory right to apply to the court for an order permitting a legal practitioner or auditor to inspect the books of the scheme (para 11.4).

109. Scheme operators should be required to issue certificates to purchasers of interests within two months after the allotment of those interests unless the scheme constitution otherwise provides (para 11.5).

110. The half yearly and annual reports of a collective investment scheme should include details of changes of directors of the scheme operator (para 11.9).

111. The operator of a listed collective investment scheme should have to keep a register of substantial interest holdings (para 11.12).

112. The operator of a listed collective investment scheme should include in the annual report of the scheme the total number of voting interests in the scheme as at the date of the report. An investor should have to notify the operator within 14 days of receiving the report if, on the basis of information in that report,

- unless previously notified, its entitlement has increased to 30% or more of the voting interests in the scheme
- its voting entitlement has changed by at least 5% since it last notified the operator of its substantial holding or
- it is no longer entitled to 30% of the voting interests (para 11.12).

113. A scheme operator should include on the register of investors details of its entitlement to interests if it exceeds 30% of the total issued interests. If its entitlement changes by 5% or falls below 30% of total issued interests, the operator should have to amend the register (para 11.12).

114. The Corporations Law should contain provisions for mergers of collective investment schemes, based on the Corporations Law Pt 5.1 as it applies to the amalgamation of companies (para 11.14).

115. A scheme operator should not be able to transfer its right to operate a scheme without the approval of investors unless pursuant to the court appointment of a replacement scheme operator (para 11.15).

116. Where a temporary scheme operator considers that the scheme should continue and the court agrees, the temporary scheme operator should be obliged to, and the investors may, call a meeting of investors to appoint a temporary scheme operator (para 11.16).

117. Investors in a collective investment scheme should be able to remove the scheme operator by the majority vote of the holders of more than 50% of the value of the interests in the scheme. If the investors do not agree on a replacement operator, the outgoing operator should be required to apply to the court for the appointment of a temporary scheme operator. An investor or the ASC should also be able to apply to the court for the appointment of a temporary scheme operator (para 11.17).

118. Investors in a collective investment scheme should have no power to give directions to the scheme operator (para 11.18).

119. Where a scheme operator proposes an amendment to the scheme's constitution, it should give investors and the ASC notice of the proposed amendment and inform them of

- details of the amendment sought
- the reasons for the proposed amendment.

It must call a meeting of investors to approve the amendment unless it considers that the proposed amendment is minor and will not adversely affect the interests of investors. If the operator does not call a meeting, the investors or the ASC may call a meeting of investors to vote on the amendment (para 11.21).

120. An investor in a collective investment scheme may propose an amendment to the scheme constitution, with the agreement of the scheme operator. The proposed amendment must be voted on by investors (para 11.22).

121. The voting majority for investor approval of an amendment to the scheme constitution should be 75% by value or more of at least 25% of the value of interests held by persons entitled to vote (para 11.21, 11.22).

122. Investors in a collective investment scheme should be able to call a meeting for the purpose of exercising the powers they have in respect of the scheme (para 11.23).

123. Any interests in the scheme held by the scheme operator or its associates should be non-voting interests except where those interests are held on bare trust and the operator or the associate does not have any discretion in determining how to vote. Non-voting interests should not be counted when determining the total number of interests in the scheme for the purpose of calculating the percentage of investors voting (para 11.26).

124. Investors in a collective investment scheme should be permitted to vote on a resolution in person, by post or by proxy (para 11.27).

125. There should be a comprehensive review of takeovers of collective investment schemes. The review should include the need for provisions permitting compulsory acquisition of minority interests (para 11.30).

126. The Corporations Law should provide a right for investors in collective investment schemes to apply to the court for an order under a provision based on the Corporations Law s 260 (oppression remedy) (para 11.33).

127. Scheme operators should be required to

- maintain an internal dispute resolution procedure to deal with investor enquiries and complaints

- include in each prospectus and annual report details of the scheme's internal dispute resolution procedure (para 11.35).

128. The Corporations Law should limit the liability of investors in collective investment schemes that are trusts to the unpaid amount, if any, of their investment in the scheme (para 11.37).

Chapter 12 — No compulsory third party needed

129. The Corporations Law should not require the operator of a collective investment scheme to involve another entity in the operation of the scheme (para 12.12).

Chapter 13 — Intermediaries

130. The prohibition in the Corporations Law on dealing in securities without a dealers licence should not be infringed merely because the licensed operator of a collective investment scheme issues, buys or redeems interests in its own scheme. Nor should the prohibition on advising on securities without a dealers licence or investment advisers licence be infringed merely because the operator of a scheme gives advice about interests in a scheme of which it is the operator (para 13.4).

131. If a scheme operator authorises a representative, the procedures and requirements and, particularly, the liability, for the representative should be the same, as nearly as possible, as for representatives of licensed dealers (para 13.4).

132. Specific educational qualifications and experience necessary to gain a dealers licence under which the licensee will be allowed to advise persons about securities or an investment advisers licence should be prescribed. This should be done as soon as possible (para 13.6).

133. The Corporations Law should be amended to prohibit a securities adviser or the holder of a scheme operators licence from making a securities recommendation to a client that the client may reasonably be expected to rely on unless

- the adviser or operator has made reasonable inquiries about, and other reasonable investigations of, the client's investment objectives, financial situation and needs and
- the recommendation is based on the results of those inquiries and investigations (para 13.10).

134. The Corporations Law should require that, if a securities adviser or the holder of a scheme operators licence makes a securities recommendation to a client who can reasonably be expected to rely on it, it should have to give the client a written statement of the recommendation (para 13.11).

135. The Corporations Law should prohibit a dealer or investment adviser from holding himself or herself out as independent, whether by describing himself or herself as independent or otherwise, if he or she has entered into any arrangement

under which he or she will, as a result of a recommendation to a client, receive a benefit other than from the client on account of buying or selling any securities. 'Benefit' should include all benefits, not just commissions (para 13.16).

136. A dealer or investment adviser that is a body corporate must not hold itself out as independent if a body in whose securities it may lawfully deal or about whose securities it may lawfully advise other persons or publish reports is in a position to control it (para 13.16).

137. The Corporations Law should be amended to require securities advisers and scheme operators, when they make a securities recommendation, to disclose to their clients how much of the client's investment will be deducted for fees, commissions and other charges. The amount of each fee and charge, and what it was for, should be disclosed in writing before the transaction recommended, or one substantially like it, is carried out. Failure to disclose should be an offence (para 13.19).

138. The *Life Insurance Act 1945* (Cth) should be amended to impose on persons selling investment linked life insurance policies requirements that reflect the recommendations made in respect of intermediaries regulated under the Corporations Law (recommendations 133 — 137) (para 13.23).

139. No system for licensing life agents should be introduced (para 13.27).

Chapter 14 — The regulator

140. Collective investment schemes as defined in chapter 3 should be regulated by the ASC as part of the national corporations scheme laws (para 14.3).

141. The Commonwealth should retain primary responsibility for regulating participants in the collective investments industry (para 14.4).

142. In regulating collective investment schemes, the ASC should have available all its existing information gathering powers under the Corporations Law and the *Australian Securities Commission Act 1989* (Cth) (para 14.7).

143. To enhance its existing surveillance powers, the ASC should have powers, exercisable whether or not a contravention is suspected, to

- gain access to, and within, premises to search for and examine relevant books
- bring devices upon premises to assist in such search or examination
- check and operate computers or other devices already upon the premises to obtain relevant information
- secure relevant books found during a surveillance visit
- require persons to assist its surveillance audit (para 14.9).

144. The ASC should have power to require a person within Australia to authorise the Commission to obtain documents or any other record of information directly from overseas parties (para 14.10).

145. The existing search warrant provisions should be amended to permit warrants to be obtained by facsimile or telephone if it is impractical to apply for a warrant in person and to permit a person executing a warrant to leave the premises temporarily without the warrant thereby being discharged (para 14.11).

146. The ASC should be able to apply to a court for the arrest of a person who is absconding from Australia or improperly dealing with books to avoid his or her obligations in connection with the winding up of a collective investment scheme (para 14.13).

147. The directors and other officers of scheme operators and any other persons involved in the compliance activities of collective investment schemes should be given statutory qualified privilege in respect of any information volunteered to the ASC (para 14.15).

148. The court should have power, exercisable upon the application of the ASC, a director of the scheme operator or an investor, to direct a scheme operator to comply with the scheme constitution (para 14.19).

149. The court should have power, upon an application by the ASC, an investor or the scheme operator or any of its directors to appoint a person to act as the temporary scheme operator (para 14.20).

150. The ASC should be entitled act as a representative party pursuant to the Federal Court class action rules (para 14.22).

151. The ASC should have a specific power to provide private litigants with any relevant books it has in its possession, in addition to those related to an oral examination (para 14.22).

152. The ASC should have a power similar to that available to the Trade Practices Commission under the *Trade Practices Act 1974* (Cth) s 87B to enter into enforceable undertakings with a scheme operator (para 14.24).

153. The ASC should have power to call investors' meetings and propose resolutions (para 14.26).

154. The ASC should be able to attend and speak at any meeting of the investors in a collective investment scheme (para 14.27).

155. A scheme operator should have to advise the ASC promptly of any breach of its licence conditions (para 14.28).

156. The ASC should have power, without a hearing, to revoke the licence of a scheme operator if it

- becomes an externally administered body corporate
- ceases to carry on business
- requests the ASC to revoke its licence (para 14.29).

157. The ASC should have power to revoke a scheme operators licence, outright or in respect of one or more schemes, subject to providing an opportunity for a hearing, if it is satisfied that there is a significant risk that the operator will contravene or fail to comply with the Corporations Law in relation to a substantial matter (para 14.30).

158. The ASC should, on giving a notice revoking a scheme operators licence, apply to the court for the appointment of a temporary scheme operator, unless an eligible replacement scheme operator has already been properly appointed or the scheme has been terminated (para 14.31).

159. Any written notice to a scheme operator, or any other affected person, of a decision or determination by the ASC should be required to include a statement of any rights to apply for a review of the decision or determination by the Administrative Appeals Tribunal (para 14.32).

Chapter 15 — Offences and remedies

160. The fault element of each contravention of the Corporations Law should be expressly stated in that law (para 15.2).

161. For a number of contraventions there should be no fault element (para 15.3).

162. The defence that the defendant was taking all reasonable measures to prevent contravention of the relevant kind should apply in respect of most contraventions (para 15.5).

163. The penalty notice provision of the Corporations Law (s 1313) should be available for appropriate offences (para 15.7).

164. The civil penalty regime (Corporations Law Pt 9.4B) should apply to contraventions of duties (analogous to the duties set out in the Corporations Law s 232) that directors and other executive officers of a scheme operator owe to investors (para 15.9).

165. The civil penalty regime should not apply to a scheme operator in respect of a breach by it of its obligations to investors (para 15.11).

166. All the acts of a body corporate's officers and agents that are within their actual or apparent authority should be attributed to the corporation except where the servant or agent acted only for his or her own benefit and where the body corporate took reasonable measures to prevent its servants or agents doing the act (para 15.16).

167. The state of mind of, or standard of care exercised by, the person who does an act that, under the previous recommendation, is attributed to the body corporate should also be attributed to the body (para 15.17).

168. The state of mind of, or standard of care exercised by, the person who, within his or her actual or apparent authority, authorises or directs an act to be done should be attributed to the body as well (para 15.17).

169. Attribution rules similar to those in recommendations 166 — 168 should apply in cases where there is a need to determine when a scheme operator has knowledge of a matter (para 15.18).

Chapter 16 — Transitionals

170. Subject to the exceptions indicated in chapter 16, all schemes that are to continue after the commencement of the collective investment provisions of the Corporations Law should be required to comply with the requirements of those provisions (para 16.2).

171. Existing schemes should have two years in which to convert from the existing regime to the new regime. The ASC should be able to extend this period if appropriate (para 16.3).

172. The consent of the party that does not apply to be licensed as the scheme operator should have to be attached to the licence application if the application is made within 18 months after the legislation implementing the Review's recommendations is implemented. After that time, the management company should be able to apply without the trustee's consent (para 16.3).

173. The law should be amended to ensure that if, during the transition to the new regime, assets of a prescribed interest scheme are transferred no liability to stamp duty or to capital gains tax is incurred (para 16.3).

174. The rules for terminating and winding up a scheme should not apply until the scheme is registered and the operator licensed (para 16.3).

175. All disclosure requirements that do not depend on the existence of a scheme number, such as the enhanced disclosure recommendations, should apply from the commencement of the amendments to the Corporations Law recommended in this report (para 16.4).

176. Schemes should not have to comply with the financial controls recommended in chapter 6 until they are registered under the new regime. The requirements relating to audits should, however, apply as soon as the new provisions are implemented (para 16.5).

177. The Review's recommendations about procedures for leaving a collective investment scheme should be implemented at the earliest opportunity. They can be implemented independently of the other recommendations in this report (para 16.6).

178. The obligations to be imposed on scheme operators and their officers should not be imposed until the scheme is registered and a scheme operator licensed (para 16.7).

179. The recommended investors' rights of access to information about the scheme should be available as soon as the amending legislation commences (para 16.8).

180. The obligations the Review recommends should be imposed on scheme operators in respect of annual and other reports should be imposed on managers of prescribed interest schemes for which there is an approved deed as soon as possible after the amending legislation is enacted (para 16.8).

181. After commencement of the recommended amendments but before the scheme is registered and an operator licensed, investors should have the same right to dismiss the trustee or management company as they would have under the new regime to dismiss the operator (para 16.9).

182. The mechanism for amending the constitution of a prescribed interest scheme should not be changed until the scheme is registered (para 16.9).

183. The recommended right of investors to apply to the court for relief on the grounds of oppression should be available to investors in all schemes on the commencement of the amending legislation (para 16.10).

184. The recommended controls on intermediaries should apply as soon as the amending legislation commences (para 16.11).

185. As soon as the amending legislation commences, the ASC should be able to exercise, in relation to both the trustees and managers of prescribed interest schemes, all the powers it will have, including powers to conduct audit surveillances, in respect of scheme operators (para 16.12).