

**The Law
Reform
Commission**

Report No 65

**The Companies
and Securities
Advisory Committee**

Report

**COLLECTIVE INVESTMENTS:
OTHER PEOPLE'S MONEY**

Volume 2: Draft legislation

**This Report
reflects the law
as at 1 June 1993**

[It assumes that the *Corporate Law Reform Act 1992 (Cth)* and the *Corporate Law Reform (No 2) Bill 1992 [1993] (Cth)* are both fully in operation.]

© Commonwealth of Australia 1993

ISBN 0 642 19350 9

ALRC Reference: ALRC 65

The Law Reform Commission was established by the *Law Reform Commission Act 1973* section 5 to review, modernise and simplify the law. It started operation in 1975. The office of the Commission is at 99 Elizabeth Street, Sydney, NSW, Australia (tel (02) 231 1733; fax (02) 223 1203).

The Companies and Securities Advisory Committee was established by the *Australian Securities Commission Act 1989* to monitor and advise on the operation of national scheme laws. It started operation in 1989. The office of the Committee is at Level 16, Westpac Plaza, 60 Margaret Street, Sydney, NSW, Australia (tel (02) 911 2950; fax (02) 911 2955).

Printed by Alken Press Pty. Ltd. – Smithfield

Contents

Terms of Reference	<i>page</i> iv
Participants	vi
Summary of recommendations	ix
A Guide to the Collective Investment Schemes Bill 199? [Explanatory Memorandum]	1
Collective Investment Schemes Bill 199?	63

Terms of reference

COMMONWEALTH OF AUSTRALIA

Law Reform Commission Act 1973
Australian Securities Commission Act 1989

1. I, Michael Duffy, Attorney-General of Australia noting:

- the report of the Companies and Securities Law Review Committee to the Ministerial Council for Companies and Securities titled 'Prescribed Interests'; and
- the need to ensure that there is a proper legal framework for prescribed interests and like collective investment schemes (collective investment schemes) that:
 - promotes commercial stability, and efficiency in capital raising and capital formation; and
 - provides an appropriate level of regulation that adequately and effectively protects the interest of investors,

refer to the Law Reform Commission for review and report under the *Law Reform Commission Act 1973* section 6:

- (1) Whether the present legal framework for collective investment schemes provides for the most efficient and effective legal framework for the operation of the various kinds of such schemes and, in particular, whether a different operating structure should be provided for such schemes, including whether separate structures should apply to different kinds of schemes;
- (2) Whether there is a proper level of regulation of the various kinds of collective investment schemes, and in particular:
 - whether different systems of regulation should be provided for different kinds of such schemes;
 - what disclosures should be made to the public;
 - whether scheme documents, such as trust deeds, can be simplified or standardised;
 - what should be the powers, duties and responsibilities of the persons who promote, manage, or supervise the operation of collective investment schemes, such as managers and trustees, including whether, and the extent to which, such duties and responsibilities should be codified;
 - whether any form of self-regulation would be appropriate;
 - what prudential requirements, if any, should be imposed on such persons as promoters, managers or trustees of such schemes, including requirements as to availability of capital;
 - whether a special framework for the liquidity of collective investment schemes, and for the secondary sale or trading of collective investment scheme interests, is desirable, including whether buy-back arrangements are appropriate and, if so, whether there is a need for particular buy-back provisions for particular kinds of such schemes; and
- (3) any related matter;

and, under the *Australian Securities Commission Act 1989* section 148, request the Companies and Securities Advisory Committee to advise me about those matters.

2. In carrying out their functions, the Commission and the Committee are to consult the Australian Securities Commission, the Commonwealth Attorney-General's Department, relevant Commonwealth, State, and Territory authorities, the securities industry and any other person or body they think appropriate, having special regard to the Commonwealth's Access and Equity policy.

3. The report and advice should include draft legislation and an explanatory memorandum.

4. The report is to be delivered by 1 November 1992.

DATED: 24 May 1991

Michael Duffy
Attorney-General

Participants

Australian Law Reform Commission

The Division of the Commission for the purpose of this report comprised:

President

Justice Elizabeth Evatt AO

Members

Jim Armitage (to 31 December 1992)¹

Leigh Hall (to 31 December 1992)²

Stephen Mason

Mr Mason drafted the legislation in Volume 2.

Christopher Sidoti

Justice John von Doussa (from 17 September 1992)

The Companies and Securities Advisory Committee

Convenor

Mr Mark Burrows

Members

Mr Don Argus

Mr John Barner

Mr Reg Barrett

Professor Philip Brown

Mr Alan Cameron (from 1 January 1993)

Mr David Crawford

Mr Kevin Driscoll CBE

Mr William Gurry

Mr Leigh Hall

Mr Tony Hartnell (to 31 December 1992)

Mr Wayne Lonergan

Ms Ann McCallum

Mr Alan McGregor AO

Mr Mark Rayner

Mr Andrew Turnbull

Officers (ALRC)

*Project manager*³

Russell Agnew

-
1. Mr Armitage and Mr Hall continued to work with the Review until the completion of this report.
 2. Mr Hall is also a member of the Advisory Committee.
 3. By agreement, the ALRC project team had primary responsibility for preparing this report.

Senior Law Reform Officers

Mark Blair (5 November 1992 to 26 February 1993)

Kate Hamilton (21 April 1992 to 4 November 1992)

Margaret Ryan

Research Assistant

Steven Lam (from 4 January 1993)

Project Assistant

Lynne Munnich

Typesetting

Anna Hayduk

Library

Joanna Longley *Librarian*

Louise Levido *Library Assistant*

Officers (Advisory Committee)

Executive Director

John Kluver

Officers

Mark Blair (to 4 November 1992)

Vincent Jewell (from 17 February 1992)

Executive Assistant

Ms Timmi Parrino

Consultants to the Australian Law Reform Commission⁴

Mr Robert Ferguson, Managing Director, Bankers Trust Australia

Mr Richard Beetham, then Commissioner, Insurance & Superannuation Commission

Mr Don Blyth, National Director, Trustee Companies Association

Mr Richard Braddock, Head, Economics Discipline, School of Economics and Financial Studies, Macquarie University

Mr Tony Cole, then Secretary, Department of the Treasury

Mr David Davis, Managing Director, Permanent Trustee Company

Mr John Denyer, then Executive Director, Investment Funds Association of Australia

Mr John Field, Partner, Blake Dawson Waldron

Ms Lyn Gearing, Director, Rothschild Australia Asset Management Limited

Professor David Knox, Associate Professor in Actuarial Studies, School of Economics and Financial Studies, Macquarie University

Mr Mike Lyons, Partner, Clayton Utz

Mr Donald Magarey, Partner, Blake Dawson & Waldron

Mr Ian Martin, Director, Bankers Trust

4. The recommendations, statements of opinion and conclusions in this report are those of the members of the ALRC and the Advisory Committee. They do not necessarily represent the views of consultants or of the organisations with which they are associated.

Ms Jenni Mattila, Partner, Tress Cocks & Maddox
Mr John Morgan, Partner, Allen Allen & Hemsley
Mr Jim Murphy, Special Adviser, Business Affairs Division, Attorney-
General's Department, Canberra
Ms Catherine Prime, Catherine Prime & Associates
Mr David Purchase, Executive Director, Life Insurance Federation of Australia
Mr Ken Robinson, Tax and Legislation Manager, National Mutual Life
Association of Australasia Ltd
Mr Joseph Rooney, Partner, Tress Cocks & Maddox
Mr Iain Ross, Assistant Secretary, ACTU, Melbourne
Mr John Rutherford, Director, Corporate Supervision Unit, Australian
Securities Commission
Mr Ray J Schoer, Director of Operations, Australian Stock Exchange
Mr Brian Scullin, Executive Director, Association of Superannuation Funds of
Australia
Mr Malcolm Starr, Director, Companies and Securities, International Banks and
Securities Association of Australia
Professor Tom Valentine, Director, Centre for Applied Finance, University of
Technology, Sydney
Mr Garry Weaven, Senior Consultant, Westpac Financial Services Group
Ms Sarah Worthington, Lecturer, Faculty of Law, Melbourne University

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 (vol 1 para 3.5; vol 2 s 50B).
2. The expression 'prescribed interests' should be replaced by 'collective investment schemes' (vol 1 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 (vol 1 para 3.6; vol 2 s 50M).
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 (vol 1 para 3.7, 3.22; vol 2 s 50D).
5. The collective investment provisions of the Corporations Law should not apply to employee participation schemes (vol 1 para 3.8; vol 2 s 50H(c)).
6. The collective investment provisions of the Corporations Law should not apply to retirement village schemes (vol 1 para 3.9; vol 2 s 50C).
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 (vol 1 para 3.10; vol 2 s 50L).
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 (vol 1 para 3.11; vol 2 s 50K(a)).
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 (vol 1 para 3.12; vol 2 s 50K(b)).
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 (vol 1 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 (vol 1 para 3.16; vol 2 s 50P).

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 (vol 1 para 3.17; vol 2 s 50J(2)).

13. Arrangements declared as joint ventures by the ASC should not be regulated by the collective investment provisions of the Corporations Law (vol 1 para 3.19; vol 2 s 50E).

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 (vol 1 para 3.20; vol 2 s 50H(b)).

15. Franchise arrangements should not be regulated by the collective investment provisions of the Corporations Law (vol 1 para 3.21; vol 2 s 50F).

16. Shares, debentures and notes should not be regulated by the collective investment provisions of the Corporations Law (vol 1 para 3.23, 3.24; vol 2 s 50L).

17. The regulation of investment companies should be referred to the Review for examination (vol 1 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 (vol 1 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 (vol 1 para 3.29; vol 2 s 50H(a)).

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 (vol 1 para 3.30).

21. The ASC should report annually to the Parliament on the number and kind of exemptions it granted during the year (vol 1 para 3.30; vol 2 s 138 ASC Act).

Chapter 4 — Establishing a collective investment scheme

22. The Corporations Law should not prescribe a particular legal form for collective investment schemes (vol 1 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 (vol 1 para 4.4; vol 2 cl 135).
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 (vol 1 para 4.6; vol 2 s 164, 165).
25. There should be no requirement for the constituting document of a collective investment scheme to be approved by the ASC (vol 1 para 4.8).
26. Each collective investment scheme should have to be registered by the ASC and given a unique registration number (vol 1 para 4.9; vol 2 s 113A, 219A).

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 (vol 1 para 5.7; vol 2 s 995).
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 (s 1021A). Advertisements should also have to display that information (vol 1 para 5.8; vol 2 s 1082A).
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 (vol 1 para 5.11; vol 2 s 1022(1A)).
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 (vol 1 para 5.14; vol 2 s 1021).
31. Limited offers of collective investment schemes should not automatically be exempted from the prospectus requirements of the Corporations Law (vol 1 para 5.18).
32. Prospectuses issued for collective investment schemes should have to be lodged, but not registered, with the ASC (vol 1 para 5.19; vol 2 s 1017A).
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 (vol 1 para 5.21; vol 2 s 10AA).
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 (vol 1 para 5.25; vol 2 s 323KA).
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 (vol 1 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 (vol 1 para 7.13, 7.21; vol 2 s 323J).

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 (vol 1 para 5.28; vol 2 s 315).

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 (vol 1 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 (vol 1 para 7.13, 7.21; vol 2 s 323J).

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 (vol 1 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 (vol 1 para 5.35; vol 2 s 22G).

Chapter 6 — Financial controls

40. The Corporations Law should not prescribe a minimum liquidity requirement for collective investment schemes (vol 1 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 (vol 1 para 6.10; vol 2 s 260AJ, 1021(6B)(c)).

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 (vol 1 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 (vol 1 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 (vol 1 para 6.17; vol 2 s 323H(b)).
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 (vol 1 para 6.19; vol 2 s 332AA).
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 (vol 1 para 6.19; vol 2 s 329A).

Chapter 7 — Withdrawing from a collective investment scheme

47. The existing statutory buy back obligation imposed on management companies should be repealed (vol 1 para 7.9; vol 2 cl 135).
48. A scheme operator should be able to purchase new interests in its scheme on the same basis as other investors (vol 1 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 (vol 1 para 7.12; vol 2 s 216AM–216AT).
50. The annual and half yearly reports of a collective investment scheme should set out prescribed information about recent buy back offers (vol 1 para 7.13; vol 2 s 323J).
51. Fully liquid schemes that provide redemption facilities must make the facility available to all investors on the same terms (vol 1 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 (vol 1 para 7.21; vol 2 s 216AC–216AK).

53. The annual and half yearly reports of a collective investment scheme should set out prescribed information about recent redemptions (vol 1 para 7.21; vol 2 s 323J).

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 (vol 1 para 8.3; vol 2 s 1346).

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 (vol 1 para 8.4; vol 2 s 581AA(2)).

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) (vol 1 para 8.5; vol 2 s 581AE).

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 (vol 1 para 8.6; vol 2 s 581AE).

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 (vol 1 para 8.7; vol 2 s 581AC).

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 (vol 1 para 8.8; vol 2 s 581AD).

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 (vol 1 para 8.9; vol 2 s 581AB).
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 (vol 1 para 8.10; vol 2 s 581DB, 113B).
62. Matters that are common to the winding up of collective investment schemes in which the scheme operator holds the scheme property should be included in the Corporations Law (vol 1 para 8.11; vol 2 Pt 5.6A Divisions 2, 3 and 4).
63. The court should have a wide power to give directions in relation to the winding up of a scheme (vol 1 para 8.11; vol 2 s 581DL).
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 (vol 1 para 8.12; vol 2 s 581BB, 581BC, 581BD, 581BE, 581DB(2)).
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 (vol 1 para 8.13; vol 2 Pt 5.3B).
66. The liquidator of a scheme operator should not become the liquidator of the operator's schemes unless the court so orders (vol 1 para 8.14; vol 2 s 424A).

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 (vol 1 para 9.10; vol 2 s 158D(1)(f), 183B).
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 (vol 1 para 9.14; vol 2 s 260AA).

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 (vol 1 para 9.15; vol 2 s 260AC).

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 (vol 1 para 9.15; vol 2 s 1020).

Chapter 10 — The scheme operator

71. Only companies incorporated under the Corporations Law may apply for a scheme operators licence (vol 1 para 10.2; vol 2 s 113A(1)(c)).

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 (vol 1 para 10.6; vol 2 s 232AA, 260AA–260AL).

73. The Corporations Law should impose an obligation on the operator of a collective investment scheme to act honestly in respect of the scheme (vol 1 para 10.7; vol 2 s 260AD).

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 (vol 1 para 10.8; vol 2 s 260AE).

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 (vol 1 para 10.9; vol 2 s 260AK).

76. A scheme operator should not be able to recover from scheme assets the cost of hiring an investment manager or an investment adviser (vol 1 para 10.10; s 260AL).

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 (vol 1 para 10.11; vol 2 s 260AB).

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 (vol 1 para 10.12; vol 2 s 260AF).

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 (vol 1 para 10.13; vol 2 s 260AG).

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 (vol 1 para 10.17; vol 2 s 232AA(7)).

81. The Corporations Law should impose on officers of scheme operators the duty to act honestly in all matters relating to the scheme (vol 1 para 10.18; vol 2 s 232AA(3)).

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 (vol 1 para 10.19; vol 2 s 232AA(2)).

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 (vol 1 para 10.20; vol 2 s 232AA(4)).

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 (vol 1 para 10.21; vol 2 s 232AA(6)).

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 (vol 1 para 10.22; vol 2 s 232AA(1)).

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 (vol 1 para 10.25; vol 2 Pt 3.2A).

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 (vol 1 para 10.26; vol 2 s 183K, 183L).

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 (vol 1 para 10.31; vol 2 s 183H).

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 (vol 1 para 10.32; vol 2 s 260J).

90. Scheme operators should be required to have a scheme operators licence, issued by the ASC (vol 1 para 10.35, 10.36; vol 2 s 113A).

91. The ASC should keep a register of licensed operators of collective investment schemes (vol 1 para 10.41; vol 2 s 158M).

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 (vol 1 para 10.43; vol 2 s 158C).

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 (vol 1 para 10.43; vol 2 s 158D(2), 158D(3)).

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 (vol 1 para 10.44; vol 2 s 158C(3)).

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 (vol 1 para 10.45; vol 2 s 158C).

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 (vol 1 para 10.46; vol 2 s 158D(3)).

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 (vol 1 para 10.47; vol 2 s 158E).

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 (vol 1 para 10.48; vol 2 s 158K).

99. The ASC may change the conditions of an operator's licence at the request of the operator or on its own initiative (vol 1 para 10.49; vol 2 s 158J).

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 (vol 1 para 10.52; vol 2 s 158D(1)).

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 (vol 1 para 10.53; vol 2 s 158D(1)).

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 (vol 1 para 10.53, 10.54; vol 2 s 158A(3)(h)).

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 (vol 1 para 10.54; vol 2 s 158D(1)).

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 (vol 1 para 10.55; vol 2 s 158D(1)(f)).

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 (vol 1 para 10.57; vol 2 s 158N).

Chapter 11 — The investor

106. The operator of a collective investment scheme should be required to maintain a register of investors (vol 1 para 11.3; vol 2 s 216BA).

107. Investors in a collective investment scheme should have access to material contracts referred to in a scheme prospectus (vol 1 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 (vol 1 para 11.4; vol 2 s 323KC).

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 (vol 1 para 11.5; vol 2 s 113C).

110. The half yearly and annual reports of a collective investment scheme should include details of changes of directors of the scheme operator (vol 1 para 11.9; vol 2 s 323J(3)(m)).

111. The operator of a listed collective investment scheme should have to keep a register of substantial interest holdings (vol 1 para 11.12; vol 2 s 216BA, 216 BB)).

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 (vol 1 para 11.12; vol 2 s 216BB).

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 (vol 1 para 11.12; vol 2 s 216BB).

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 (vol 1 para 11.14; vol 2 Pt 5.1, Div 2).

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 temporary scheme operator (vol 1 para 11.15; vol 2 s 158N, 183C, 183D, 183E).

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 replacement scheme operator (vol 1 para 11.16; vol 2 s 183E).

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 (vol 1 para 11.17; vol 2 s 183C).

118. Investors in a collective investment scheme should have no power to give directions to the scheme operator (vol 1 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 (vol 1 para 11.21; vol 2 s 183A).

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 (vol 1 para 11.22; vol 2 s 183A).

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 (vol 1 para 11.21, 11.22; vol 2 s 183A).

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 (vol 1 para 11.23; vol 2 s 260BC).

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 (vol 1 para 11.26; vol 2 s 260BG).

124. Investors in a collective investment scheme should be permitted to vote on a resolution in person, by post or by proxy (vol 1 para 11.27; vol 2 s 260BH, 260BI).

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 (vol 1 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) (vol 1 para 11.33; vol 2 s 260AQ).

127. Scheme operators should be required to

- maintain an internal dispute resolution procedure to deal with investor enquiries and complaints (s 260AM)
- include in each prospectus and annual report details of the scheme's internal dispute resolution procedure (vol 1 para 11.35; vol 2 s 323J(3)(c), s 1021(6B) (j)).

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 (vol 1 para 11.37; vol 2 s 581DC).

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 (vol 1 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 (vol 1 para 13.4; vol 2 s 780, 781).

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 (vol 1 para 13.4; vol 2 s 807A).

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 (vol 1 para 13.6; vol 2 s 783, 784).

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 (vol 1 para 13.10; vol 2 s 848A).

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 (vol 1 para 13.11; vol 2 s 851).

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 (vol 1 para 13.16; vol 2 s 841A).

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 (vol 1 para 13.16; vol 2 s 841A).

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 (vol 1 para 13.19; vol 2 s 849).

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) (vol 1 para 13.23).

139. No system for licensing life agents should be introduced (vol 1 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 (vol 1 para 14.3).

141. The Commonwealth should retain primary responsibility for regulating participants in the collective investments industry (vol 1 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) (vol 1 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 (vol 1 para 14.9; vol 2 Dvn 1A ASC Act).

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 (vol 1 para 14.10; vol 2 s 33A ASC Act).

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 (vol 1 para 14.11; vol 2 s 36A ASC Act).

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 (vol 1 para 14.13; vol 2 s 486B).

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 (vol 1 para 14.15; vol 2 s 260CB).

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 (vol 1 para 14.19; vol 2 s 260AP).
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 (vol 1 para 14.20; vol 2 s 183E).
150. The ASC should be entitled act as a representative party pursuant to the Federal Court class action rules (vol 1 para 14.22; vol 2 s 50 ASC Act).
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 (vol 1 para 14.22; vol 2 s 25 ASC Act).
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 (vol 1 para 14.24; vol 2 s 83B ASC Act).
153. The ASC should have power to call investors' meetings and propose resolutions (vol 1 para 14.26; vol 2 s 260BD).
154. The ASC should be able to attend and speak at any meeting of the investors in a collective investment scheme (vol 1 para 14.27; vol 2 s 260BF(3)).
155. A scheme operator should have to advise the ASC promptly of any breach of its licence conditions (vol 1 para 14.28; vol 2 s 158L).
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 (vol 1 para 14.29; vol 2 s 158R).
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 (vol 1 para 14.30; vol 2 s 158Q).
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 (vol 1 para 14.31; vol 2 s 158S).

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 (vol 1 para 14.32; vol 2 s 1317CA).

Chapter 15 — Offences and remedies

160. The fault element of each contravention of the Corporations Law should be expressly stated in that law (vol 1 para 15.2).

161. For a number of contraventions there should be no fault element (vol 1 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 (vol 1 para 15.5).

163. The penalty notice provision of the Corporations Law (s 1313) should be available for appropriate offences (vol 1 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 (vol 1 para 15.9; vol 2 s 1317DA).

165. The civil penalty regime should not apply to a scheme operator in respect of a breach by it of its obligations to investors (vol 1 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 (vol 1 para 15.16; vol 2 s 1345AC).

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 (vol 1 para 15.17; vol 2 s 1345AC).

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 (vol 1 para 15.17; vol 2 s 1345AC).

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 (vol 1 para 15.18; vol 2 s 1345AE).

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 (vol 1 para 16.2; vol 2 s 1398).

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 (vol 1 para 16.3; vol 2 s 1395).

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 (vol 1 para 16.3; vol 2 s 1399).

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 (vol 1 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 (vol 1 para 16.3; vol 2 s 1396).

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 (vol 1 para 16.4; vol 2 s 1398).

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 (vol 1 para 16.5; vol 2 s 1396, 1398).

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 (vol 1 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 (vol 1 para 16.7; vol 2 s 1396).

179. The recommended investors' rights of access to information about the scheme should be available as soon as the amending legislation commences (vol 1 para 16.8; vol 2 s 1398).

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 (vol 1 para 16.8; vol 2 1398).

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 (vol 1 para 16.9; vol 2 s 1398).

182. The mechanism for amending the constitution of a prescribed interest scheme should not be changed until the scheme is registered (vol 1 para 16.9; vol 2 s 1396).

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 (vol 1 para 16.10; vol 2 s 1398).

184. The recommended controls on intermediaries should apply as soon as the amending legislation commences (vol 1 para 16.11; vol 2 s 1398).

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 (vol 1 para 16.12; vol 2 cl 178).



**A GUIDE
TO
THE**

**COLLECTIVE INVESTMENT
SCHEMES BILL 199?**

[EXPLANATORY MEMORANDUM]



1. Outline

Outline

1.1. The *Collective Investment Schemes Bill 1997* contains amendments to the Corporations Law, the *Corporations Act 1989* and the *Australian Securities Commission Act 1989*. The amendments give effect to recommendations of the Australian Law Reform Commission and the Companies and Securities Advisory Committee in their report *Collective investment schemes: other people's money* (ALRC 65, 1993) to upgrade the prudential regulation of collective investment schemes.

Main features

1.2. The Bill's main features are:

- it requires an operator of a collective investment scheme to be specially licensed
- it imposes a minimum capital requirement for collective investment scheme operators
- it imposes requirements designed to ensure that scheme operators comply with their obligations under the Corporations Law and under the constitution of the scheme
- it provides a fair and effective set of rules to govern redemption of investors' interests out of scheme assets and scheme operators' buying back interests from investors
- it updates and rationalises the rules for termination and winding up of schemes both solvent and insolvent
- it improves control over the marketing of schemes, particularly through intermediaries such as investment advisers and securities dealers.

Plan of the Bill and this Guide

Plan of the Bill

1.3. The Bill is in four Parts.

1.4. The first contains preliminary provisions. Part 2 contains amendments to the Corporations Law to give effect to the recommended regime for the regulation of collective investment schemes. The ALRC and the Advisory Committee considered whether to recommend a separate Chapter of the Corporations Law for collective investment schemes, to contain all the provisions relating to those schemes. Because of the present structure of the Corporations Law, however, it is more convenient to locate particular provisions about collective investment schemes close to similar

provisions affecting companies. This will allow a close integration of the provisions. This has been done both for provisions that make substantive changes and for those that make consequential changes.

1.5. Part 3 amends the ASC Act, while Part 4 amends the regulation making power in the *Corporations Act 1989* section 22.

'Finding aids' in the Bill

1.6. The Bill amends the relevant provisions of the Corporations Law and the ASC Act in the order in which they appear in the Corporations Law and the ASC Act respectively. Nevertheless, it includes a number of 'plain language' innovations.

- Relevant Part, Division and Subdivision numbers and titles are clearly indicated, to allow readers of the Bill to locate easily the relevant provisions of the Corporations Law or the ASC Act.
- Extensive use is made of notes in many of the provisions inserted into the Corporations Law and the ASC Act, to refer readers to other relevant provisions, for example, as to administrative review of decisions.
- New sections explaining the structure of Parts, or giving an overview of the effect of particular Parts or Divisions, are included (for example, see new section 50A (definitions of collective investment schemes) and new sections 216AE and 216AM (redemptions and buy-back procedures)).
- Relevant defences to offence or civil penalty provisions are clearly indicated, as is the extent to which those provisions include 'fault' elements.
- In provisions with many paragraphs (for example, clause 4, and new subsections 323J((2) and (3)) each paragraph has its own heading.

Plan of this Guide to the Bill

1.7. The Explanatory Memorandum describes the substantive reforms made by the Bill in the following chapters:

- what are collective investment schemes
- registration and licensing
- the constitution of the scheme and the scheme operator
- conduct of collective investment schemes — general
- investors' meetings
- related party transactions
- directors' and officers' duties to investors
- issue of interests, redemption and buy backs

-
- accounts, audits and reports to investors and to the ASC
 - marketing schemes — intermediaries
 - marketing schemes — prospectuses and 'enhanced disclosure'
 - names and registration numbers
 - terminating and winding up
 - the ASC's powers
 - problems of corporate form
 - transitional provisions.

2. What is a collective investment scheme?

Introduction

2.1. New Part 1.2, Division 6A defines what is a collective investment scheme. It brings together the relevant definitions which presently appear in several places in the Corporations Law and in the Corporations Regulations.

2.2. The definition of 'collective investment scheme' is essentially the same as the definition of 'prescribed interest' under the present Corporations Law.

Definition of schemes

2.3. New section 50B provides for four kinds of schemes to be collective investment schemes:

- schemes that issue rights to participate, or interests, in profits, assets or realisation of any financial or business scheme
- common enterprise schemes — that is, schemes the holders of interests in which are led to expect profits, rents or interest from the efforts of the promoter or of a third party
- schemes involving investments that generate rights in respect of property that will or may, at the investor's option, be used in common with other such rights
- time share schemes.

New subsection 50B(4) also authorises the regulations to make provision excluding schemes or kinds of schemes from the definition of collective investment scheme.

2.4. This is a very broad definition. The balance of new Part 1.2, Division 6A sets out exceptions to the general rule, namely, schemes that will not be regarded as collective investment schemes. The major exceptions are discussed below.

Exceptions

Retirement village schemes

2.5. Retirement village schemes are not collective investment schemes [new section 50C].

Partnerships

2.6. Partnerships are excluded unless promoted by or on behalf of a person whose ordinary business is or includes the promotion of similar schemes [new section 50D]. However, limited partnerships that have more than 15 members, or that are promoted by or on behalf of a person or an associate of the person whose ordinary business is the promotion of such schemes, are covered by the definition of collective investment scheme since they have many features analogous to trust type collective investment schemes.

Joint ventures, franchising and small schemes

2.7. Joint ventures and franchising schemes are excluded [new section 50E and new section 50F]. The scheme must be certified as a joint venture scheme or a franchising scheme by the ASC. The ASC is not to give such a certificate for a joint venture scheme if the scheme is operated by or on behalf of a person or an associate of the person whose ordinary business is the promotion of such schemes.

2.8. Small schemes, that is schemes that cannot accept more than \$100,000 in total fund subscriptions, are excluded [new section 50H].

Trusts

2.9. New section 50G reflects the existing law by generally excluding trusts. There are two broad exceptions. A trust, or a trust for a scheme, that is generally promoted by or on behalf of a person or an associate of a person whose ordinary business includes the promotion of such trusts or schemes will be treated as a collective investment scheme. Similarly, trusts that can have more than 15 beneficiaries will be treated as collective investment schemes unless they existed before the commencement of the Corporations Law.

Intra-group and employee incentive schemes

2.10. Schemes the only members of which are related bodies corporate are excluded [new section 50H].

2.11. Employee incentive schemes are excluded [new section 50H].

Trustee common funds

2.12. Trustee common funds are not collective investment schemes [new section 50M]. A common fund must be administered by a statutory trustee company and must only hold money from deceased estates administered by the trustee company or money administered by the trustee company under private individual arrangements.

Life insurance products

2.13. Some life insurance products, those with an investment component, will fall within the definition of collective investment schemes in new section 50B. New section 50J provides an exclusion for such products if the premiums are paid into a statutory fund maintained under the *Life Insurance Act 1945*. The new section also excludes the statutory fund itself, and superannuation funds, approved deposit funds and pooled superannuation trusts. These latter are to be regulated by the *Superannuation Industry (Supervision) Bill 1993*.

Other exclusions

2.14. Other exclusions [see new sections 50K, 50L and 50N] are

- bank, building society and credit union deposits
- friendly society investments
- debentures, shares and government guaranteed bonds
- certain interests in co-operatives under Western Australian legislation.

These largely reflect the existing law.

Other matters

2.15. Two interpretative provisions are included. New section 50P makes sure that the exceptions are not read down by reference to each other, and new section 50Q makes it clear that a person can be regarded as having a business of promoting schemes or contracts even if the scheme or contract in question is the first that he or she has promoted.

3. Registration and licensing

Introduction

3.1. The Bill requires operators of collective investment schemes to obtain a special licence, a scheme operators licence, and requires that all collective investment schemes be registered.

Licensing the scheme operator

Who must be licensed?

3.2. New section 113A requires operators of collective investment schemes to be licensed. An operator who is unlicensed will commit offences if it invites applications for the issue of interests in a collective investment scheme. It will also commit an offence if it deals with scheme property.

3.3. Exceptions are provided for temporary scheme operators [see new section 183E] and administrators of collective investment schemes [see new Part 5.3B]. A further exception from the prohibition on dealing with the property exists for liquidators of schemes [see new section 458MA and new Part 5.6A].

Licensing procedure

3.4. **Introduction.** New Part 2.2A, Division 1 sets out the process for obtaining a scheme operators licence.

3.5. **Licensing application.** An application must be made to the ASC. New subsection 158A(3) sets out the information required in a licence application. In particular, the application must include a summary of the measures that the operator will take to detect in advance and prevent a contravention of the scheme's constitution or of the Corporations Law. The application must also include a copy of the constitution of the scheme. There is provision for independent reports to be submitted to the ASC, if the applicant wishes, as part of the licence application.

3.6. The ASC can seek further information from the applicant [new section 158B].

3.7. **Consideration of compliance measures.** New section 158C requires the ASC to give specific consideration to the effectiveness of the compliance measures in detecting and preventing contraventions of the Corporations Law or of the scheme's constitution. 'Compliance measures' are defined in an amendment to section 9. New subsection 158C(3) sets out a non-exhaustive list of matters to which the ASC must have regard in its consideration. These include

- who will have custody of the scheme property and on what terms
- what procedures the applicant will follow for dealing with scheme property, including for determining the extent to which it can reimburse itself for its fees and expenses out of the scheme property.

3.8. The ASC will be able to rely solely on the information presented in the summary of the compliance measures in the application if it considers this appropriate. However, it is not limited to relying on the summary. Applications must be dealt with within 30 days [new subsection 158D(4)].

3.9. *When the ASC must refuse.* There are several circumstances in which the ASC must refuse a licence application:

- an executive officer of the applicant has been convicted of serious fraud within the previous five years
- a civil penalty has been imposed on an executive officer of the applicant within the past five years for an act of dishonesty (civil penalties include civil penalties imposed under the civil penalties regime in Part 9.4B, but also include penalties imposed under other civil penalty provisions such as those in the *Trade Practices Act 1974*)
- an executive officer is bankrupt
- an executive officer is subject to a banning order
- a receiver or manager or liquidator has been appointed to the applicant
- the name of the new scheme is not one that is available [for names of schemes see new section 367A]
- the applicant does not meet the minimum capitalisation requirements in new section 183H
- the board of the applicant does not meet the requirement for non-executive directors specified in new section 183B
- the application is materially false or misleading [new subsection 158D(1)].

An executive officer is anyone (including a director) who takes part in the management of the scheme operator [section 9].

3.10. *Refusal of application if compliance measures ineffective.* The ASC can refuse to grant a licence application on the ground that the applicant's compliance measures disclosed in the application or as otherwise known to the ASC are not reasonably likely to detect in advance and prevent contraventions of the scheme's constitution or of the Corporations Law [new subsection 158D(2)].

3.11. *Notice of intention to grant licence.* If none of the circumstances set out in new subsection 158D(1) or (2) apply, the ASC must send the applicant a notice advising that it will grant the licence and setting out the conditions under which it will grant the licence [new subsection 158D(3)]. It will not be possible to have a licence without conditions. The conditions must

- require the applicant to observe some or all of the compliance measures stated in its licence application
- substitute other compliance measures or add other compliance measures, or
- limit or restrict the activities of the operator to activities for which the compliance measures are appropriate.

3.12. *Directors must sign off on compliance measures.* Once the ASC has set out the conditions it will impose on a licence, the intending scheme operator must consider whether to accept them. The ASC is to grant the licence only if the directors of the scheme operator certify that they have examined the conditions submitted to them by the ASC and are satisfied, after due inquiry, that the compliance measures required by the conditions will be effective and can be put into effect by the scheme operator [new section 158E].

3.13. *Appeals.* If the directors are not able to give that assurance, and it is not possible for the applicant and the ASC to reach agreement on an appropriate set of compliance measures within 3 months, the applicant may reject the offer of a licence and apply for the matter to be reviewed by the Administrative Appeals Tribunal [new section 158E]. Decisions refusing applications will be reviewable by the Administrative Appeals Tribunal: see Part 9.4A. A notice setting out conditions to be imposed on the grant of a licence will not, however, be reviewable by the Administrative Appeals Tribunal [new section 1317C].

Ensuring that operators observe licence conditions

3.14. A scheme operator must comply with the licence conditions [new section 158K]. While non-compliance is not an offence, the ASC or investors will be able to take action to compel the operator to comply with the conditions and to compensate investors for loss or damage suffered because of non-compliance [new sections 260AO, 260AP]. The ASC must be informed of contraventions when they occur [new section 158L].

Changing the conditions of a licence

3.15. The compliance measures that form the basis of the conditions attached to a scheme operators licence can be reviewed by the ASC. The ASC can vary the conditions, after giving the scheme operator an opportunity for a hearing [new section 158J]. This, combined with the amendments to the ASC Act [ASC Act Part 3, new Division 1A] allowing the ASC to conduct surveillance audits of scheme operators, will allow the ASC to maintain close scrutiny of the compliance activities of scheme operators.

Revocation of scheme operators licences

3.16. *When hearing required.* New Part 2.2A, Division 2 provides for the revocation of scheme operators licences. The ASC may revoke a licence, subject to

the requirement of a hearing, if satisfied that there is a significant risk that the operator will contravene or fail to comply with the Corporations Law or the scheme's constitution in relation to a substantial matter [new section 158Q]. Section 158Q sets out a non-exhaustive list of matters that the ASC must take into account. In many respects they reflect the considerations relevant to the decision whether to grant the licence [new section 158D] but include in particular whether what the operator is doing by way of compliance measures is adequate.

3.17. *No hearing needed.* The ASC may revoke a licence without a hearing

- if the operator becomes externally administered (that is, a receiver is appointed to its property or it goes into liquidation)
- on request by the operator
- if the operator has ceased to carry on business [new section 158R].

3.18. *Application for temporary scheme operator needed.* Whenever the ASC revokes a licence, it may have to apply to the Court for the appointment of a temporary scheme operator [new section 158S]. For temporary scheme operators see new section 183E.

Replacement operators

3.19. Special provisions are made for licensing replacement operators. The replacement operator may have been issued a scheme operators licence for the scheme before the investors vote under new section 183D that it be so appointed. However, the ASC must not grant the licence until such a resolution has been passed [new sections 158D and 158E]. A temporary scheme operator must give access to the scheme's books to a company that the investors have resolved be appointed replacement scheme operator or a person acting in good faith for the purpose of making an application for a scheme operators licence for the scheme [new section 183E].

Registering the scheme

3.20. As well as scheme operators being licensed, the schemes themselves must be registered [new section 113A]. Registration is designed merely to identify schemes. The procedure for applying for registration is the same as, and is to be done at the same time as, the procedure for applying for and issuing a scheme operators licence for the scheme, except where a replacement scheme operator is being appointed to an existing scheme [new Part 2.2A, Division 1].

3.21. The ASC may deregister a scheme but only if satisfied that the scheme has been terminated [new section 158P; for termination of schemes see generally new Part 5.6A, Division 1].

4. The constitution and the scheme operator

Introduction

4.1. New Part 2.3A sets out a number of important rules about the way collective investment schemes are constituted and about the operators of collective investment schemes.

The constitution of a collective investment scheme

Introduction

4.2. The constitution of a collective investment scheme is its governing document. It will replace the 'approved deed' for prescribed interest schemes under Part 7.12, Division 5. Generally speaking, there are few mandatory provisions which must be included in collective investment scheme constitutions and few restrictions on what can be included.

Definition

4.3. Clause 4 amends the definition of 'constitution' presently in section 9 to take account of the registration and licensing process in new Part 2.2A.

Constitution to be lodged

4.4. The constitution must be lodged with the licensing and registration application [new paragraph 158A(3)(e)].

Changing the constitution

4.5. There are three ways in which the constitution of a collective investment scheme can be changed.

- A meeting of scheme investors can approve an amendment [new section 183A].
- Investors can be notified of the amendment, which will be taken to be agreed to if the 'waiting period' (28 days after they have been notified) passes [new section 183A]. This method is only available if the directors of the scheme operator certify that they are satisfied, after due inquiry, that the proposed amendment is minor and does not prejudice the interests of investors [new section 183A].

- The Court can also order the scheme constitution to be amended under new section 260AQ (the remedy available for oppression).

4.6. Notice of all proposed amendments (except those to be made by the Court under proposed section 260AQ — the oppression remedy) must be given to the investors and lodged with the ASC. An explanation of, and a statement of the reasons for, the amendment must be included [new section 183A]. If the operator has not called an investors' meeting to approve the amendment, investors or the ASC can requisition a meeting to discuss it. A minimum of 100 investors or 10% by number or value may requisition a meeting. The procedure for requisitions is set out in new sections 260BC and 260BD.

4.7. An investors' meeting only approves an amendment if the votes cast represent more than 25% of the value of all the interests on issue and more than 75% of those votes are in favour of the amendment [new section 183A].

4.8. Further provisions about the conduct of meetings are found in new Part 3.4A, Division 2.

4.9. This procedure is not available for amendments the effect of which is to remove a scheme operator or terminate the scheme; for these see new sections 183C and 581AE.

Non-executive directors

4.10. An important element of the prudential framework for collective investment schemes is the requirement that at least half of a scheme operator's directors be 'non-executive' directors [new section 183B]. A scheme operator will contravene new section 183B if the number of non-executive directors falls below half the number of directors for more than 14 days without a reasonable excuse.

4.11. New subsection 183B(2) sets out the requirements for non-executive directors. A non-executive director must not be involved in the management of the scheme operator otherwise than as a director. He or she cannot hold any shares in the scheme operator or any related entity and must not be or, within the previous three years, have been an officer or employee of the scheme operator or of a related entity. However, this latter provision does not include persons who were or are non-executive directors of related entities. This will mean that companies that operate more than one collective investment scheme with different subsidiary scheme operators may have common non-executive directors for these subsidiary scheme operators.

Scheme operator

Tenure of scheme operator

4.12. **Removal of operator [new section 183C].** The investors in a scheme may, by resolution in a meeting, remove the operator. The vote needed to remove an operator is at least 50% of the interests on issue in the scheme. If the vote succeeds, the operator must forthwith apply to the Court for the appointment of a temporary scheme operator unless the investors separately resolve at the same meeting to appoint a replacement scheme operator. A replacement operator takes up office if it has, or when it gets, a scheme operators licence for the scheme [new subsections 158D(3), 158E(1)].

4.13. **Replacement scheme operators.** If the investors vote in a replacement scheme operator at the same meeting as removing the present scheme operator, the vote needed is the same: 50% of all the interests on issue in the scheme [new section 183D]. If they do this in another meeting, say, one called by a temporary scheme operator, the vote needed is at least 50% of all the votes cast on the question [new section 183EA]. Special provision is made to ensure that the scheme property held by the old operator is transferred, free of taxes and charges, to the replacement operator [new sections 183F, 183G].

4.14. Provisions about scheme operators licences are found in new Part 2.2A. Provisions about the conduct of meetings are found in new Division 2 of Part 3.4A.

Temporary scheme operators appointed by the Court [new section 183E]

4.15. **Appointment of temporary scheme operator.** The Court may appoint a temporary scheme operator. The class of persons who can apply for the appointment include, for example, a company to be appointed as scheme operator (this covers a case where one scheme operator sells its business to another), an investor in the scheme and a director of the scheme operator. A temporary scheme operator need not be licensed.

4.16. **What the temporary scheme operator does.** The appointment of a temporary scheme operator is a short term appointment, initially three months. It must report back to the Court, recommending a course of action. The Court may then make any appropriate order, including an order terminating the scheme. The consequences of termination are set out in new Part 5.6A.

Minimum capitalisation

4.17. **Capitalisation requirements.** New section 183H requires scheme operators to have at all times a net value of at least \$100,000. It also requires a scheme operator

to have a minimum net value of 5% of the total value of all the property in all the schemes of which it is operator. However, there is a 14 day period of grace if the operator's net value falls below the 5% limit. The operator must notify the ASC if it falls below either minimum net value.

4.18. *Working out capitalisation.* Net values are based on the value of the property that the operator owns beneficially (that is, excluding property of its collective investment schemes). Interests that it owns beneficially in a collective investment scheme run by one of its associates must also be excluded. Values are to be worked out as at the most recent day on which the scheme's accounts had to be prepared. For scheme accounts, see Part 3.6, Division 11.

Certain clauses in scheme constitutions void

4.19. Special provision [new sections 183], 183L] is made to ensure that any provision of the constitution of a collective investment scheme is void if it

- has the effect of limiting or excluding liability of the operator or one of its officers for loss because of a contravention of the Corporations Law or of the scheme's constitution, or because of negligence or misfeasance
- authorises a 'golden handshake' or like payment out of scheme property otherwise than by the statutory mechanism.

Golden handshakes

4.20. Termination benefits to be paid from property of the scheme to a scheme operator or any of its related parties are dealt with in chapter 7 of this Guide. Such benefits may not be paid to other persons except with the consent of an absolute majority of investors in the scheme [section 183K].

5. General provisions

Introduction

5.1. New Part 3.4A sets out a number of general rules for the conduct of collective investment schemes [new Division 1], provides for the conduct of meetings of scheme investors [new Division 2] and imposes obligations and gives protections about giving information and reports to the ASC [new Division 3].

Observing the scheme constitution

5.2. *Compliance with the scheme constitution.* There is a general obligation on scheme operators to observe the scheme constitution. There are two mechanisms by which this obligation is imposed:

- the Court can order the operator to comply with the scheme constitution [new section 260AO] — it can restrain contraventions and direct the scheme operator to take specified steps to ensure that a contravention does not occur
- civil proceedings for damages to compensate the scheme for any loss in the value of the scheme property caused by the contravention [new section 260AP].

Either of these can be invoked by the ASC or an investor in the scheme. The former may also be invoked by a director of the scheme operator. Money paid under the latter must be paid into the scheme funds.

5.3. *Payment of charges, expenses and fees.* There is specific provision prohibiting a scheme operator from overpaying itself for its fees, charges and expenses, or for charging the cost of investment advisers or investment managers directly to the scheme [new sections 260AK, 260AL]. Investment advisers' fees and charges must be met by the operator out of its own funds. These provisions are all backed up by penal sanctions. Prospectuses and annual reports to investors must set out the basis on which the operator's fees will be charged [sections 1021, 323].

Scheme property

Obligations about scheme property

5.4. *Scheme property to be kept separate.* A scheme operator that holds scheme property holds it on trust for the investors in the scheme [new section 260AA]. As part of their trust obligations, operators have a fundamental obligation to keep the

scheme property separate from their own property [new section 260AB]. This reflects the usual obligation of a trustee at general law not to intermingle trust property and its own property. This obligation will be satisfied if, for example, the operator engages a trustee or custodian to hold the property.

5.5. *Scheme property to be separately identified.* To support this separation of property, scheme operators must keep records that separately identify the scheme property [new section 260AC]. The Bill also, however, allows property that is able to be registered on a public register, or for which documents of title are deposited or registered in a public register, to be registered in a way that identifies it as scheme property. Thus, for example, real property which is owned by a scheme operator on behalf of a collective investment scheme would be registered in the normal way but a notation that indicated that it was collective investment scheme property would be endorsed on the certificate of title. The Bill amends the Corporations Law specifically to override State and Territory laws that prevent notations of this kind on public registers (for example, the prohibition in Torrens statutes on giving notice of trusts on the register), but preserving the rights of purchasers and mortgagees and other chargees of such property.

Valuations of scheme property

5.6. *Valuers to be unrelated etc.* A valuer engaged by a scheme operator to value scheme property must not be related to the scheme or an associate of the scheme or to the scheme operator [new section 260AH]. The definition of 'related to the scheme' is found in new subsection 243F(1A), and of 'associate' in Part 1.2, Division 2.

5.7. *Property based schemes.* Particular rules are set out in new section 260AN for property based schemes. These are defined as schemes where more than 20% by value of the scheme property is real property, that is, estates in land [new section 88AA]. The rules are:

- any dealing with the real property must be preceded by a valuation
- the real property must be valued at least once every twelve months and whenever the scheme operator reasonably believes there has been a significant change in value
- the one valuer should not make more than two consecutive valuations
- the operator must make reasonable enquiries to ensure that valuers have at least five years valuation experience and do not have a possible conflict of interests.

The operator is under an obligation to provide all necessary information to the valuer and there is provision for the regulations to specify matters to be included in the valuation report.

General obligations

5.8. The Bill imposes on scheme operators a number of general obligations:

- to act honestly in all matters relating to the scheme [new section 260AD]
- to prefer the interests of investors to anyone else's interest, including the interest of the scheme operator [new section 260AE]
- to treat investors equally and to treat investors in different classes fairly [new section 260AF]
- not to make improper use of its position as scheme operator, or of information obtained because of its position as scheme operator, to gain an advantage for itself or for anyone else or cause detriment to the scheme [new section 260AG].

Financial controls

5.9. The Bill restricts scheme operators from raising or borrowing money and using the scheme property to give guarantees or indemnities. Generally speaking, a scheme will not be able to borrow more than 10% of the value of the scheme property. The only exception will be for schemes specifically established as borrowing schemes and which indicate that they can borrow by including the word 'geared' in their names, or some other word approved by the ASC that indicates that the scheme may borrow. There is a wide definition of 'borrowing' [new section 260AI]. Scheme operators are not allowed to guarantee the liability of another person or provide an indemnity, nor can they use scheme property to pay professional indemnity insurance premiums.

Informal dispute resolution arrangements

5.10. Scheme operators will have to maintain at all times informal dispute resolution arrangements to deal with investors' inquiries or complaints [new section 260AM].

Oppression remedy

5.11. Section 260 gives the Court a wide power to intervene in the operation of companies if one or more members of the company are being oppressed or dealt with unfairly. New section 260AQ confers similar power on the Court in respect of unfair or oppressive conduct of investors, or conduct by the scheme operator that is contrary to the interests of the investors as a whole. The powers of the Court include powers

- to terminate the scheme
- to amend the scheme constitution
- to order interests to be redeemed
- to order a person, including the scheme operator, to act in a particular way or refrain from acting in a particular way.

Particular provision is made to ensure that amendments of a scheme's constitution ordered by the Court cannot be altered without the Court's leave.

6. Investors' meetings

Introduction

6.1. New Part 3.4A, Division 2 sets out some general rules for calling, and the conduct of, investors' meetings. Investors' meetings may be called under sections 260BB to 260BD. The resolutions that they can pass include resolutions

- removing the operator [new section 183C]
- appointing a replacement operator [new sections 183D, 183EA]
- approving a financial benefit to a related party [Part 3.2A]
- terminating the scheme [new section 581AE].

Calling meetings

Meetings called by operator [new section 260BB]

6.2. If the operator of a collective investment scheme calls an investors' meeting on its own initiative, it must do so by giving written notice to all the investors. It must also give a copy of the notice to the ASC.

Meetings requisitioned by investors [new section 260BC]

6.3. Investors have the power to requisition a meeting to deal with specified resolutions. One hundred investors is enough to requisition a meeting. A meeting may also be requisitioned by 10% by number or value of investors. If, within a period of 28 days, enough investors requisition a meeting, the scheme operator has two weeks to call a meeting. The meeting must be held within two months after the requisition is made.

Meetings requisitioned by the ASC [new section 260BD]

6.4. The ASC may requisition a meeting to consider one or more specified resolutions. If it does, the operator has two weeks to call the meeting which must be held within two months after the requisition was made.

Notice of meeting

6.5. Any notice of meeting must be in writing and set out the resolutions to be considered at the meeting. Investors must have at least 21 days notice of the meeting. The notice of meeting may be accompanied by an explanatory statement about whatever resolutions are to be put forward at the meeting. If the meeting was requisitioned by investors or the ASC, any explanatory statement included in the requisition must be sent to all the investors [new section 260BE].

Conduct of the meeting

Conduct of the meeting

6.6. New section 260BF deals with how investors' meetings are run. It provides that the scheme operator may appoint a person to preside, but if the scheme operator does not appoint anyone, an election for that purpose must be held at the meeting. The meeting must be conducted fairly and in accordance with the scheme's constitution. A member or staff member of the ASC must be allowed to speak to any resolution to be dealt with at the meeting. There are also provisions about voting by proxy or by post, minute taking and lodging copies of resolutions with the ASC [new sections 260BH, 260BI, 260BJ and 260BK].

When the operator and its associates can vote

6.7. New section 260BG sets out the circumstances in which interests owned by the operator will be counted and can be voted on and deals with other matters relevant to working out the number and value of interests.

- The number and value of interests are to be calculated as at the close of business on the business day immediately before the meeting.
- Generally speaking, the operator cannot vote any interests it owns, and those interests are not to be taken into account in working out whether a resolution has been passed. However, special provision is made to allow the operator, or an associate of the operator, to vote interests which it holds if it has no discretion as to the way those interests are voted.
- Where the meeting is considering approving a 'golden handshake' payment [new section 183K] or a payment of a financial benefit to a related party [Part 3.2A] or appointing a replacement scheme operator [new sections 183D, 183EA], the number and value of interests held by the entity to benefit from the resolution, or an associate of that entity, are to be disregarded in working out whether the resolution has been passed.

7. Related party transactions

Introduction

Effect of the Bill

7.1. The draft Bill modifies Part 3.2A, which was added by the *Corporate Law Reform Act 1992*. That Part imposes controls over public companies giving financial benefits to related parties. The modifications control scheme operators giving financial benefits, including golden handshakes, to related parties out of scheme property. Financial benefits in the form of golden handshakes to non-related parties are dealt with elsewhere [new section 183K].

Public company provisions not to apply

7.2. Relevant provisions of the Corporations Law are amended to exclude their operation in relation to scheme operators giving financial benefits out of the scheme property. The provisions are section 243H (which prohibits public companies giving financial benefits to related parties), Part 3.2A, Division 4 (which sets out some general exceptions to the prohibition) and Part 3.2A, Division 5 (which allows exceptions to the prohibition if giving the financial benefit is approved by a meeting of the company).

Prohibition

The basic prohibition

7.3. Instead, new section 243HA prohibits the operator of a collective investment scheme giving a financial benefit to a party related to the scheme out of property of the scheme. The definition of 'party related to a scheme' is contained in an amendment to section 243F. Parties related to a collective investment scheme include

- the operator of the scheme
- directors of the operator
- parent or sibling entities of the operator.

In other respects the definition largely follows the definition for parties related to a public company in section 243F.

The basis of the prohibitions

7.4. *Civil penalty provisions.* The prohibitions presently in Part 3.2A [section 234H] are enforced as civil penalty provisions. This is because the contraventions

are committed by natural persons, that is, the directors and other officers of the company giving the financial benefit. Section 243ZE also makes the related party and certain other persons involved in the contravention liable.

7.5. *Modified approach.* The amendments made by the Bill proceed on a different basis. The contraventions are primarily committed by the scheme operator, which must, under new section 113A, be a company. New section 243ZEA also makes liable

- the related party that receives the payment
- persons involved in the contravention constituted by making the payment, or the contravention of new section 243ZEA
- each person directly or indirectly concerned in either of those contraventions.

Section 1317DA makes new section 243ZEA a civil penalty provision, so contraventions by persons other than the scheme operator will be enforced under Part 9.4B. A specific defence is provided that the person did not know and could not reasonably have known of the facts which made giving the financial benefit a contravention. The contravention by the scheme operator, however, being a contravention by a body corporate, is not appropriate to be enforced by the civil penalty regime.

7.6. *Two offences.* New section 243HA imposes two restrictions on operators giving financial benefits. The first is a prohibition that does not involve any fault or mental element on the part of the operator. The operator has available a defence that it was taking reasonable compliance measures. The penalty for this contravention will be low. The second is a more serious offence — where the operator knowingly or recklessly gives a financial benefit.

7.7. *Commencement.* New section 1396 provides that these prohibitions apply in relation to a scheme from the day it is registered. They will also be applied to existing prescribed interest schemes from *[date to be inserted]*. However, the trustee or representative and the management company of an existing prescribed interest scheme may elect to apply the provisions to the scheme from an earlier date.

Exceptions

Particular exceptions

7.8. Part 3.2A, new Division 4A sets out general exceptions to the prohibition in new section 243HA on scheme operators giving related parties financial benefits out of scheme property. The new exceptions are similar to, though not as extensive as, those set out in Part 3.2A, Division 4. They include financial benefits given under contracts made before the prohibition applies [new section 243PC], financial

benefits given on arm's length terms [new section 243PD], financial benefits given to investors in their capacity as investors, if giving the benefit does not discriminate unfairly [new section 243PE], and financial benefits given under court order [new section 243PF].

Approval by meeting

7.9. Part 3.2A, Division 5 provides for shareholders' meetings to approve public companies giving financial benefits to related parties. For collective investment schemes, Part 3.2A, new Division 5A will apply. The provisions in new Division 5A are largely similar to those in Division 5, but modified as necessary for collective investment schemes. In particular, new section 243ZDE requires that, generally, more than 50% by value of the votes cast must be in favour of the benefit being given before it can lawfully be given. Termination benefits, however, require approval by votes in respect of 50% or more of the value of the interests in the scheme. Controls over documents and material given to investors in relation to the matter are broadly similar to the controls imposed in relation to public companies. However, new section 243ZDD also makes the scheme operator liable if material or documents are given to investors without being lodged at the ASC unless the operator was taking reasonable steps to ensure that the requirement to lodge was complied with.

Compensation and restitution

Civil penalty provisions

7.10. Sections 1317, 1317HA, 1317HB and 1317HD are part of the civil penalty provisions in Part 9.4B. They allow courts, in civil penalty proceedings, to order persons who contravene a civil penalty provision to pay compensation for loss or damage caused by the contravention. Each of these provisions is amended to enable compensation to be ordered and paid into the scheme property where a contravention of the related party provisions [section 243HA] is enforced by the civil penalty procedure [under section 243ZEA].

Scheme operator to pay compensation

7.11. New section 260AP allows a claim for compensation against a scheme operator who commits an offence against the related party provisions (these contraventions are not enforced through the civil penalty provisions). In this case, the Court may order compensation to be paid if satisfied on the balance of probabilities that a contravention has occurred. The application for compensation may be made by the ASC, an investor in the scheme or the administrator or liquidator of the scheme.

Recovery from beneficiary

7.12. New section 243ZHA allows the scheme operator to recover amounts of financial benefit paid out in contravention of the related party provisions. The amount that may be recovered is the difference between the amount paid and the amount that would have been paid on an arm's length basis. Amounts recovered become property of the collective investment scheme.

8. Directors' and officers' duties to investors

Introduction

8.1. Section 232 imposes on directors and other officers of a corporation a number of specific obligations. Amendments to the Corporations Law made by the *Corporate Law Reform Act 1992* [Part 9.4B] made directors and officers liable to civil penalties for breaches of these duties. The duties are owed to the company, and the company can sue to recover loss occasioned by a breach of the duties. New section 232AA imposes similar liabilities on directors and officers of collective investment scheme operators. These obligations are owed to the investors rather than to the company. The standard of care imposed by these obligations was considered fully by the Parliament when it enacted the *Corporate Law Reform Act 1992*. The principles embodied in this Bill are the same. Section 1318, which allows courts a discretion to excuse directors and officers who have acted honestly and ought fairly to be excused, is unaffected by these amendments.

The duties

8.2. The obligations are

- to take reasonable steps to ensure that the operator complies with its obligations as operator
- to use the degree of diligence and care that a reasonable person in a like position would exercise in similar circumstances
- to act honestly in all matters concerning the scheme
- to prefer the interests of investors over his or her own interests
- not to make improper use of his or her position or of information obtained by virtue of his or her position as an officer.

New subsection 232AA(7) ensures that these duties, owed to investors, are in addition to the duties owed to the company and prevail over the duties owed to the company if both cannot be discharged consistently.

Related provisions

8.3. Section 1317DA is amended to include these provisions as civil penalty provisions and sections 1317HA and 1317HB allow the court, in civil penalty proceedings or criminal proceedings in relation to these contraventions, to order compensation for loss arising because of the breach of these duties to be paid to the scheme. Section 1317HD is also amended to allow the operator to sue in ordinary civil proceedings for such losses.

9. Issue of interests, redemptions and buy-back of interests

Introduction

9.1. New Part 2.5 deals with issuing interests in collective investment schemes and sets out the rules for the redemption of investors' interests out of scheme property and the rules governing scheme operators themselves buying investors' interests from them (the buy back).

Issue of interests

Issue price

9.2. New section 216AB governs the price for which collective investment scheme interests may be issued, allotted or sold. It requires the price to be worked out in accordance with the scheme's constitution.

Applications and certificates

9.3. Other provisions covering the issue, allotment or sale of interests include

- the requirement under section 1020 that the form of application for the issue of interests must be attached to a prospectus
- the requirement under new section 113C that, unless the scheme's constitution otherwise provides, a certificate evidencing a holding must be issued to an investor within 2 months after his or her interests are issued or allotted.

Unlawful issues voidable

9.4. New section 113B provides for the consequences of issuing interests contrary to the Corporations Law or the scheme constitution. The issue is to be voidable at the instance of the investor, who can, despite any restrictions on redemption, require the interests to be redeemed out of liquid property of the scheme. 'Liquid property' is defined in amendments to section 9. If the value of the interest at the date of the redemption notice is more than he or she paid, the investor keeps the difference. If it is less, however, the investor can recover the amount of the difference from the scheme operator (unless the amount is minor and the unlawfulness did not prejudice the investor's interests significantly). If the investor chooses to avoid the contract for the issue of interests after the scheme has

terminated, however [for termination see new Part 5.6A, Division 1], only the purchase price or subscription is refundable, but the investor has a right to be repaid that amount in priority to the other investors' sharing in the surplus, if any, of the scheme.

Redemption of interests

Fully liquid schemes

9.5. Schemes that have only liquid property as defined in section 9 may redeem interests at call, or otherwise as provided under their constitutions, subject only to the requirements that the redemption value be worked out in accordance with the constitution and that any redemption offer must apply on equal terms to all interests [section 216AC].

Wholly or partly non-liquid schemes

9.6. New Part 2.5, Division 2 sets out the procedure to be followed when scheme operators offer a redemption facility.

9.7. *Value of interests for redemptions.* New section 216AD requires the operator to redeem interests only for a value worked out in accordance with the scheme's constitution.

Procedure

9.8. *Overview.* New section 216AE sets out the procedure for redeeming interests.

- The scheme operator gives notice to the ASC that it is offering a redemption facility and lodges a copy of the redemption offer document that sets out the terms of the offer.
- Investors can accept the offer, which must remain open for a specified period (at least 28 days).
- At the end of the offer period the scheme operator must use the available liquid property to pay out the investors who accepted the offer. If there is not enough liquid property to pay out all requests, the investors who accepted the offer must be paid out on a *pro rata* basis.

9.9. *Redemption offers and redemption offer documents.* New sections 216AF, 216AG and 216AH set out requirements for redemption offers and redemption offer documents. A redemption offer must apply to all interests of the relevant kind and on the same terms. This requirement also applies to fully liquid schemes. Only one redemption offer can be made at any particular time. The terms of the offer must be set out in a redemption offer document but that document must not give any

indication of how much liquid property is available to satisfy redemptions. The operator must lodge the redemption offer with the ASC. The offer does not become effective until the offer document is lodged or on a later specified day.

9.10. *Accepting the offer.* New sections 216AI and 216AJ provide for the investor to accept redemption offers. Accepting an offer is done simply by returning the acceptance form that comes with the redemption offer document, properly completed. New section 216AI specifies that acceptances must be made on a form that draws to investors' attention the procedure for redemption. Although scheme investors can put in redemption requests at any time, the requests will only be honoured if a redemption offer is open. An investor who puts in a redemption request at a time when a redemption offer is not open will not have the request honoured immediately; instead, when the next relevant redemption offer is made, the investor will be provided with a copy of the offer and an acceptance form.

9.11. *Redemption or pro rata.* New section 216AK requires the scheme operator to redeem interests for which a redemption offer has been accepted. New subsection 216AK(2) sets out the *pro rata* formula to be used if there is not enough cash or other liquid property in the scheme to support all the redemptions sought by investors. Each investor will receive the proportion of the liquid property that represents the value of his or her acceptances over the value of the total acceptances for the offer period. The scheme operator must lodge a notice with the ASC if it has to meet a redemption request on a *pro rata* basis.

The buy-back

Introduction

9.12. New Part 2.5, Division 3 sets out the procedure to be followed when scheme operators offer to buy back investors' interests.

Value of interests for buy-back

9.13. New section 216AL requires an operator who buys back interests to do so only for a value worked out under the scheme's constitution.

Procedure

9.14. New section 216AM sets out the procedure for the operator buying interests from investors.

- The scheme operator gives notice to the investors that it is offering to buy their interests back, and lodges a copy of the buy-back offer document that sets out the terms of the offer. The document must set out the maximum amount that the operator will spend (the stated cash amount).

- Investors can accept the offer, which must remain open for a specified period (at least 28 days).
- At the end of the offer period the scheme operator must buy back the interests for which an acceptance has been sent. If the price of the interests that it has to buy back is more than the stated cash amount, the investors who accepted must be paid out on a *pro rata* basis.

9.15. **Buy-back offers and buy-back offer documents.** New sections 216AO, 216AP and 216AQ set out requirements for buy-back offers and buy-back offer documents. A buy-back offer must apply to all interests of the relevant kind and on the same terms. Only one buy-back offer can be made at any particular time. The terms of the offer must be set out in a buy-back offer document, which must state how much the operator will spend on buy-backs under the offer. The operator must lodge the buy-back offer document with the ASC. The offer does not become effective until the offer document is lodged or on a later specified day. The notice lodged with the ASC must also include a statement signed by each director of the scheme operator certifying that the scheme operator has available to it the amount specified in the offer notice as the total amount it will spend on buy-backs under the offer.

9.16. **Accepting the offer.** New sections 216AR and 216AS provide for investors to accept buy-back offers. Accepting an offer is done simply by returning the acceptance form that comes with the buy-back offer document, properly completed. New section 216AR specifies that acceptances must be made on a form that draws to investors' attention the procedure for buy-backs. Although scheme investors can put in buy-back requests at any time, they will only be honoured if a buy-back offer is open. An investor who puts in a request at a time when a buy-back offer is not open will not have the request honoured immediately; instead, he or she will receive, or be given notice of, the next buy back offer.

9.17. **Making the pay out.** New section 216AT requires the scheme operator to buy back interests for which a buy-back offer has been accepted. New subsection 216AT(2) sets out the *pro rata* formula to be used if the amount stated in the buy-back offer document as the total amount that the operator was to spend on buy-backs under the offer is not enough to pay for all the interests that investors want bought back. Each investor will receive the proportion of the stated amount that represents the value of his or her acceptances over the value of the total acceptances in the offer period. The scheme operator must lodge a notice with the ASC if it has to meet a buy-back request on a *pro rata* basis.

Anti-avoidance measures

9.18. New section 216AU contains provisions designed to prevent scheme operators avoiding the buy-back restrictions in Part 2.5, new Division 3. Operators who enter into arrangements to avoid the buy back restrictions will commit an offence. Contracts and arrangements entered into to avoid the buy back restrictions are void. What is prohibited is a scheme operator making a payment, or entering

into an arrangement under which it must make a payment, to someone else on account of the other person's buying interests in the scheme from an investor. Two particular defences are provided:

- the purchase would not have contravened the buy-back restrictions if it had been made by the operator
- the payment was made on account of expenses reasonably incurred by the person in connection with the purchase of the interests (for example, brokerage or stamp duty).

10. Accounts and audits; reports to investors and to the ASC

Accounts of the scheme

Introduction

10.1. The Bill amends Part 3.6, Division 11 (which was inserted by the *Corporate Law Reform (No 2) Bill 1992* [1993]) making extensive provision for the preparation of accounts in relation to collective investment schemes.

10.2. Under the amendments made by the *Corporate Law Reform (No 2) Bill 1992* [1993] these requirements are imposed on prescribed interest schemes if the prescribed interests are ED securities, that is, subject to the enhanced disclosure regime. This Bill continues to apply the enhanced accounting requirements to collective investment schemes the interests in which are ED securities.

What is an ED security?

10.3. The Bill amends Part 1.2, Division 3A which defines which securities are ED securities. It replaces section 22G with a provision which defines ED securities as collective investment scheme interests in respect of which a prospectus is required. For when a prospectus is required, see section 1018. Most collective investment schemes will require a prospectus.

Accounts requirements

10.4. Part 3.6, Division 11, as amended by the Bill, requires collective investment scheme operators to prepare profit and loss accounts and balance sheets for the scheme. The accounts must comply with applicable accounting standards and the regulations and must give a true and fair view of the operations of the scheme. The accounts must be prepared for each accounting period, financial year or half year, under the enhanced disclosure requirements in the Corporations Law.

Audit and review

10.5. The audit or review must be made by a qualified auditor. Part 3.7, Division 1 is amended to ensure that the qualifications of, and restrictions on, auditors imposed by that Division are appropriate for auditors of collective investment schemes. In particular, new section 329A is added to govern the resignation of auditors of collective investment schemes who are not the same as the auditors of the scheme operators. It requires the auditor to apply to the ASC for consent to the resignation, setting out the reasons for the resignation.

Scheme operators' reports

10.6. Section 323J provides for the management company of a prescribed interest scheme to prepare a report containing a review of the scheme's operations, and giving particulars of significant changes in states of affairs, during an accounting period (either a year or half year). These reports, together with the auditor's report [see section 323H] and the accounts for the accounting period must be lodged with the ASC [section 323K].

10.7. The Bill amends section 323J to include specific matters which annual and half yearly reports must contain. Half yearly reports must contain

- changes in directors
- redemption and buy-back information
- redemption and buy back history.

Annual reports must contain

- the borrowing limits of the scheme
- valuation information
- information about the informal dispute resolution arrangements
- for non liquid or listed schemes, the total number of voting interests
- the unit values of the interests, and information about the extent to which these have changed over the period of the report and how they are worked out
- the significant scheme assets
- the scheme's investment policy and its performance against that policy
- changes in directors of the scheme operator
- notices given under the enhanced disclosure regime
- the scheme's management expense ratio for the last 5 years
- information about redemptions and buy backs.

Investors to get reports

10.8. New section 323KA gives investors the right to receive copies of these reports and accounts. All investors will be entitled to receive, free of charge, the annual report and its related accounts. They will not be entitled to receive free of charge the half-yearly report: that will be lodged with the ASC. They may, however, obtain on demand a copy of the half yearly report and related accounts. A reasonable fee may be charged for providing a copy of these reports and accounts.

10.9. Amendments to section 315 will also mean that investors in a collective investment scheme will be able to obtain copies of the scheme operator's reports and accounts on demand and on payment of a reasonable fee.

Auditors' reports

10.10. The provisions of Part 3.7 that relate to auditors are amended by the Bill to take account of auditors who audit collective investment schemes. Specific provision is made about the resignation of an auditor of a collective investment scheme who is not the auditor of the scheme operator [new section 329A].

10.11. The auditor has a particular duty to report suspected breaches of a national scheme law in relation to a collective investment scheme to the ASC [new section 331G]. The auditor must also certify, each year or half year when it audits or reviews the accounts of the scheme, whether the scheme operator is complying with the conditions to which its scheme operators licence is subject [section 323H]. This certificate from the auditor must be included with the annual and half yearly reports, so that it will come to investors' attention.

11. Marketing schemes: intermediaries

Introduction

11.1. The Bill makes significant improvements to the regulation of intermediaries, that is, investment advisers and securities dealers. Under the Corporations Law, persons who carry on a securities business or an investment advice business must be licensed. The Bill preserves this licensing system. In addition, the Bill upgrades the standard that advisers must comply with.

Licensing intermediaries

Dealers licence not needed in some cases

11.2. The Bill makes several changes to the regime for licensing intermediaries under the Corporations Law. It provides that collective investment scheme operators will not need to have a dealers licence or an investment advisers licence merely because they deal in or advise on interests in their own schemes. If the operator deals in other securities in the course of managing the scheme, it will need to have a dealers licence. These provisions are implemented in amendments to sections 780 and 781.

Educational qualifications

11.3. Sections 783 and 784 are amended to enable regulations to be made to prescribe educational qualifications for licensees. Consequential amendments are made to the power the ASC has under section 826 to revoke licences.

Representatives of scheme operators

11.4. New section 807A requires persons who act as representatives of operators of collective investment schemes in relation to the schemes to hold a proper authority from the operator. A consequence of this provision is that the operator will be fully liable for the actions of its representatives [section 817].

New rules

Know your client rule

11.5. New section 848A requires securities advisers not to make recommendations to their clients unless they have undertaken a needs inquiry. This inquiry is designed to ensure that the adviser works out the clients' investment objectives, financial situation and particular needs and bases the recommendation on the outcome of that inquiry. Failure to comply with this requirement will not be an

offence but will give rise to a civil liability and will be a ground for revoking the securities adviser's licence. Scheme operators who give advice are covered by this clause.

Disclosing information about the investment

11.6. The Corporations Law already requires significant disclosures by intermediaries, including disclosure of commissions and other benefits payable on account of business placed by the intermediary. Section 849 is amended to impose further disclosure requirements. Under the amendments, the adviser must also disclose

- how much of the money that the client actually pays to the adviser will be spent on fees and commissions
- particulars of the charges payable in connection with the transaction, including, for example, stamp duty and disbursements.

These disclosures must be made before carrying out the client's instructions to conclude the transaction. New section 851 requires recommendations to be in writing.

'Independent' advisers

11.7. New section 841A deals with the problem of advisers calling themselves independent when they are not truly so. It prohibits securities advisers from holding themselves out as independent if they are party to an arrangement with an entity in whose securities the adviser may lawfully deal or about whose securities the adviser may lawfully advise under which the adviser will derive a pecuniary or other benefit on account of business placed. Advisers who rebate commissions, effectively being paid only by charging the client, will not be caught. Advisers who are employed by, or act as agents for, entities in whose securities they may lawfully deal, or about which they may lawfully advise, face a similar prohibition on calling themselves 'independent'.

12. Marketing schemes: prospectuses and 'enhanced disclosure'

Introduction

12.1. Most collective investment schemes will require a prospectus, that is, a document issued by the scheme operator giving potential investors information they need to be able to decide whether to invest. Section 1019 prohibits securities from being sold without a prospectus unless the exception set out in section 1017 applies (that is, the sale results from an excluded offer of securities or an excluded invitation — these expressions are defined in section 66). The Bill reflects the principles underlying these provisions.

Information to be included in prospectuses

12.2. Sections 1022, 1022AA and 1022AB set out the general rules about what information is to be required in prospectuses. The basic principle, set out in section 1022, is that prospectuses for collective investment schemes must

contain all such information as investors in collective investment schemes and their professional advisers would reasonably require, and reasonably expect to find in the prospectus, for the purpose of making an informed assessment of:

- (a) the assets and liabilities, financial position, profits and losses, and prospects of the scheme;
- (b) the rights attaching to the interests; and
- (c) the merits of participating in the scheme and the nature and extent of the risks involved in participating.

This principle is embodied in regulations under the Corporations Law. The Bill amends section 1022 by writing this principle into the Corporations Law itself. A small amendment is made, to require the prospectus to indicate the nature of the risks involved. Consequential amendments are made to sections 1022AA and 1022AB.

Registration of prospectuses

12.3. At present Part 7.12, Division 2 requires prospectuses for prescribed interest schemes to be registered. Section 1017A is amended to make it clear that collective investment scheme prospectuses will have to be lodged with the ASC but will not have to be registered.

Front covers etc

Front covers

12.4. New section 1021A imposes a requirement that the front cover of a collective investment scheme prospectus clearly state the name and ACN of the scheme operator and the name and registration number of the scheme itself.

Application forms

12.5. A small amendment is made to section 1020 requiring the application form attached to a prospectus for a collective investment scheme to state clearly that cheques and payment orders for interests in the scheme must be made in favour of the operator for payment into an account clearly designated as a scheme account, and giving details of the redemption and buy-back procedure [see new Part 2.5].

Special disclosures required

12.6. The Bill makes amendments to ensure that collective investment scheme prospectuses always address a number of specific issues that are critical to the decision whether to invest. Section 1021 is amended to ensure that prospectuses set out particulars of the following:

- the range of investments permitted under the scheme's constitution
- how the operator's fees and charges will be worked out
- for schemes whose constitutions permit borrowings in excess of 10% [new section 260AI] — what the borrowing limits are and how much was outstanding when the prospectus was issued
- the nature of links with other entities mentioned in the prospectus, for example, parent corporations
- management expense ratio for the past five years [for the definition of management expense ratio see new section 88AB]
- what redemption and buy back facilities will be offered by the operator and the procedure involved for making redemption and buy back requests
- details of the informal dispute resolution arrangements.

Setting out all this information in the prospectus will not relieve scheme operators of the general obligation imposed by section 1022.

Time limits

12.7. Unless an exemption is obtained, the Corporations Law presently sets a six month life for a prospectus for a prescribed interest scheme. The Bill amends sections 1022AB and 1040 to provide for an extended life period of one year. For technical reasons concerned with rolling over prospectuses, the Bill provides for a 13 month life for prospectuses.

Marketing schemes — advertising

12.8. The Bill imposes further controls on advertising collective investment schemes. It specifically extends the prohibition in section 995 on misleading or deceptive advertising to collective investment scheme advertising whatever medium is used, including electronic media. Prohibitions on false or misleading conduct imposed by the *Trade Practices Act 1974* continue to apply in relation to collective investment schemes.

Enhanced disclosure

12.9. The *Corporate Law Reform (No 2) Bill 1992 [1993]* creates a regime of 'enhanced disclosure' for securities that are ED securities. Under other amendments, collective investment schemes for which a prospectus is required will be ED securities. The Bill amends, in particular, Part 7.12A to update references in the enhanced disclosure provisions to prescribed interests to collective investment schemes.

13. Names and registration numbers

Introduction

13.1. The draft Bill requires schemes to be registered and allocated a registration number. Scheme operators must use that number in the same way that companies must use their registration numbers (ACN).

Amendments

13.2. New section 367A limits the names that companies can use for collective investment schemes they operate. A company is not allowed to use a name that is used by or reserved for another collective investment scheme or is declared by the regulations to be unacceptable. Sections 380 and 381 are amended to give effect to the allocation of names and registration numbers. New section 219A requires scheme operators to use the registration number of the scheme in all documents and eligible negotiable instruments issued by them.

14. Termination, winding up and administration

Introduction

14.1. A significant problem with the present law relating to prescribed interests is that there is insufficient provision governing the termination and winding up of prescribed interest schemes. The Bill makes extensive provision governing termination and winding up. The provisions on voluntary administration are closely modelled on the substantial amendments made by the *Corporate Law Reform Act 1992* implementing the Harmer Report's recommendations (Australian Law Reform Commission Report No 45 *General Insolvency Inquiry*). Other reforms based on the Harmer Report have been adopted for collective investment schemes.

Termination

Terminating events

14.2. *Date of termination.* New Part 5.6A, Division 1 sets out the circumstances in which a collective investment scheme will terminate. A scheme constitution may specify a date at which the scheme will terminate (fixed term schemes) and new section 581AA provides that such schemes terminate on that date. However, the new section renders void 'poison pill' provisions, under which the scheme's constitution automatically terminates the scheme if the operator is removed as operator.

14.3. New section 581AB allows a scheme operator to terminate a scheme on the ground that the purpose of the scheme has been or cannot be accomplished. The termination must be notified to investors and the ASC who have the opportunity to requisition a meeting. If a meeting is requisitioned, the scheme cannot be terminated unless the meeting approves the termination (see paragraph 14.6).

14.4. New section 581AC allows the court to terminate a scheme on a broad just and equitable ground. Other provisions in the Bill, in particular new section 260AQ (the oppression remedy), allow the Court to terminate a scheme.

14.5. New section 581AD allows an application to be made to terminate a scheme on the ground of its insolvency. The provision is analogous to similar provisions relating to companies and includes a statement of circumstances in which it will be presumed, unless the contrary is shown, that the scheme is insolvent.

14.6. A meeting of investors may under new section 581AE terminate a scheme. For the vote to be effective, the votes in favour of termination must represent more than 50% of the total value of all the interests in the scheme. However, if a

registered company auditor who is not the scheme's auditor, or the scheme operator's auditor, has certified that the scheme is insolvent, a vote of 75% of the total value of all the interests that are voted would be enough to terminate the scheme. Section 95A is amended to include equivalent definitions of insolvency in relation to a collective investment scheme.

Winding up

Which schemes?

14.7. Some collective investment schemes will not be so arranged that the scheme operator holds the property. The Bill makes no provision for the winding up of such schemes: the general law relating to the legal form of such a scheme will govern its winding up. For schemes where the scheme operator holds the scheme property, new Divisions 2, 3 and 4 of Part 5.6A govern the winding up procedure after the scheme has been terminated.

Liquidators

14.8. New Part 5.6A, Division 2 requires a liquidator to be appointed to the scheme [new section 581BB]. The restrictions on the liquidator's appointment and provisions of a mechanical kind such as for remuneration, vacancy in office and removal of liquidator reflect equivalent provisions in Part 5.6 in relation to companies.

14.9. The effect of the liquidator's appointment is covered in new Division 3 of Part 5.6A. Broadly speaking, its effect is similar to the effect of the appointment of a liquidator to a company.

14.10. New Part 5.6A, Division 4 deals with the actual winding up. It provides that the scheme operator must not continue to accept subscriptions [new section 581DB]. New section 113B deals with the consequences of scheme operators breaching this provision. The business of the scheme must not be carried on unless the liquidator so permits for the better winding up of the scheme.

14.11. New section 581DC limits the liability of an investor in trust based schemes, on winding up, to the amount of the investor's subscription. This provision avoids the current reliance on the provisions of particular trust deeds.

14.12. New section 581DF provides that the property of the scheme that is being wound up is to be applied first in satisfaction of the scheme's debts and then distributed amongst the investors according to the value of their interests or as the scheme's constitution provides. In effect, creditors of the scheme have priority over the investors.

14.13. Other provisions in new Division 4 largely mirror the equivalent provisions applying to the liquidation of companies.

14.14. New section 581DL gives the court a very wide power to supervise the liquidation of a collective investment scheme. It expressly includes the power to order the liquidator to make good the loss caused by default, misfeasance or neglect.

Preferences

14.15. Provisions for the recovery of preferential payments by scheme operators out of scheme property will need to be included at this point. Although the Collective Investments Review considers that such provisions ought to be included, this draft does not include them. The draft, when done, will need to take account of a number of matters, for example, the relationship between the scheme's insolvency and the scheme operator's insolvency so that preferences will not be able to be recovered twice.

Administration of schemes

14.16. New Part 5.3B is inserted to provide an equivalent for collective investment schemes of the 'voluntary administration' procedure recently enacted for companies (*Corporate Law Reform Act 1992*). The provisions of new Part 5.3B are drawn from those recently enacted reforms and modified slightly to take account of the particular circumstances of collective investment schemes.

15. The ASC's powers

Introduction

15.1. The Bill introduces significant new information gathering and enforcement powers for the ASC, including giving legislative backing to the ASC conducting surveillance audits of collective investment schemes. These audits may be conducted without any suspicion of contravention occurring. They will enable the ASC to maintain appropriate supervision of the operation of collective investments. In addition, the Bill makes amendments to existing ASC powers, in particular, by allowing the ASC to take enforceable undertakings from companies subject to national scheme laws. These other amendments extend beyond collective investment schemes.

Surveillance audits

Introduction

15.2. Clause 162 inserts a new Division 1A into Part 3 of the ASC Act, to authorise the ASC to conduct surveillance audits. Only specially authorised officers of the ASC can conduct surveillance audits [ASC Act new section 12B].

Power of entry

15.3. ASC Act new section 12C is the primary provision. It authorises the ASC to enter premises used by the operator of a collective investment scheme in relation to the scheme and search for books and documents related to activities of the scheme or the way it is conducted. The ASC is entitled to full and free access to and within such places to conduct a search and may do whatever is necessary to conduct a search.

15.4. The ASC may examine books found during the search to determine whether they are books that relate to the collective investment scheme and, if they are, to examine the operations of the scheme.

15.5. The new section imposes controls on when the ASC can carry out surveillance audits. If audits are conducted outside business hours, the occupier's consent or a warrant under ASC Act Part 3, Division 3 must be obtained.

Power to take possession

15.6. New sections 12D and 12E give the ASC power to take possession of and remove books found during the search if the occupier of the place consents. If the occupier does not consent, the books may be secured until authority under the ASC

Act Part 3, is obtained. Books cannot be secured for longer than 24 hours. New section 67A makes it an offence to interfere with books that have been secured.

Help to be given

15.7. New section 12E imposes on occupiers and other persons who own or have possession of the books a duty to help ASC officers in conducting a surveillance audit. Examples of help that might be required include making copies or photocopies of books, indicating where they are and making them available for inspection.

Enhanced enforcement powers

Enforceable undertakings

15.8. New ASC Act section 83B allows the ASC to take enforceable undertakings on any matter in respect of which it has a power or function under a national scheme law. The undertakings must be agreed to by the person giving them. If a provision of an undertaking is breached, the ASC may apply to the Court which can make any appropriate order including, for example, an order for compliance with the undertaking. The provision is modelled on recent amendments to the *Trade Practices Act 1974*.

Order for compliance

15.9. An apparent refusal or failure of the scheme operator to comply with the Corporations Law or the scheme constitution might, in some instances, be best remedied through a court order for compliance. The ASC is given this additional enforcement power under new section 260AO.

15.10. The Bill makes a number of other minor amendments to the ASC's powers. These include

- widening the ASC's power to give litigants or intending litigants copies of books and documents in its possession [section 25]
- ensuring that the examination and inspection powers are available for checking compliance with national scheme laws [sections 13 and 28]
- allowing the ASC to take steps to get access to books and documents kept overseas [ASC Act new section 33B]
- bringing the warrant provisions of the ASC Act up to date [new sections 36A and 36B]
- allowing the ASC to use the 'class actions' procedure available in the Federal Court for proceedings under national scheme laws [ASC Act section 50].

Use of computers

15.11. ASC Act new sections 87A, 87B, 87C and 87D provide for the ASC to use devices such as computers and photocopiers in conducting surveillance orders or investigations.

Exemptions

15.12. ASC Act new Part 9.9A gives the ASC the power to grant exemptions from any provisions of the Corporations Law for particular collective investment schemes or for collective investment schemes of a particular kind. The ASC presently has the power in relation to prescribed interest schemes [see section 1084].

15.13. There is considerable flexibility in exemptions. They may, for example, be continuing [new section 1350B] or 'one off', for a particular matter or for a particular scheme.

15.14. The ASC may attach conditions to the exemption [new section 1350C] and may vary or revoke exemptions [new section 1350D].

15.15. Special provision is made to cover the case where an act would have been a contravention of the law but for an exemption and the exemption is varied or revoked. New section 1350D provides that no liability will attach to the person contravening the law if he or she did not know and could not reasonably have known about the variation or revocation.

16. Problems of corporate form

Introduction

16.1. New Part 9.7A deals with the extent to which acts of directors and other officers, and agents, of collective investment scheme operators can be attributed to the operator. Similar provision is presently made by section 762 but that section only applies to matters arising under Chapter 7. The effect of new Part 9.7A is to apply the same principles, with some modifications, to matters arising under any Part of the Corporations Law, so far as scheme operators are concerned. Consequently, section 762 is amended to exclude its operation in relation to scheme operators.

Attributing acts etc.

16.2. New sections 1345AC and 1345AD set out the circumstances in which something that a director, officer, employee or agent of a collective investment scheme operator does is to be attributed to the operator itself. So long as the person acts within his or her actual or apparent authority, the operator is to be taken to have done the act. However, there is an exception if it is established that the person acted only for his or her own benefit and not for the operator's benefit and the operator did not in fact benefit from the act.

16.3. New section 1345AD provides a further exception, where it is established that the operator had taken all reasonable measures to prevent its officers, directors, employees and agents from doing acts of the relevant kind. However, this test will not be satisfied if the person who did the act believed on reasonable grounds that the system for reporting contraventions would not lead to effective action being taken or would have resulted in the person being victimised.

Attributing states of mind

16.4. In a number of instances it will be necessary to determine whether a scheme operator had a particular state of mind or exercised a particular degree of care in relation to a matter. New section 1345AC provides that the state of mind, intention and beliefs, and the degree of care exercised by, a person whose acts are to be attributed to a scheme operator are also to be attributed to the scheme operator. It is also necessary to deal effectively with chains of authority within bodies corporate. The section also therefore covers the case where a person who is a director, officer, employee or agent authorises or orders, within the scope of his or her actual or apparent authority from the scheme operator, an act to be done. It provides that the person's state of mind, and the standard of care that that person exercised, are to be attributed to the scheme operator.

17. Transitional provisions

Transitional arrangements

17.1. Part 9.11, new Division 7 makes provision for the transition from the existing regime for regulating prescribed interest schemes to the new regime set out in the Bill.

Conversion of existing prescribed interest schemes

17.2. From the commencement of the Bill, the ASC will not be able to approve deeds for prescribed interest schemes under Part 7.12, Division 5. Instead, these schemes will have to be structured as collective investment schemes. Existing prescribed interest schemes will, subject to specified exceptions, continue to be regulated under the old law, in particular, Part 7.12, Divisions 5 and 5A [new section 1395]. They will have 2 years within which to convert to collective investment schemes under the regime in the Bill. The ASC may, however, extend the 2 year period in particular circumstances.

17.3. Any application for a scheme operators licence in respect of an existing prescribed interest scheme will need to be made with the consent of both the manager and the trustee or representative. However, if no such application has been made for a particular prescribed interest scheme within 18 months after the commencement of the Bill, the management company may make the application for a scheme operators licence without the need for any other consent [new section 1399]. The trustee or representative must give assistance in these circumstances to the management company and the costs of doing so will come out of scheme property.

Related party amendments

17.4. The amendments to the related parties provision [Part 3.2A] will apply to collective investment schemes from the date of their registration as collective investment schemes or [date to be inserted]. Existing prescribed interest schemes may elect to have the Part apply to them from an earlier date. This is similar to the arrangements for the introduction of the related party provisions in the case of public companies.

Other amendments

17.5. The other amendments in the Bill will not apply to existing prescribed interest schemes until they are registered. A number of exceptions to this are set out in new section 1397. They include

- new section 183C (investors may remove the operator) which will apply so as to enable the investors in an existing prescribed interest scheme to remove either the trustee or the management company using the procedure in section 183C
- the annual and half-yearly reporting provisions
- the prospectus provisions
- the amendments to the ASC's powers, in particular the power to conduct surveillance audits
- the oppression remedy [new section 260AQ].

18. Short notes on clauses

1. *Short title*
This is the short title of the Bill.
2. *Commencement*
This provides for the commencement of the Bill. Transitional provisions for the amendments to the Corporations Law are in Corporations Law new Part 9.11, Division 7 and for the amendments to the ASC Act in clause 178.
3. *Interpretation*
This clause defines the expressions Corporations Law, *Corporations Act 1989* and ASC Act.
4. *Amendment of Corporations Law section 9: Dictionary*
This clause amends section 9 to include defined expressions relevant to the amendments made by the Bill. Most of the amendments are noted elsewhere in this Guide or are consequential on other amendments.
5. *Amendment of Corporations Law section 22A: Effect of Division*
6. *Amendment of Corporations Law section 22E: Securities ceasing to be ED securities when number of holders falls below 50*
7. *Repeal of section 22G and substitution of new section 22G*
These clauses amend Part 1.2, Division 3A, which defines what is an ED security. The amendments update references to prescribed interests to references to interests in collective investment schemes. See also paragraph 10.3 of this Guide.
8. *Insertion of new Part 1.2, Division 6A — Collective investment schemes*
See chapter 2 of this Guide.
9. *Amendment of Corporations Law section 53: Affairs of a body corporate*
10. *Insertion of new section 53AAAA: Affairs of a collective investment scheme*
11. *Amendment of Corporations Law section 53AA: Business affairs of a body corporate*
This clause amends the definition of the expression 'affairs of a body corporate' and inserts a new section 53AAAA to define the expression 'affairs of the collective investment scheme' The definitions are relevant to the ASC's surveillance, investigation and examination powers [see ASC Act Part 3, Divisions 1A, 1 and 2).
12. *Amendment of Corporations Law section 57: Classes of shares etc.*
This clause amends section 57, which concerns dividing shares and prescribed interests into classes, by updating references to prescribed interests to interests in collective investment schemes.

13. *Amendment of Corporations Law section 64B: Entities connected with a corporation*
This amendment provides that a collective investment scheme is connected with the corporation that is its operator.
14. *Amendment of Corporations Law section 66: Excluded issues, offers and invitations*
This amendment changes references from prescribed interests to references to interests in collective investment schemes.
15. *Repeal of Corporations Law section 68A*
This clause repeals section 68, which is covered in new section 50N.
16. *Insertion of new section 80AB: MER — management expense ratios*
See paragraph 12.6 in this Guide.
17. *Amendment of Corporations Law section 82: Offers and invitations to the public*
This clause changes references to prescribed interests to references to interests in collective investment schemes.
18. *Repeal of Corporations Law section 85*
This clause repeals section 85 which defines participation interests.
19. *Amendment of Corporations Law section 88: Proper authority from securities licensee or collective investment scheme operator; invalid securities authority*
This amendment is consequential on the changes to the dealers licensing provisions: see paragraph 11.2 to 11.4 of this Guide.
20. *Insertion of new section 88AA: Property based schemes*
See paragraph 5.7 in this Guide.
21. *Amendment of Corporations Law section 91A: Effect of such a prohibition, order, notice or disqualification*
This amendment is consequential on the scheme operator licensing provisions in new Part 2.2A.
22. *Amendment of Corporations Law section 92: Securities*
This amendment changes references to prescribed interests to references to interests in collective investment schemes.
23. *Amendment of Corporations Law section 95A: Solvency and insolvency*
This amendment extends the definitions of solvency and insolvency to collective investment schemes.
24. *Insertion of new sections 109KA and 109KB*
This amendment inserts two sections in the Corporations Law. They give meaning to the drafting technique adopted in the Bill of providing specifically for defences at the end of each offence provision. The amendments ensure that

the matters specified as defences will be available as defences in prosecutions and in civil penalty proceedings. They will not be available as defences in civil proceedings.

New section 109KB explains another drafting technique used in the Bill, specifying the fault elements that will not be relevant in prosecutions for offences or civil penalty proceedings.

25. *Insertion of new section 109Z: How notices are given to investors in collective investment schemes*

This amendment sets out how notices are to be given to collective investment scheme investors.

26. *Insertion of new sections 113A, 113B and 113C*

For new section 113A see paragraphs 3.2 and 3.3 of this Guide. The new section 113B makes voidable unlawful issues of interests in collective investment schemes. New section 113C requires scheme operators to give a certificate of interests to an investor unless the scheme constitution provides otherwise.

27. *Insertion of new Part 2.2A: Registering collective investment schemes and licensing scheme operators*

See chapter 3 of this Guide.

28. *Amendment of Corporations Law section 164: Persons having dealings with companies and collective investment scheme operators*

29. *Amendment of Corporations Law section 165: Lodgment of documents etc. not to constitute constructive notice*

Sections 164 and 165 allows persons dealing with companies to make a number of assumptions about compliance with the Corporations Law. The amendments allow similar assumptions to be made in relation to the dealings with operators of collective investment schemes.

30. *Insertion of new Part 2.3A: Requirements for constitutions and operators of collective investment schemes*

See chapter 4 of this Guide.

31. *Insertion of new Parts 2.5 and 2.6*

For new Part 2.5 (issue, redemption and buy-back of interests in collective investment schemes) see chapter 9 of this Guide. New Part 2.6 provides for the operator of the collective investment scheme to keep registers. Many of these provisions reflect provisions in the existing prescribed interests provisions of the Corporations Law. New section 216BA requires a register of investors to be kept and to be kept up to date. New section 216BB provides for substantial investors, upon becoming aware from the most recent annual report they have received that they are entitled to 30% or more of the total value of voting

interests in the scheme, to notify the operator. The operator must enter this information in the investors register and keep it up to date. Fluctuations of interests of more than 5% must also be reported in the register.

New section 216BC requires the operator to keep a separate register of real property or property of a prescribed kind. For real property, the register must show the valuations obtained by the operator.

The remaining provisions of this new Part set out where the registers are to be kept, that they may be inspected by anyone and allow the court to order their rectification if they are in error.

32. *Insertion of new section 219A: Use of registration number*
See chapter 13 of this Guide.
33. *Amendment of Corporations Law section 229: Certain persons not to manage corporations*
34. *Amendment of Corporations Law section 230: Court may order person not to manage corporation*
These amendments are consequential on new section 232AA.
35. *Insertion of new section 232AA: Additional duties and liabilities of officers of collective investment scheme operators*
See chapter 8 of this Guide.
36. *Amendment of Corporations Law section 235: Register of directors' shareholdings etc.*
37. *Amendment of Corporations Law section 236: General duty to make disclosure*
These amendments change references to prescribed interests to references to interests in collective investment schemes.
38. *Insertion of new section 241B: Collective investment scheme property not to be used to pay insurance premiums or indemnities*
See paragraph 5.9 of this Guide.
39. *Amendment of heading to Part 3.2A*
40. *Amendment of Corporations Law section 243A: Object*
41. *Amendment of Corporations Law section 243C: Entities*
42. *Amendment of Corporations Law section 243F: Related parties*
43. *Amendment of Corporations Law section 243G: Giving a financial benefit*
44. *Amendment of Corporations Law section 243H: Prohibited financial benefit to related parties of public companies*
45. *Insertion of new section 243HA: Restriction on collective investment scheme operators giving financial benefits out of the scheme property to related parties*
46. *Heading to Part 3.2A Division 4*
47. *Insertion of new section 243HB: Application of Division*
48. *Insertion of new Division 4A: General exceptions: collective investment schemes*

-
49. *Insertion of new section 243PG: Application of Subdivision*
 50. *Insertion of new Division 5A: Financial benefits given by collective investment scheme operator out of scheme property approved by investors' meeting*
 51. *Insertion of new section 243ZEA: Consequences of scheme operator giving financial benefit out of scheme property when not permitted*
 52. *Insertion of new section 243ZHA: Recovery of financial benefits paid out of collective investment scheme property in contravention of this Part*
 53. *Amendment of Corporations Law section 243Zl: Effect of Part*
See chapter 7 of this Guide.
 54. *Insertion of new Part 3.4A — Conduct of collective investment schemes*
This clause inserts new Part 3.4A, which covers a number of areas. For Division 1 (conducting collective investment schemes), see chapter 5 of this Guide. For Division 2 (meetings of investors) see chapter 6 of this Guide.

New Division 3 requires scheme operators to give information about the scheme when asked by the ASC [new section 260CA] and provides protection for whistleblowers, in particular directors and employees of a collective investment scheme operator or of a custodian of scheme property, who give information in good faith about the scheme to the ASC [new section 260CB].
 55. *Amendment of Corporations Law section 285: Application of accounting standards: financial years*
 56. *Amendment of Corporations Law section 289: Accounting records*
These amendments add references to collective investment schemes and collective investment scheme operators.
 57. *Amendment of Corporations Law section 315: Members and investors entitled to financial statements and reports*
See paragraph 10.9 in this Guide.
 58. *Heading to Division 11 of Part 3.6*
 59. *Repeal of section 323B and substitution of new section 323B: Introduction*
 60. *Amendment of Corporations Law section 323C: Profit and loss account*
 61. *Amendment of Corporations Law section 323D: Balance-sheet*
 62. *Amendment of Corporations Law section 323E: Accounts to comply with regulations*
 63. *Amendment of Corporations Law section 323F: Accounts to comply with applicable accounting standards*
 64. *Amendment of Corporations Law section 323G: Additional information to give a true and fair view*
 65. *Amendment of Corporations Law section 323H: Audit or review of accounts*
 66. *Amendment of Corporations Law section 323J: Scheme operator's report for accounting period*
 67. *Insertion of new section 323JA: Report may omit prejudicial information*
 68. *Amendment of Corporations Law section 323K: Lodging accounts etc.*
 69. *Insertion of new sections 323KA, 323KB and 323KC*
-

70. *Amendment of Corporations Law section 323L: Regulations may make additional provision based on Divisions 2 to 8*
71. *Amendment of Corporations Law section 324: Qualifications of auditors*
72. *Insertion of new section 329A: Resignation of auditors of collective investment schemes*
73. *Insertion of new Division 2A: Auditor's report on collective investment schemes*
74. *Amendment of Corporations Law section 332: Auditor may obtain information and attend company meetings*
75. *Amendment of Corporations Law section 332A: Board to be informed of non-compliance with accounting standard*
76. *Amendment of Corporations Law section 333: Obstruction of auditor*
See chapter 10 of this report.
77. *Insertion of new section 38A: Annual returns — collective investment schemes*
This new section requires scheme operators to lodge annual returns containing in particular information about the investors in the scheme.
78. *Insertion of new section 367A: Names available to companies for proposed collective investment schemes*
See chapter 13 of this Guide.
79. *Amendment of Corporations Law section 378: Applications under section 367A and sections 373 to 377*
80. *Amendment of Corporations Law section 380: Cancellation of registration*
81. *Amendment of Corporations Law section 381: Registration number remains in force until cancelled*
These amendments are consequential on clause 77 and proposed section 219A.
82. *Insertion of new section 382A: Collective investment schemes — change of name*
This new section provides for ASC approval to a change of name of a collective investment scheme.
83. *Amendment of Corporations Law section 383C: Transport documents*
This amendment is consequential on clause 77.
84. *Insertion of Division heading in Part 5.1*
85. *Amendment of Corporations Law section 410: Interpretation*
86. *Amendment of Corporations Law section 414: Acquisition of shares from shareholders dissenting from scheme or contract approved by majority*
87. *Amendment of Corporations Law section 415: Notification of appointment of scheme manager and power of Court to require report*
These amendments are consequential on clause 87.

88. *Insertion of Part 5.1, new Division 2*

This new Division provides for the merger of collective investment schemes. The provisions are analogous to those presently in Part 5.1 for the merger of corporations.

89. *Insertion of new section 424A: Controller of property of collective investment scheme operator to apply for temporary scheme operator*

New section 424A requires a chargee of property of the operator of a collective investment scheme and the liquidator of the operator of a collective investment scheme to apply to the Court for the appointment of a temporary scheme operator.

90. *Insertion of new Part 5.3B: Administration of the affairs of a collective investment scheme with a view to executing a deed of arrangement*

See paragraph 14.6 of this Guide.

91. *Amendment of Corporations Law section 486A: Court may make order to prevent officer or related entity from avoiding liability to company*

92. *Insertion of new sections 486AA and 486AB*

These clauses amend section 486A, which allows the Court to make orders to prevent officers etc. from avoiding their liabilities. The amendments make similar provision in relation to officers of collective investment scheme operators.

93. *Amendment of Corporations Law section 486B: Warrant to arrest person who is absconding, or who has dealt with property or books, to avoid obligations in connection with winding up*

This amendment extends section 486B of the Corporations Law to cover collective investment schemes.

94. *Amendment of Corporations Law section 536: Supervision of liquidators*

95. *Amendment of Corporations Law section 538: Regulations relating to money etc. received by liquidator*

96. *Insertion of new section 540A: Application of section 539 and 540 to collective investment schemes*

These amendments extend the operation of sections 538, 539 and 540 to liquidators of collective investment schemes.

97. *Insertion of new Part 5.6A — Termination and winding up collective investment schemes*

See chapter 14 of this Guide.

98. *Amendment of Corporations Law section 595: Inducement to be appointed liquidator etc. of a company*

This amendment extends the prohibition in section 595 on inducements to be appointed a liquidator to a collective investment scheme.

99. *Amendment of Corporations Law section 596A: Mandatory examination*
100. *Amendment of Corporations Law section 596B: Discretionary examination*
101. *Amendment of Corporations Law section 596E: Notice of examination*

These amendments extend Part 5.9, Division 1, which relates to examining a person about a corporation in relation to an insolvency, to collective investment schemes.

102. *Amendment of Corporations Law section 598: Orders against persons concerned with corporations*
103. *Amendment of Corporations Law section 599: Court may order persons not to manage certain corporations*

These amendments extend Part 5.9, Division 2, which allows a court to make orders against a person in relation to a corporation in the event of the corporation's insolvency, to collective investment schemes.

104. *Amendment of Corporations Law section 603: Definitions*

This section updates section 603 by substituting, for references to prescribed interests, references to interests in collective investment schemes.

105. *Amendment of Corporations Law section 762: Conduct*
See chapter 16 of this Guide.

106. *Amendment of Corporations Law section 780: Dealers*
107. *Amendment of Corporations Law section 781: Investment advisers*
108. *Amendment of Corporations Law section 783: Grant of licence to natural person*
109. *Amendment of Corporations Law section 784: Grant of licence to body corporate*
110. *Insertion of new section 807A: Representatives of dealers and scheme operators*
111. *Amendment of Corporations Law section 808: Defence*
112. *Insertion of new section 812A: Scheme operators*
113. *Amendment of Corporations Law section 826: Power to revoke licence after a hearing*
114. *Insertion of new section 841A: Independent advisers*
115. *Insertion of new section 847A: Interpretation*
116. *Insertion of new section 848A: Adviser must have reasonable basis for recommendation*
117. *Amendment of Corporations Law section 849: What client must be told about adviser's interest in transaction*
118. *Amendment of Corporations Law section 850: Defences to alleged breach of subsection 849(2)*
119. *Repeal of Corporations Law section 851 and substitution of new section 851: Recommendation to be in writing*
See chapter 11 of this Guide.

-
120. *Amendment of Corporations Law section 995: Misleading or deceptive conduct and advertising*
See chapter 12 of this Guide.
121. *Amendment of Corporations Law section 1002A: Securities*
122. *Repeal of Corporations Law section 1002H and substitution of new section 1002H: Exception for redemption and buy-back of interests in collective investment schemes*
123. *Amendment of Corporations Law section 1002M: Chinese wall arrangements by bodies corporate*
124. *Amendment of Corporations Law section 1002N: Chinese wall arrangements by partnerships, etc.*
125. *Amendment of Corporations Law section 1006: Civil liability for false or misleading statement in, or omission from, prospectus*
126. *Amendment of Corporations Law section 1011: No liability for mistake etc. if reasonable precautions taken*
127. *Amendment of Corporations Law section 1013: Liability for insider trading*
This amendment is consequential on the registration and licencing provisions.
128. *Amendment of Corporations Law section 1017A: Registrable prospectuses*
129. *Amendment of Corporations Law section 1020: Form of application for securities to be attached to prospectus*
130. *Amendment of Corporations Law section 1021: Specific provisions applicable to prospectuses*
131. *Insertion of new section 1021A: Prospectuses for collective investments — covers*
132. *Amendment of Corporations Law section 1022: General provisions applicable to all prospectuses other than those to which section 1022AA or 1022AB apply*
133. *Amendment of Corporations Law section 1022AA: General provisions applicable to certain primary prospectuses for securities of disclosing entities*
134. *Amendment of Corporations Law section 1022AB: General provisions applicable to certain secondary prospectuses for securities of disclosing entities*
135. *Amendment of Corporations Law section 1023A: Obligation to notify person who lodged prospectus of false or misleading statements, changes etc.*
136. *Amendment of Corporations Law section 1024: Supplementary prospectuses*
137. *Amendment of Corporations Law section 1040: Time limit on allotment, issue or sale of securities on the basis of a prospectus*
138. *Repeal of Divisions 5 and 5A of Part 7.12*
139. *Insertion of new Division 6A — Advertisements for collective investment schemes*
140. *Amendment of Corporations Law section 1084B: How this Part applies to an undertaking that is a disclosing entity*
141. *Amendment of Corporations Law section 1084G: Defences*
142. *Amendment of Corporations Law section 1084H: Enhanced disclosure provisions*
See chapter 12 of this Guide.
143. *Amendment of Corporations Law section 1089: Loss or destruction of certificates*
144. *Amendment of Corporations Law section 1090: Definition*
-

145. *Insertion of new section 1091B: Rights of trustee of estate of bankrupt investor in collective investment scheme*
146. *Amendment of Corporations Law section 1280: Registration of auditors*
147. *Amendment of Corporations Law section 1289: Auditors and other persons to enjoy qualified privilege in certain circumstances*
148. *Amendment of Corporations Law section 1308: False or misleading statements*
149. *Amendment of Corporations Law section 1309: False information etc.*

These provisions are consequential on other provisions in the Bill or update Corporations Law in relation to collective investment schemes.

150. *Amendment of Corporations Law section 1317C: Excluded decisions*
151. *Insertion of new section 1317CA: Statement to accompany notification of decisions*
- These provisions update the provisions in the Corporations Law providing for administrative review by the AAT to take account of decisions, particularly those in relation to registration and licensing, under the amendments made by the Bill.

152. *Amendment of Corporations Law section 1317DA: Civil penalty provisions*
153. *Heading to Division 5 of Part 9.4B*
154. *Amendment of Corporations Law section 1317HA: On application for civil penalty order, Court may order compensation*
155. *Amendment of Corporations Law section 1317HB: Criminal court may order compensation*
156. *Amendment of Corporations Law section 1317HD: Recovery of profits, and compensation for loss, resulting from contravention*
- These provisions amend the civil penalty regime to take account of civil penalty provisions inserted in the Corporations Law by the Bill.

157. *Amendment of Corporations Law section 1322: Irregularities*
- This clause updates section 22 of the Corporations Law, which allows the court to sanction irregularities in meetings, to take account of collective investment schemes.

158. *Insertion of new Part 9.7A: Attributing acts, states of mind etc. to collective investment scheme operators*
- See chapter 16 of this Guide.

159. *Amendment of Corporations Law section 1346: Non-application of rule against perpetuities to certain schemes*
- This section extends to all collective investment schemes the provision which avoids the operation against the rule of perpetuities in relation to certain employee related schemes under the Corporations Law.

160. *Insertion of new Part 9.9A: Exemptions for collective investment schemes*
- See paragraph 15.12-15.15 of this Guide.

161. *Insertion of new Division 7: Changes from the Collective Investment Schemes Act 1997*

See chapter 17 of this Guide.

162. *Amendment of Corporations Law Schedule 3*

This clause fixes penalties for contraventions of the Law that are offences.

163. *Amendment of the ASC Act section 1: Objects*

This clause amends the objects provision of the ASC Act to refer expressly to collective investment schemes.

164. *Amendment of the ASC Act section 5: Interpretation*

165. *Insertion of new Division 1A in ASC Act: Surveillance audits for collective investment schemes*

See paragraph 15.2-15.7 of this Guide.

166. *Amendment of the ASC Act section 13: General powers of investigation*

167. *Amendment of the ASC Act section 15: Investigation after report of receiver, administrator or liquidator*

168. *Repeal of ASC Act section 25 and substitution of new ASC Act section 25: Giving to other persons copies of record*

169. *Amendment of the ASC Act section 28: When certain powers may be exercised*

170. *Amendment of the ASC Act section 30: Notice to produce books about affairs of body corporate or collective investment scheme*

171. *Amendment of the ASC Act section 31: Notice to produce books about securities*

172. *Amendment of the ASC Act section 33: Notice to produce documents in persons' possession*

173. *Insertion of new sections 33A and 33B in ASC Act:*

174. *Insertion of new sections 36A and 36B in ASC Act*

175. *Amendment of the ASC Act section 40: When certain powers may be exercised*

176. *Amendment of the ASC Act section 50: Commission may cause civil proceeding to be begun*

177. *Insertion of new section 67A in ASC Act: Interfering with books that have been secured*

178. *Insertion of new section 83B in ASC Act: Enforceable undertakings*

179. *Insertion of new sections 87A, 87B, 87C and 87D in ASC Act:*

180. *Amendment of the ASC Act section 138: Application of Division 3 of Part XI of the Audit Act*

See chapter 15 of this Guide.

181. *Transitional*

This clause makes transitional provisions applying the amendments to the ASC Act to existing prescribed interest schemes.

182. *The Corporations Regulations*

This clause amends the *Corporations Act 1989* to make it clear that regulations may exclude or modify the operation of the Corporations Law in relation to collective investment schemes.

COLLECTIVE INVESTMENT SCHEMES BILL 1997
TABLE OF PROVISIONS

PART 1 — PRELIMINARY

1. Short title
2. Commencement
3. Interpretation

PART 2 — AMENDMENTS OF THE CORPORATIONS LAW

Part 1.2, Division 1 — General

4. Dictionary

Part 1.2, Division 3A — ED securities

5. Effect of Division
6. Securities ceasing to be ED securities when number of holders falls below 50
7. Repeal of section 22G and substitution of new section:
 - 22G. Interests in collective investment schemes

Part 1.2, new Division 6A

8. Insertion of new Division:
 - Division 6A — Collective investment schemes*
 - 50A. Outline of this Division
 - 50B. What are collective investment schemes
 - 50C. Retirement village schemes
 - 50D. Partnerships
 - 50E. Joint ventures
 - 50F. Franchises
 - 50G. Certain trusts
 - 50H. Small schemes, intragroup schemes and employment incentive schemes
 - 50J. Life insurance etc. and superannuation
 - 50K. Banks and other deposit taking institutions
 - 50L. Shares, bonds, debentures etc.
 - 50M. Trustee common funds

- 50N. Exempt interests in collective investment schemes in relation to a jurisdiction
 50P. Exclusions do not limit each other
 50Q. The business of promoting schemes

Part 1.2, Division 7 — Interpretation of other expressions

9. Affairs of a body corporate
 10. Insertion of new section:
 53AAAA. Affairs of a collective investment scheme
 11. Business affairs of a body corporate
 12. Classes of shares etc.
 13. Entities connected with a corporation
 14. Excluded issues, offers and invitations
 15. Repeal of section 68A
 16. Insertion of new section:
 80AB. MER — management expense ratios
 17. Offers and invitations to the public
 18. Repeal of section 85
 19. Proper authority from securities licensee or collective investment scheme operator; invalid securities authority
 20. Insertion of new section:
 88AA. Property based schemes
 21. Effect of such a prohibition, order, notice or disqualification
 22. Securities
 23. Solvency and insolvency

Part 1.2, Division 8 — Miscellaneous interpretation rules

24. Insertion of new sections:
 109KA. Defences
 109KB. Fault — where excluded
 25. Insertion of new section:
 109Z. How notices are given to investors in collective investment schemes

Part 2.1 — Restrictions on forming certain entities

26. Insertion of new sections:
 113A. Collective investment schemes must be registered and operators licensed
 113B. Unlawful issues of interests voidable
 113C. Certificate of holding to be issued

new Part 2.2A

27. Insertion of new Part:
 PART 2.2A — REGISTERING COLLECTIVE INVESTMENT SCHEMES AND LICENSING SCHEME OPERATORS

Division 1 — Applications etc. for registration and licences

- 158A. Application for scheme registration and scheme operators licence
 158B. Commission can ask for more information
 158C. Considering applications — in particular, the suitability of proposed compliance measures
 158D. Determining applications
 158E. Undertaking by directors before application granted
 158F. Issue or endorsement of licence
 158G. Registration of collective investment schemes
 158H. Life of registration and licences

- 158J. Changing conditions of licences
- 158K. Licence conditions must be complied with
- 158L. Contraventions to be notified to Commission
- 158M. Register of scheme operators

Division 2 — Cancellation of registration and revocation of licences

- 158N. Operator continues to be operator while its scheme operators licence in force
- 158P. Cancellation of scheme registration
- 158Q. Revocation of scheme operators licence
- 158R. Revocation of scheme operators licence without a hearing
- 158S. Commission must apply for temporary scheme operator when revoking licence
- 158T. Return of licence etc. on cancellation or revocation

Part 2.3, Division 1 — Legal capacity and powers

- 28. Persons having dealings with companies and collective investment scheme operators
- 29. Lodgment of documents etc. not to constitute constructive notice

new Part 2.3A

- 30. Insertion of new Part:
PART 2.3A — REQUIREMENTS FOR CONSTITUTIONS AND OPERATORS OF COLLECTIVE INVESTMENT SCHEMES

- 183A. Changing the constitution of a collective investment scheme
- 183B. Non-executive etc. directors
- 183C. Investors may remove operator
- 183D. Investors may resolve that replacement scheme operator be appointed
- 183E. Court may appoint temporary scheme operator
- 183EA. Appointment of replacement scheme operator after temporary scheme operator
- 183F. Scheme property vests in replacement operator
- 183G. Certain transfers of property not liable to stamp duty
- 183H. Minimum net value of scheme operator
- 183J. Constitution etc. not to excuse operator etc. from liability
- 183K. 'Golden handshakes' etc. prohibited
- 183L. 'Golden handshake' etc. clauses void

new Parts 2.5 and 2.6

- 31. Insertion of new Parts:
PART 2.5 — ISSUE, REDEMPTION AND BUY-BACK OF INTERESTS IN COLLECTIVE INVESTMENT SCHEMES

Division 1 — Preliminary

- 216AA. Interpretation
- 216AB. Interests not to be issued etc. except for proper price

Division 2 — Redemption of interests

- 216AC. Division does not apply to fully liquid schemes
- 216AD. Redemptions to be in accordance with this Division
- 216AE. Overview of redemption procedure
- 216AF. Redemption offers
- 216AG. Redemption offer documents

- 216AH. When the redemption period starts
- 216AI. Scheme operator must give investors offer document and acceptance forms
- 216AJ. Accepting a redemption offer
- 216AK. Making the pay out

Division 3 — Scheme operator buying interests from investors (buy-back)

- 216AL. Restriction on operator buying interests from investors
- 216AM. Overview of buy-back procedure
- 216AN. Buy-back offers
- 216AO. Buy-back offer documents
- 216AP. When the buy-back period starts
- 216AQ. Scheme operator to notify investors when offer period starts
- 216AR. Scheme operator must give investors offer document and acceptance forms
- 216AS. Accepting a buy-back offer
- 216AT. Making the pay out

Division 4 — Avoiding the buy-back restrictions

- 216AU. Arrangements to avoid buy-back restrictions prohibited

PART 2.6 — COLLECTIVE INVESTMENT SCHEMES: REGISTERS TO BE KEPT
ETC.

- 216BA. Register of investors
- 216BB. Substantial investors to notify scheme operator
- 216BC. Register of scheme property and valuations
- 216BD. Where registers to be kept
- 216BE. Inspecting registers
- 216BF. Court may rectify register etc.

Part 3.1 — Registered office and name

- 32. Insertion of new section:
 - 219A. Use of registration number

Part 3.2 — Officers

- 33. Certain persons not to manage corporations
- 34. Court may order person not to manage corporation
- 35. Insertion of new sections:
 - 232AA. Additional duties and liabilities of officers of collective investment scheme operators
- 36. Register of directors' shareholdings etc.
- 37. General duty to make disclosure
- 38. Insertion of new section:
 - 241B. Collective investment scheme property not to be used to pay insurance premiums or indemnities

Part 3.2A, Division 1 — Object and outline of Part

- 39. Amendment of heading to Part 3.2A
- 40. Object

Part 3.2A, Division 2 — The meaning of expressions

- 41. Entities
- 42. Related parties
- 43. Giving a financial benefit

Part 3.2A, Division 3 — The prohibitions

44. Prohibited financial benefit to related parties of public companies
 45. Insertion of new section:
 243HA. Restriction on collective investment scheme operators giving financial benefits out of the scheme property to related parties

Part 3.2A, Division 4 — General exceptions

46. Heading to Part 3.2A Division 4
 47. Insertion of new section:
 243HB. Application of Division

Part 3.2A, new Division 4A

48. Insertion of new Division:
 Division 4A — General exceptions: collective investment schemes
- 243PC. Financial benefit under contract made before section 243HA begins to apply
 243PD. Financial benefit on arm's length terms
 243PE. Financial benefits to investors as such
 243PF. Financial benefit under court order

Part 3.2A, Division 5, Subdivision A — Exceptions from the prohibitions

49. Insertion of new section:
 243PG. Application of Subdivision

Part 3.2A, new Division 5A

50. Insertion of new Division:
 Division 5A — Financial benefits given by collective investment scheme operator out of scheme property approved by investors' meeting
- 243ZDA. Financial benefit given by collective investment scheme operator approved by investors' meeting
 243ZDB. Investors meeting to authorise related party transaction — notice and explanatory statement to be lodged
 243ZDC. Commission may comment
 243ZDD. Calling the meeting
 243ZDE. Vote needed to authorise giving a benefit to a related party
 243ZDF. Notice of resolution when passed
 243ZDG. Substantial compliance

Part 3.2A, Division 6 — Enforcement

51. Insertion of new section:
 243ZEA. Consequences of scheme operator giving financial benefit out of scheme property when not permitted
 52. Insertion of new section:
 243ZHA. Recovery of financial benefits paid out of collective investment scheme property in contravention of this Part
 53. Effect of Part

new Part 3.4A

54. Insertion of new Part:

PART 3.4A — CONDUCT OF COLLECTIVE INVESTMENT SCHEMES

Division 1 — Conducting collective investment schemes

- 260AA. Operator holds scheme property for investors
- 260AB. Property must be kept separate
- 260AC. Scheme property to be separately identified
- 260AD. Operator must act honestly
- 260AE. Operator must act in the interests of investors
- 260AF. Equal and fair treatment of scheme investors
- 260AG. Improper use of position or information
- 260AH. Valuers not to be related to schemes
- 260AI. Schemes not to borrow more than 10% of their value
- 260AJ. Operator not to guarantee or indemnify other liabilities
- 260AK. Expenses and charges not to be paid except in accordance with constitution
- 260AL. Payment of investment managers' and investment advisers' fees
- 260AM. Informal dispute resolution arrangements
- 260AN. Valuation etc. requirements for property based schemes
- 260AO. Court may order operator to comply with scheme constitution or this Law
- 260AP. Court may order scheme operator to pay compensation for loss caused by contravention
- 260AQ. Remedy in cases of oppression etc. — collective investment schemes
- 260AR. Effect of other laws

Division 2 — Meetings of investors

- 260BA. Effect of Division
- 260BB. Operator may call meeting
- 260BC. Investors may requisition investors meeting
- 260BD. Commission may requisition meeting
- 260BE. Notice of meeting
- 260BF. Conduct of meetings
- 260BG. Operators' etc. interests not counted
- 260BH. Voting by proxy
- 260BI. Voting by post
- 260BJ. Copies of resolutions to be lodged
- 260BK. Minutes of meetings

Division 3 — Reports to the Commission

- 260CA. Giving information on request to the Commission
- 260CB. Protection for whistleblowers

Part 3.6, Division 1 — Accounting standards

55. Application of accounting standards: financial years

Part 3.6, Division 2 — Accounting records

56. Accounting records

Part 3.6, Division 7 — Financial statements and directors' reports

57. Members and investors entitled to financial statements and reports

Part 3.6, Division 11 — Accounts in relation to prescribed interests that are ED securities

58. Heading to Division 11 of Part 3.6
 Division 11 — Accounts and reports in relation to collective investment schemes
59. Repeal of section 323B and substitution of new section:
 323B. Introduction
60. Profit and loss account
61. Balance-sheet
62. Accounts to comply with regulations
63. Accounts to comply with applicable accounting standards
64. Additional information to give a true and fair view
65. Audit or review of accounts
66. Scheme operator's report for accounting period
67. Insertion of new section:
 323JA. Report may omit prejudicial information
68. Lodging accounts etc.
69. Insertion of new sections:
 323KA. Investors entitled to financial statements and reports
 323KB. Contravention of Part
 323KC. Inspection of records
70. Regulations may make additional provision based on Divisions 2 to 8

Part 3.7, Division 1 — Appointment and removal of auditors

71. Qualifications of auditors
72. Insertion of new section:
 329A. Resignation of auditors of collective investment schemes

Part 3.7, new Division 2A

73. Insertion of new Division:
 Division 2A — Auditor's report on collective investment schemes
- 331G. Collective investment schemes — auditor to report breaches to the Commission

Part 3.7, Division 3 — Certain powers and duties of auditors

74. Auditor may obtain information and attend company meetings
75. Board to be informed of non-compliance with accounting standard
76. Obstruction of auditor

Part 3.8 — Annual return

77. Insertion of new section:
 338A. Annual returns — collective investment schemes

Part 4.2, Division 1 — Names

78. Insertion of new section:
 367A. Names available to companies for proposed collective investment schemes
79. Applications under section 367A and sections 373 to 377
80. Cancellation of registration
81. Registration number remains in force until cancelled
82. Insertion of new section:
 382A. Collective investment schemes — change of name

Part 4.2, Division 2 — Exemptions from requirements to publish registration numbers

83. Transport documents

Part 5.1 — Arrangements and reconstructions

84. Insertion of Division heading in Part 5.1

Division 1 — Corporations

85. Interpretation

86. Acquisition of shares from shareholders dissenting from scheme or contract approved by majority

87. Notification of appointment of scheme manager and power of Court to require report

Part 5.1, new Division 2

88. Insertion of new Division:

Division 2 — Collective investment schemes

415B. Interpretation

415C. When merger takes effect

415D. Court may order meetings

415E. Explanatory statement to be lodged

415F. Holding and voting at meetings

415G. When an investors' meeting approves a proposed merger

415H. Application to Court for approval of merger

415J. Court's approval of merger

Part 5.2 — Receivers, and other controllers of property of corporations

89. Insertion of new section:

424A. Controller of property of collective investment scheme operator to apply for temporary scheme operator

new Part 5.3B

90. Insertion of new Part:

PART 5.3B — ADMINISTRATION OF THE AFFAIRS OF A COLLECTIVE INVESTMENT SCHEME WITH A VIEW TO EXECUTING A DEED OF ARRANGEMENT

Division 1 — Preliminary

458AA. Object of Part

458AB. Interpretation

458AC. When administration of a scheme begins and ends

Division 2 — Appointment of administrator and first meeting of creditors

458BA. Operator may appoint administrator if board thinks the scheme is or will become insolvent

458BB. Temporary scheme operator may appoint administrator

458BC. Chargee may appoint administrator

458BD. Scheme already under administration

458BE. Purpose and timing of first meeting of creditors

458BF. Functions of committee of creditors

458BG. Membership of committee

Division 3 — Administrator assumes control of scheme's affairs

- 458CA. Role of administrator
- 458CB. Administrator acts as scheme operator's agent
- 458CC. Powers of other officers suspended
- 458CD. Only administrator can deal with scheme property
- 458CE. Order for compensation if officer involved in void transaction
- 458CF. Effect of administration on scheme investors

Division 4 — Administrator investigates scheme's affairs

- 458DA. Administrator to investigate affairs and consider possible courses of action
- 458DB. Directors to help administrator
- 458DC. Administrator's rights to operator's books about the scheme
- 458DD. Reports by administrator

Division 5 — Meeting of creditors decides scheme's fate

- 458EA. Administrator to convene meeting and inform creditors
- 458EB. Conduct of meeting
- 458EC. What creditors may decide

Division 6 — Protection of scheme property during administration

- 458FA. Terminating and winding up scheme
- 458FB. Charges unenforceable
- 458FC. Owner or lessor cannot recover property used by scheme
- 458FD. Stay of proceedings
- 458FE. Administrator not liable in damages for refusing consent
- 458FF. Suspension of enforcement process
- 458FG. Duties of court officer in relation to scheme property
- 458FH. *Lis pendens* taken to exist
- 458FI. Administration not to trigger liability of director or relative under guarantee of scheme's liability

Division 7 — Rights of chargee, owner or lessor

- 458GA. Where chargee acts before or during decision period
- 458GB. Where enforcement of charge begins before administration
- 458GC. Charge on perishable property
- 458GD. Court may limit powers of chargee, etc. in relation to charged property
- 458GE. Giving a notice under a charge
- 458GF. Where recovery of property begins before administration
- 458GG. Recovering perishable property
- 458GH. Court may limit powers of receiver etc. in relation to property used by scheme
- 458GI. Giving a notice under an agreement about property
- 458GJ. Effect of Division

Division 8 — Powers of administrator

- 458HA. Additional powers of administrator
- 458HB. Dealing with property subject to a floating charge that has crystallised
- 458HC. When administrator may dispose of encumbered property
- 458HD. Administrator's powers subject to powers of chargee, receiver etc.
- 458HE. Protection of persons dealing with administrator

*Division 9 — Administrator's liability and indemnity for debts of administration**Subdivision A — Liability*

- 458JA. General debts
- 458JB. Payments for property used or occupied by, or in the possession of, the scheme
- 458JC. Administrator not otherwise liable for scheme's debts

Subdivision B — Indemnity

- 458JD. Right of indemnity
- 458JE. Right of indemnity has priority over other debts
- 458JF. Lien to secure indemnity

Division 10 — Execution and effect of deed of arrangement for collective investment schemes

- 458KA. Effect of creditors' resolution
- 458KB. Execution of deed
- 458KC. Creditor etc. not to act inconsistently with deed before its execution
- 458KD. Effect of deed on creditors
- 458KE. Protection of scheme property from persons bound by deed
- 458KF. Court may limit rights of secured creditor or owner or lessor
- 458KG. Effect of deed on scheme operator, officers and members
- 458KH. Extent of release of scheme's debts

Division 11 - Variation, termination and avoidance of deed

- 458LA. Variation of deed by creditors
- 458LB. Court may cancel variation
- 458LC. When deed terminates
- 458LD. When Court may terminate deed
- 458LE. Creditors may terminate deed and resolve that scheme be wound up
- 458LF. Meeting of creditors to consider proposed variation or termination of deed
- 458LG. When Court may void or validate deed
- 458LH. Effect of termination or avoidance

Division 12 — Transition to winding up

- 458MA. Administrator becomes liquidator in certain cases

Division 13 — Powers of Court

- 458NA. General power to make orders
- 458NB. Orders to protect creditors during administration
- 458NC. Court may declare whether administrator validly appointed
- 458ND. Administrator may seek directions
- 458NE. Supervision of administrator of scheme or deed
- 458NF. Effect of Division

Division 14 — Qualifications of administrators

- 458PA. Appointee must consent
- 458PB. Administrator must be registered liquidator
- 458PC. Disqualification of person connected with scheme
- 458PD. Disqualification of insolvent under administration

Division 15 — Removal, replacement and remuneration of administrator

- 458QA. Appointment of administrator cannot be revoked
- 458QB. Court may remove administrator
- 458QC. Vacancy in office of scheme administrator
- 458QD. Vacancy in office of administrator of deed of arrangement for a collective investment scheme
- 458QE. Remuneration of administrator

Division 16 — Notices about steps taken under Part

- 458RA. Appointment of administrator
- 458RB. Execution of deed of arrangement
- 458RC. Failure to execute deed of arrangement
- 458RD. Termination of deed of arrangement
- 458RE. Notice in public documents etc. of scheme
- 458RF. Effect of contravention of this Division

Division 17 — Miscellaneous

- 458SA. Appointment of 2 or more administrators of collective investment scheme
- 458SB. Appointment of 2 or more administrators of deed of arrangement for collective investment scheme
- 458SC. Effect of things done during administration
- 458SD. Qualified privilege for administrators
- 458SE. Time for doing act does not run while act prevented by this Part

Part 5.4B, Division 3 — General powers of Court

- 91. Court may make order to prevent officer or related entity from avoiding liability to company
- 92. Insertion of new sections:
 - 486AA. Court may make order to prevent officer of collective investment scheme operator, or related entity, from avoiding liability in relation to scheme
 - 486AB. Provisions about applications and orders under section 486A or 486AA
- 93. Warrant to arrest person who is absconding, or who has dealt with property or books, to avoid obligations in connection with winding up

Part 5.6, Division 3 — Liquidators

- 94. Supervision of liquidators
- 95. Regulations relating to money etc. received by liquidator
- 96. Insertion of new section:
 - 540A. Application of section 539 and 540 to collective investment schemes

new Part 5.6A

- 97. Insertion of new Part:
 - PART 5.6A — TERMINATION AND WINDING UP COLLECTIVE INVESTMENT SCHEMES

Division 1 — Termination of collective investment schemes

- 581AA. Scheme terminates in accordance with constitution
- 581AB. Scheme operator may terminate scheme
- 581AC. Court may terminate scheme
- 581AD. Court may terminate insolvent schemes
- 581AE. Investors may terminate scheme

Division 2 — Appointment of liquidator after termination of scheme

- 581BA. Application of Division
- 581BB. Liquidator must be appointed
- 581BC. Appointee must consent
- 581BD. Disqualification of person connected with scheme
- 581BE. Disqualification of insolvent under administration
- 581BF. Remuneration of liquidator
- 581BG. Vacancy in office of liquidator
- 581BH. Removal of liquidator
- 581BI. Notice of appointment of liquidator
- 581BJ. Effect of contravention of this Division

Division 3 — Effect of liquidator's appointment

- 581CA. Application of Division
- 581CB. Effect of liquidator's appointment
- 581CC. Only liquidator can deal with scheme property
- 581CD. Order for compensation if officer involved in void transaction
- 581CE. Protection of persons dealing with liquidator

Division 4 — Winding up collective investment schemes

- 581DA. Application of Division
- 581DB. Schemes not to continue after termination
- 581DC. Limit on liability of investors in trust based schemes
- 581DD. Attachment, sequestration etc. void
- 581DE. Effect of liquidation on transfers etc.
- 581DF. Terminated schemes to be wound up
- 581DG. Directors to help liquidator
- 581DH. Liquidator's rights to operator's books about the scheme
- 581DI. Reports by liquidator
- 581DJ. Books to be kept by liquidator
- 581DK. Qualified privilege for liquidator
- 581DL. Power of Court to supervise

Part 5.8 — Offences

- 98. Inducement to be appointed liquidator etc. of a company

Part 5.9, Division 1 — Examining a person about a corporation

- 99. Mandatory examination
- 100. Discretionary examination
- 101. Notice of examination

Part 5.9, Division 2 — Orders against a person in relation to a corporation

- 102. Orders against persons concerned with corporations
- 103. Court may order persons not to manage certain corporations

Part 6.1 — Interpretation

- 104. Definitions

Part 7.1 — Interpretation

- 105. Conduct

Part 7.3, Division 1 — Dealers and investment advisers

- 106. Dealers
- 107. Investment advisers
- 108. Grant of licence to natural person
- 109. Grant of licence to body corporate

Part 7.3, Division 3 — Representatives

- 110. Insertion of new section:
 - 807A. Representatives of dealers and scheme operators
- 111. Defence
- 112. Insertion of new section:
 - 812A. Scheme operators

Part 7.3, Division 5 — Excluding persons from the securities industry

- 113. Power to revoke licence after a hearing

Part 7.4, Division 1 — Regulation of certain activities

- 114. Insertion of new section:
 - 841A. Independent advisers

Part 7.4, Division 3 — Recommendations about securities

- 115. Insertion of new section:
 - 847A. Interpretation
- 116. Insertion of new section:
 - 848A. Adviser must have reasonable basis for recommendation
- 117. What client must be told about adviser's interest in transaction
- 118. Defences to alleged breach of subsection 849(2)
- 119. Repeal of section 851 and substitution of new section:
 - 851. Recommendation to be in writing

Part 7.11, Division 2 — Prohibited conduct

- 120. Misleading or deceptive conduct and advertising

Part 7.11, Division 2A — Insider trading

- 121. Securities
- 122. Repeal of section 1002H and substitution of new section:
 - 1002H. Exception for redemption and buy-back of interests in collective investment schemes
- 123. Chinese wall arrangements by bodies corporate
- 124. Chinese wall arrangements by partnerships, etc.

Part 7.11, Division 4, Subdivision B — Liability in respect of prospectuses

- 125. Civil liability for false or misleading statement in, or omission from, prospectus
- 126. No liability for mistake etc. if reasonable precautions taken

Part 7.11, Division 4, Subdivision C — Liability in respect of unlawful market activity

127. Liability for insider trading

Part 7.12, Division 2 — Prospectuses

- 128. Registrable prospectuses
- 129. Form of application for securities to be attached to prospectus
- 130. Specific provisions applicable to prospectuses
- 131. Insertion of new section:
 - 1021A. Prospectuses for collective investments — covers
- 132. General provisions applicable to all prospectuses other than those to which section 1022AA or 1022AB apply
- 133. General provisions applicable to certain primary prospectuses for securities of disclosing entities
- 134. General provisions applicable to certain secondary prospectuses for securities of disclosing entities
- 135. Obligation to notify person who lodged prospectus of false or misleading statements, changes etc.
- 136. Supplementary prospectuses
- 137. Time limit on allotment, issue or sale of securities on the basis of a prospectus

Part 7.12, Division 5 — Prescribed interests

Part 7.12, Division 5A — Special provisions relating to unlisted property trusts

138. Repeal of Divisions 5 and 5A of Part 7.12

Part 7.12, new Division 6A

- 139. Insertion of new Division:
 - Division 6A — Advertisements for collective investment schemes*
 - 1082A. Advertisements for interests in collective investment schemes

Part 7.12A, Division 1 — Preliminary

140. How this Part applies to an undertaking that is a disclosing entity

Part 7.12A, Division 4 — Civil liability

141. Defences

Part 7.12A, Division 5 — Exemptions from enhanced disclosure provisions

142. Enhanced disclosure provisions

Part 7.13, Division 1 — Title to securities

143. Loss or destruction of certificates

Part 7.13, Division 2 — Transfer of securities

144. Definition
 145. Insertion of new section:
 1091B. Rights of trustee of estate of bankrupt investor in collective investment scheme

Part 9.2, Division 2 — Registration

146. Registration of auditors
 147. Auditors and other persons to enjoy qualified privilege in certain circumstances

Part 9.4, Division 1 — Specific offences

148. False or misleading statements
 149. False information etc.

Part 9.4A — Review by Administrative Appeals Tribunal of certain decisions

150. Excluded decisions
 151. Insertion of new section:
 1317CA. Statement to accompany notification of decisions

Part 9.4B, Division 1 — Preliminary

152. Civil penalty provisions

Part 9.4B, Division 5 — Compensation for loss suffered by corporation

153. Heading to Division 5 of Part 9.4B
 154. On application for civil penalty order, Court may order compensation
 155. Criminal court may order compensation
 156. Recovery of profits, and compensation for loss, resulting from contravention

Part 9.6 — Proceedings

157. Irregularities

new Part 9.7A

158. Insertion of new Part:
 PART 9.7A — ATTRIBUTING ACTS, STATES OF MIND ETC. TO COLLECTIVE INVESTMENT SCHEME OPERATORS
- 1345AA. Application
 1345AB. Interpretation
 1345AC. What acts and states of mind etc. are to be taken to be acts and states of mind etc. of scheme operator
 1345AD. Acts not attributed if reasonable measures to prevent it
 1345AE. When operator to be taken to know facts
 1345AF. Acts of board or of general meeting not affected

Part 9.9 — Miscellaneous

159. Non-application of rule against perpetuities to certain schemes

new Part 9.9A

160. Insertion of new Part:
 PART 9.9A — EXEMPTIONS FOR COLLECTIVE INVESTMENT SCHEMES
- 1350A. Power to exempt
 - 1350B. Exemptions may be continuing
 - 1350C. Exemptions may be conditional
 - 1350D. Exemptions may be revoked or varied

Part 9.11, new Division 7

161. Insertion of new Division:
 Division 7 — Changes from the Collective Investment Schemes Act 1997
- 1394. Interpretation
 - 1395. Commencement of amendments made by the Collective Investment Schemes Act to existing prescribed interest schemes
 - 1396. Related party provisions — commencement
 - 1397. Redemption and buy-back — commencement
 - 1398. Early application of certain provisions to existing prescribed interest schemes
 - 1399. Registration and licensing — existing prescribed interest schemes
 - 1400. Court may resolve difficulties

Schedule 3

162. Schedule 3

PART 3 — AMENDMENTS OF THE ASC ACTPart 1, Division 1 — Objects

163. Objects

Part 1, Division 4 — Interpretation

164. Interpretation

Part 3, new Division 1A

165. Insertion of new Division:
 Division 1A — Surveillance audits for collective investment schemes
- 12A. When certain powers may be exercised
 - 12B. Staff members to be specially authorised
 - 12C. Commission may enter places and search for and examine books
 - 12D. Taking possession of and removing books found during audit surveillance
 - 12E. Securing books etc.
 - 12F. Surveillance audits — duty to help Commission

Part 3, Division 1 — Investigations

166. General powers of investigation
 167. Investigation after report of receiver, administrator or liquidator

Part 3, Division 2 — Examination of persons

168. Repeal of section 25 and substitution of new section:
25. Giving to other persons copies of record

Part 3, Division 3 — Inspection of books

169. When certain powers may be exercised
170. Notice to produce books about affairs of body corporate or collective investment scheme
171. Notice to produce books about securities
172. Notice to produce documents in persons' possession
173. Insertion of new section:
33A. Notice to produce documents etc. obtained during surveillance audits
33B. Books and documents overseas
174. Insertion of new sections:
36A. Telephone, fax etc. warrants
36B. Execution of warrants

Part 3, Division 4 — Requirements to disclose information about securities or futures contracts

175. When certain powers may be exercised

Part 3, Division 5 — Proceedings after an investigation

176. Commission may cause civil proceeding to be begun

Part 3, Division 7 — Offences

177. Insertion of new section:
67A. Interfering with books that have been secured

Part 3, Division 10 — Miscellaneous

178. Insertion of new section:
83B. Enforceable undertakings
179. Insertion of new sections:
87A. Bringing devices, including computers, to places for searching or examining
87B. Testing computers etc. used to produce documents
87C. Use of computers in searches and examinations
87D. Compensation for loss or damage caused by Commission using computers

Part 8, Division 1 — General

180. Application of Division 3 of Part XI of the Audit Act

Transitional

181. Transitional

PART 4 — AMENDMENT OF THE CORPORATIONS ACT 1989

182. The Corporations Regulations



A BILL
FOR
AN ACT

to amend the Corporations Law, the *Corporations Act 1989* and the *Australian Securities Commission Act 1989* to regulate collective investment schemes¹

The Parliament of Australia enacts:

PART 1 — PRELIMINARY

Short title

1. This Act may be cited as the *Collective Investment Schemes Act 1997*.

Commencement

2. (1) Part 1, section 154 and Parts 3 and 4 commence on the day on which this Act receives the assent provided for in the Constitution.

(2) The rest of this Act commences on a day to be fixed by Proclamation, but if it has not commenced at the end of a period of 12 months after this Part commences, it commences on the first day after that period ends.

Note: Section 154 inserts transitional provisions into the Corporations Law. Part 3 makes amendments to the ASC Act. Part 4 amends the *Corporations Act 1989*.

1. The draft assumes that the *Corporate Law Reform Act 1992* (Cth) and the *Corporate Law Reform (No 2) Bill 1992 [1993]* (Cth) are both fully in operation

Interpretation

3. In this Act:

"ASC Act" means the *Australian Securities Commission Act 1989*;

"Corporations Act" means the *Corporations Act 1989*, except section 82 of that Act;

"Corporations Law" means the Corporations Law set out in section 82 of the *Corporations Act 1989*.

PART 2 — AMENDMENTS OF THE CORPORATIONS LAW²

Part 1.2 — Interpretation

Division 1 — General

Dictionary

4. Section 9 of the Corporations Law is amended:

(a) *accounting enterprise*: by omitting paragraph (c) of the definition of "accounting enterprise" and substituting the following paragraph:

"(c) a collective investment scheme;" and

(aa) *accounting period*: by omitting paragraph (c) of the definition of "accounting period" and substituting the following paragraph:

"(c) if the accounting enterprise is a collective investment scheme:

(i) a financial year in relation to the scheme at the end of which, and at the end of 90 days after which, the scheme is a disclosing entity; or

(ii) the first 6 months of a financial year in relation to the scheme at the end of which, and at the end of 75 days by omitting after which, the scheme is a disclosing entity;" and

(b) *accounts*: by omitting paragraph (b) of the definition of "accounts" and substituting the following paragraph:

"(b) in relation to a collective investment scheme, means, in this Part and in Division 11 of Part 3.6:

(i) a profit and loss account of the scheme for a period; and

(ii) a balance sheet of the scheme as at the end of that period;" and

(ba) *administration*: by adding "and, in the case of a collective investment scheme, the meaning given by section 458AC" at the end of the definition of "administration"; and

2. The draft does not make provision for mutual reciprocity, which relates to the national enforcement of the amendments in the draft.

- (c) **administrator**: by adding at the end of the definition of “administrator” the following word and paragraph:
“; or (c) in relation to a collective investment scheme:
- (i) means the administrator of the scheme appointed under Part 5.3B; and
 - (ii) if 2 or more persons are appointed under that Part as administrators of the scheme — has a meaning affected by paragraph 458SA(2)(b); or
- (d) in relation to a deed of arrangement in relation to a collective investment scheme:
- (i) means the administrator of the deed appointed under Part 5.3B; and
 - (ii) if 2 or more persons are appointed under that Part as administrators of the deed — has a meaning affected by paragraph 458SB(2)(b);” and
- (ca) **affairs**: by adding “and, in relation to a collective investment scheme, has, in the provisions referred to in section 53AAAA, a meaning affected by that section”; and
- (d) by omitting the definition of “annual return” and substituting the following definition:
“‘annual return’ means:
- (a) in relation to a collective investment scheme — the return that section 338A requires to be made; and
 - (b) in other cases — the return that section 335 requires to be made;
- and includes a document that accompanies the return;” and
- (da) **applicable accounting standard**: by omitting paragraph (b) of the definition of “applicable accounting standard” and substituting the following paragraph:
“(b) in relation to accounts, for an accounting period, of a collective investment scheme, means an accounting standard that, when the accounts are made out:
- (i) applies to that accounting period; and
 - (ii) is relevant to the accounts;” and
- (e) by omitting the definitions of “buy-back arrangements”, “buy-back covenant” and “cash management trust interest”³; and
- (f) **committee of creditors**: by adding “and, in the case of a collective investment scheme, means a committee of creditors of the scheme appointed at a meeting convened under section 458BE”; and

3. The regulations should enable the Commission to certify that a specified trust is a cash management trust for the purposes of regulation 7.12.06(f).

- (g) by omitting the definition of "constitution" and substituting the following definition:

"constitution" means:

- (a) in relation to a company, a recognised company or any other body that has a memorandum and articles — the memorandum and articles; or
- (b) in relation to a collective investment scheme — the instrument lodged with the application for registration of the scheme as the constitution of the scheme; or
- (c) in relation to any other body corporate or an unincorporated body:
 - (i) the body's charter or memorandum; or
 - (ii) any other instrument or law, except this Law, that constitutes or defines the constitution of the body or governs the activities or conduct of the body or its members;

as in force for the time being;" and

- (ga) **control**: by inserting "and section 841A" in paragraph (a) of the definition of "control" after "Part 3.2A"; and

- (h) by omitting the definition of "decision period" and substituting the following definition:

'decision period', in relation to a chargee in relation to a charge on:

- (a) property of a company under administration, means the period beginning on the day when:
 - (i) if notice of the appointment of the administrator must be given to the chargee under subsection 450A(3) — such notice is so given; or
 - (ii) otherwise — the administration begins;
 and ending at the end of the tenth business day after that day; and
- (b) property of a collective investment scheme that is under administration, means the period beginning on the day when:
 - (i) if notice of the appointment of the administrator must be given to the chargee under subsection 458RA(3) — such notice is so given; or
 - (ii) otherwise — the administration begins;
 and ending at the end of the tenth business day after that day;" and

- (ha) **deed**: by omitting "and, in relation to a prescribed interest, includes an instrument amending or affecting the deed concerned" from the definition of "deed"; and

- (j) by omitting the definition of "disclosing entity" and substituting the following definition:

"disclosing entity" means:

- (a) in relation to interests in a collective investment scheme that are ED securities — the company that is the scheme operator, so far as the disclosure concerned relates to those interests; and
- (b) in relation to other securities of a body that are ED securities — the body;”; and
- (ja) **enforce**: in the definition of “enforce”:
 - (i) by inserting “or a collective investment scheme” after “company” (first occurring); and
 - (ii) by inserting “or scheme” after “company” in paragraph (a); and
 - (iii) by inserting “or operator of the scheme” after “company” in paragraph (d)”; and
- (k) **examinable officer**: by adding at the end of the definition of “examinable officer” the following words and paragraphs:
“and, if the corporation is the operator of a collective investment scheme, also includes:
 - (g) a receiver, or receiver and manager, of property of the scheme, whether appointed under a provision contained in an instrument or by a court; or
 - (h) the administrator of the scheme or of a deed of arrangement in relation to the scheme; or
 - (j) the liquidator of the scheme, whether or not appointed by a court;”; and
- (ka) **excluded security**: by omitting paragraph (b) of the definition of “excluded security”; and
- (m) by omitting the definition of “**exempt prescribed interest**”; and
- (n) **insolvent**: by inserting “or (2B)” after “subsection 95A(2)” in the definition of “insolvent”; and
- (na) **issue**: by omitting “in relation to prescribed interests” from paragraph (a) of the definition of “issue” and substituting “in relation to interests in a collective investment scheme”; and
- (p) **licence**: by inserting before paragraph (a) of the definition of “licence” the following paragraph:
“(aa) in Part 2.2A — a scheme operators licence; and” and
- (pa) by omitting the definition of “**management company**”; and
- (q) **of** by omitting “prescribed interests” from the definition of “of” and substituting “interests in a collective investment scheme”; and
- (qa) by omitting the definition of “participation interest” and substituting the following definition:
“‘**participation interest**’ means a right or interest of a kind mentioned in paragraph 50B(1)(a) or (b);”; and
- (r) by omitting the definition of “**prescribed interest**”; and
- (ra) **proper authority**: by adding “or the operator of a collective investment scheme” after “securities licensee” in the definition of “proper authority”; and

- (s) by omitting the definition of "registration application" and substituting the following definition:
 "'registration application' means, in relation to:
- (a) a company — the application that the Commission registered in the course of registering the company under Division 1, 2, 3 or 4 of Part 2.2; and
 - (b) a collective investment scheme — an application under Part 2.2A for registration of the scheme and the issue of a scheme operators licence in respect of the scheme;"; and
- (sa) **registration number**: by adding at the end of the definition of "registration number" the following word and paragraph:
 "; or (d) in relation to a collective investment scheme — the number allotted to the scheme under section 158F;"; and
- (t) by omitting the definition of "retirement village scheme"; and
- (ta) **solvent**: by adding "or (2A)" at the end of the definition of "solvent"; and
- (u) **subscriber**: in the definition of "subscriber":
- (i) by omitting "prescribed interests" (first occurring) and substituting "interests in a collective investment scheme"; and
 - (ii) by omitting "prescribed interests" (second occurring) and substituting "interests"; and
- (ua) by omitting the definitions of "timesharing scheme" and "undertaking"; and
- (v) **unit**: by omitting "(whether a prescribed interest or not)" from the definition of "unit" and substituting "(whether an interest in a collective investment scheme or not)"; and
- (va) by inserting the following definitions:
 "'civil penalty', in Part 2.2A, means:
- (a) a penalty imposed under Division 2 of Part 9.4B; or
 - (b) a pecuniary penalty imposed on a person under an Australian law, being a penalty imposed in a proceeding in a court, other than a prosecution for an offence, for an act of dishonesty;
- 'collective investment scheme': see *Division 6A of this Part*;
- 'collective investment scheme property': see *the definition of 'property of a collective investment scheme' in this section*;
- 'compliance measures', in relation to a collective investment scheme, means measures to detect in advance and prevent relevant contraventions in relation to the scheme;
- 'creditor', in relation to a collective investment scheme, means a person who is a creditor of the scheme operator in respect of a debt:
- (a) incurred by the operator as operator; or
 - (b) incurred by the operator as agent for, or otherwise on behalf of, the scheme investors or a class of investors;

'deed of arrangement', in relation to a collective investment scheme, means a deed of arrangement in relation to the scheme executed under Part 5.3B or such a deed as varied and in force for the time being;

'eligible applicant', in relation to a collective investment scheme, means:

- (a) the Commission; or
- (b) the administrator or liquidator of the scheme; or
- (c) the administrator of a deed of arrangement in relation to the scheme; or
- (d) a person authorised in writing by the Commission to make:
 - (i) applications under the Division of Part 5.6A in which the expression occurs; or
 - (ii) such an application in relation to the scheme;

'investment contract' means a contract for investment in a scheme that is of a kind mentioned in paragraph 50B(1)(c);

'investor', in relation to a collective investment scheme, means a person who holds an interest in the scheme or a unit of such an interest;

'liability', in relation to a collective investment scheme, means a liability of the scheme operator incurred in respect of the scheme;

'liquid property' means cash or any of the following:

- (a) property of a prescribed kind;
- (b) securities listed for quotation with a stock exchange as defined for the purposes of Chapter 6;
- (c) interests in 1 or more collective investment schemes the property of each of which is all property of either or both of the kinds mentioned in paragraph (a) or (b);

Note: For the definition of 'stock exchange' see later in this section.

'MER': see section 80AB;

'offence provision' means a provision of this Law creating an offence;

'operator', in relation to a collective investment scheme, means the company specified in a scheme operators licence as the operator of the scheme;

'property of a collective investment scheme' means:

- (a) property specified in the constitution of the scheme as property of the scheme, whether held by the scheme operator or not; and
- (b) contributions or subscriptions paid to the scheme operator for the issue or allotment of interests in the scheme; and
- (c) amounts paid in relation to the scheme to the scheme operator under section 458CE or 581CD or subsection 1317HA(1A), 1317HB(3) or 1317HD(1A); and

- (d) income and other property derived from or attributable to property mentioned in paragraphs (a), (b) or (c);

Note: Section 458CE allows the Court to order compensation if an officer of the scheme operator of a collective investment scheme that is under administration engages in a void transaction; section 581CD allows the Court to order compensation if an officer of the scheme operator of a collective investment scheme that is in liquidation engages in a void transaction; subsection 1317HA and 1317HB allow the Court, in civil penalty proceedings or in criminal proceedings for a contravention of a civil penalty provision, to order compensation to be paid for loss to the collective investment scheme concerned; section 1317HD allows a court to order compensation for loss occasioned to a collective investment scheme by a contravention of a civil penalty provisions.

'property based collective investment scheme' and **'property based scheme'**: see section 88AA;

'related entity', in relation to a collective investment scheme, means any of the following:

- (a) the operator of the scheme;
- (b) a director or member of the operator or of a body corporate related to the operator;
- (c) a relative, or de facto spouse, of such a director or member;
- (d) a relative of a spouse, or of a de facto spouse, of such a director or member;
- (e) a body corporate that is related to the operator;
- (f) a body corporate one of whose directors is also a director of the operator;

'relevant contravention', in relation to a collective investment scheme, means a contravention of the constitution of the scheme or of this Law so far as it relates to the scheme and includes a contravention of section 183H by the operator of the scheme;

Note: Section 183H requires that scheme operators have at all times a minimum net value.

'replacement scheme operator', in relation to a collective investment scheme, means the person specified in a resolution of investors under section 183D as operator of the scheme;

'scheme' includes undertaking and enterprise;

'scheme investor': see the definition of *'investor'* in relation to a collective investment scheme in this section;

'scheme operator': see the definition of *'operator'* in relation to a collective investment scheme in this section;

'scheme operators licence' means a licence issued under Part 2.2A;

'temporary scheme operator', in relation to a collective investment scheme, means the person appointed under section 183E as operator of the scheme;".

Part 1.2, Division 3A — ED securities

Effect of Division

5. Section 22A of the Corporations Law is amended by omitting subsection (2) and substituting the following subsection:

“(2) For the purposes of this Division, except section 22E, a class of shares, debentures or interests in a collective investment scheme includes units of shares, debentures or interests in that class.”

Securities ceasing to be ED securities when number of holders falls below 50

6. Section 22E of the Corporations Law is amended:

- (a) by omitting “, or prescribed interests to which a deed relates,” from subsection (1) and substituting “, or interests in a collective investment scheme”; and
- (b) by omitting “, or prescribed interests to which the deed relates,” from subsection (2) and substituting “, or interests in the scheme”; and
- (c) by omitting “prescribed interests”, second occurring, from subsection (2) and substituting “interests”; and
- (d) by omitting “, or prescribed interests to which the deed relates,” from paragraph (3)(a) and substituting “, or interests in the scheme”; and
- (e) by omitting “prescribed interests”, second occurring, from paragraph (3)(b) and substituting “interests” and
- (f) by omitting “prescribed interests” from subsection (4) and substituting “interests”.

7. Section 22G of the Corporations Law is repealed and the following section is substituted:

Interests in collective investment schemes

“22G. Interests in a collective investment scheme are ED securities if, because of section 1018, a prospectus is required for an offer or invitation or in relation to the issue of the interests.”

Part 1.2, new Division 6A

8. After Division 6 of Part 1.2 of the Corporations Law the following Division is inserted:

“Division 6A — Collective investment schemes

Outline of this Division

“50A. (1) This Division defines what is a collective investment scheme.

“(2) Section 50B sets out the basic definition.

“(3) Sections 50B to 50N, both inclusive, set out exceptions. Schemes covered in these sections are not collective investment schemes.

“(4) Section 50P and 50Q are interpretation provisions.

What are collective investment schemes

“50B. (1) A ‘**collective investment scheme**’ is any of the following:

- (a) a scheme that gives, or provides for the issue or allotment of, a right to participate in, or an interest in, any profits, assets or realisation of any financial or business scheme;
- (b) a scheme that gives, or provides for the issue or allotment of, a right to participate in, or an interest in a common enterprise in relation to which the holder of the right or interest is led to expect, profits, rent or interest from the efforts of the promoter of the enterprise or of a third party;
- (c) a scheme that in substance, whatever its legal form or character, involves the investment of money in such a way that the investor gets or may get an interest in or a right in respect of property that will or may, at the investor’s option, be used or employed in common with another interest or right in respect of property acquired in like circumstances;
- (d) a scheme that is to operate for at least 3 years and because of which the holder of an interest in the scheme is, or may become, entitled, however the entitlement arises, to use, occupy or possess, for 2 or more periods during the period for which the scheme is to operate, property to which the scheme relates.

“(2) It does not matter whether the scheme, enterprise or property is in Australia or elsewhere.

“(3) It does not matter whether or not the right or interest:

- (a) is enforceable; or
- (b) is actual, prospective or contingent; or
- (c) is evidenced in writing; or
- (d) relates to a physical asset.

“(4) A scheme that:

- (a) a provision of this Division or of the regulations declares is not a collective investment scheme; or
 - (b) provides for the issue or allotment of interests that are declared by a provision this Division or of the regulations not to be interests in a collective investment scheme;
- is not a collective investment scheme.

Retirement village schemes

"50C. A scheme, whether in Australia or elsewhere, that is or is to be carried on with the intention that the participants, or a majority of the participants, in the scheme be provided, in connection with the scheme, with residential accommodation within a retirement community is not a collective investment scheme.

Partnerships

"50D. (1) A partnership is not a collective investment scheme unless the partnership agreement:

- (a) relates to a scheme or an investment contract promoted by or on behalf of a person whose ordinary business is or includes the promotion of similar schemes or similar investment contracts, whether or not that person is, or is to become, a party to the agreement; or
- (b) is or would be an agreement, or is or would be in a class of agreements, prescribed by the regulations for the purposes of this paragraph; or
- (c) is for a limited partnership under a law of this jurisdiction that provides for limited partnerships, being a partnership that:
 - (i) relates to a scheme or an investment contract promoted by or on behalf of a person whose ordinary business is or includes the promotion of similar schemes or similar investment contracts, whether or not that person is, or is to become, a party to the agreement; or
 - (ii) is or would be an agreement, or is or would be in a class of agreements, prescribed by the regulations for the purposes of this paragraph; or
 - (iii) has or under the partnership agreement may have, more than 15 partners.

"(2) Regulations made for the purposes of paragraph (1)(b) do not apply to an agreement or class of agreements relating to a partnership if:

- (a) the business of the partnership only includes business for the carrying on of a profession or trade; and
- (b) persons who carry on that profession or trade must, under an Australian law, be registered, licensed or otherwise authorised to do so.

Joint ventures

"50E. (1) A scheme for a joint venture is not a collective investment scheme if:

- (a) the promoter of the scheme is or will be a party to the agreement for the joint venture; and

- (b) because of its constitution, there cannot be more than 15 investors of the scheme at any one time; and
- (c) the Commission declares in writing that it is a joint venture.

“(2) The Commission is not to make the declaration if the scheme is promoted by or on behalf of a person, or an associate of a person, whose ordinary business is or includes the promotion of similar schemes.

“(3) Without limiting the matters that the Commission must take into account in determining whether to make the declaration, the Commission must take the following matters into account:

- (a) whether the promoter is related to or linked with any of the other parties to the agreement;
- (b) the contribution, whether financial or otherwise, that each party has made to the scheme;
- (c) whether the parties to the agreement entered into it, or into similar agreements, at arm's length;
- (d) whether the purpose of the agreement or venture is a genuine commercial purpose;
- (e) any similar transactions that the parties or any of them have entered into or propose to enter into;
- (f) in relation to a party to the transaction that is a body corporate — whether the members of the body have approved the company's entering into the agreement.

Franchises

“50F. A scheme declared by the Commission to be a franchising scheme is not a collective investment scheme.

Certain trusts

“50G. A trust, or an agreement to enter into a trust, that relates to a scheme is not a collective investment scheme unless:

- (a) the scheme is promoted by or on behalf of a person, or an associate of a person, whose ordinary business is or includes the promotion of similar schemes; and
- (b) except in the case of a trust that existed before the commencement of this Law, the constitution of the trust provides for or allows for the trust to have more than 15 beneficiaries.

Small schemes, intragroup schemes and employment incentive schemes

“50H. If, under the constitution of a scheme:

- (a) the scheme cannot accept from its investors more than \$100,000, or such higher amount as is prescribed, in total subscriptions for the issue or allotment of interests in the scheme; or
- (b) the investors in the scheme must all be bodies corporate that are related to the promoter of the scheme and to each other; or

(c) the consideration for the issue or allotment of interests in the scheme is the provision of services as an employee, agent or independent contractor by the person to whom the interests are or are to be issued or allotted;

the scheme is not a collective investment scheme.

Life insurance etc. and superannuation

"50J. (1) The interest of an insured under a contract with a life insurance company is not an interest in a collective investment scheme if amounts received by the insurer in respect of the contract are carried to, and become an asset of, a statutory fund established under the *Life Insurance Act 1945*.

"(2) A statutory fund established under the *Life Insurance Act 1945* is not a collective investment scheme.

"(3) A superannuation fund is not a collective investment scheme.

"(4) An approved deposit fund is not a collective investment scheme.

"(5) A pooled superannuation trust is not a collective investment scheme.

"(6) In this section:
'superannuation fund', **'approved deposit fund'** and **'pooled superannuation trust'** have the meanings that they have under the *Superannuation Industry (Supervision) Act 1993*.

Banks and other deposit taking institutions

"50K. (1) A right or interest arising out of any of the following:

- (a) a deposit of money with an Australian bank as part of its banking business;
- (b) a deposit of money with a locally regulated financial institution as part of its deposit taking business;
- (c) a deposit of money or other investment with a friendly society;
- (d) a cheque;
- (e) an order for the payment of money;
- (f) a bill of exchange;
- (g) a promissory note;
- (h) a document issued or executed by an Australian bank in the ordinary course of its banking business, being a document that evidences or acknowledges indebtedness of the bank arising in the ordinary course of that business;

is not an interest in a collective investment scheme.

"(2) In this section:
'friendly society' means a society registered as a friendly society under the Friendly Societies Act 1989 of New South Wales, the *Friendly Societies Act*

1991 of Queensland, the *Friendly Societies Act, 1919* of South Australia, the *Friendly Societies Act 1888* of Tasmania, the *Friendly Societies Act 1986* of Victoria or the *Friendly Societies Act 1894* of Western Australia;

'locally regulated financial institution' means a society within the meaning of the Financial Institutions (Queensland) Code, the Financial Institutions (NT) Code, the Financial Institutions (NSW) Code, the Financial Institutions (Tasmania) Code, the Financial Institutions (South Australia) Code or the Financial Institutions (Victoria) Code.

Note: The Financial Institutions (Queensland) Code is set out in section 30 of the *Financial Institutions (Queensland) Act 1992* of Queensland. It is applied as a law of the other jurisdictions by the *Financial Institutions (NT) Act 1992* of the Northern Territory, the *Financial Institutions (New South Wales) Act 1992* of New South Wales, the *Financial Institutions (Application of Laws) Act 1992* of Tasmania, the *Financial Institutions (Application of Laws) Act 1992* of South Australia and the *Financial Institutions (Victoria) Act 1992* of Victoria.

Shares, bonds, debentures etc.

"50L. None of the following is an interest in a collective investment scheme:

- (a) a share;
- (b) a right or interest arising out of a borrowing by or on behalf of:
 - (i) the Commonwealth, a State or a Territory; or
 - (ii) a public authority of the Commonwealth, a State or a Territory; or
 - (iii) an instrumentality or agency of the Crown in right of the Commonwealth, a State or a Territory;
- (c) a debenture;
- (d) a document of a kind mentioned in paragraph (a) of the definition of 'debenture' in section 9.⁴

Trustee common funds

"50M. (1) A fund maintained by a trustee company is not a collective investment scheme if all the money in the fund is one or more of the following:

- (a) money administered by the trustee company as executor, trustee or administrator of the estate of a dead person;
- (b) money held by the trustee company on or under a trust, contract, obligation or arrangement, of whatever kind, under the terms of which the trustee company is not subject to any direction or instruction from a beneficiary or other person entitled in relation to the investment or application of the money; or
- (c) money derived from the application or investment of money mentioned in paragraph (a) or (b).

4. To deal with paragraph (f) of that definition, regulations made for the purposes of the application of the definition in section 9 to this section should not be made.

“(2) In this section:

‘**trustee company**’ means a company that is registered, licensed or approved as a trustee company under a law of a State or Territory.

Exempt interests in collective investment schemes in relation to a jurisdiction

“50N. (1) In relation to Western Australia, a participation interest and a time share right:

- (a) that a co-operative company has issued or allotted, or proposes to issue or allot, to a member of the company; or
- (b) so far as a co-operative company:
 - (i) offers the interest or right to a member of the company for subscription or purchase; or
 - (ii) invites such a member to subscribe for or buy the interest or right; or
- (c) so far as:
 - (i) a co-operative company:
 - (A) offers the interest or right to a person other than a member of the company for subscription or purchase; or
 - (B) invites a person other than such a member to subscribe for or buy the interest or right; and
 - (ii) the terms or circumstances of the offer or invitation are such that, if the offer, or an offer that the person makes because of the invitation, as the case may be, is accepted, the acceptance will result in the person becoming a member of the company;

are not interests in a collective investment scheme.

“(2) In this section:

‘**co-operative company**’ means a cooperative company registered under:

- (a) Part VI of the *Companies (Co-operative) Act 1943* of Western Australia; or
- (b) a previous law of Western Australia that corresponds to that Part.

Exclusions do not limit each other

“50P. The several provisions of each of the preceding sections of this Part do not limit each other’s operation.

The business of promoting schemes

“50Q. For the purposes of this Division, a person may be taken to be a person whose business is or includes the promotion of schemes or contracts even if the scheme or contract in question is the first that the person has promoted or on whose behalf it has been promoted.”.

Part 1.2, Division 7 — Interpretation of other expressions**Affairs of a body corporate**

9. Section 53 of the Corporations Law is amended:

- (a) by omitting “, debentures of and prescribed interests made available by,” from paragraph (e) and substituting “and debentures of”; and
- (b) by adding after paragraph (e) the following paragraph:
“(ea) if the body corporate is the operator of a collective investment scheme — any matters relating to the scheme;” and
- (c) by omitting “, debentures of, or prescribed interests made available by,” from paragraph (h) and substituting “or debentures of”; and
- (d) by omitting paragraph (j).

10. After section 53 of the Corporations Law the following section is inserted:

Affairs of a collective investment scheme

“53AAAA. A collective investment scheme’s affairs include, without limitation, each of the following:

- (a) the establishment and registration of the scheme;
- (b) matters arising under, or otherwise relating to, the provisions of the constitution of the scheme;
- (c) the appointment and removal of the scheme operator;
- (d) the application for, and issue of, a scheme operators licence in relation to the scheme;
- (e) the business, trading, transactions and dealings of the scheme operator as scheme operator;
- (f) the profits, income and receipts of the scheme operator from the scheme;
- (g) the losses, outgoings and expenditure of the operator as scheme operator;
- (h) the scheme property, including transactions and dealings in, and the income arising from, the scheme property;
- (j) the liabilities of the operator as scheme operator;
- (k) the management of the scheme;
- (m) any act done, including any contract made and any transaction entered into, by or on behalf of the operator as scheme operator or to or in relation to the scheme, at a time when the scheme is under administration or being terminated or wound up or the operator is being wound up;
- (n) the administration, termination or winding up of the scheme or the winding up of the scheme operator;
- (p) matters concerned with ascertaining the corporations with which the scheme or the operator is or has been connected.”.

Business affairs of a body corporate

11. Section 53AA of the Corporations Law is amended by adding at the end the following word and paragraph:

“; and (c) if the body corporate is the operator of a collective investment scheme — any matters relating to the scheme”.

Classes of shares etc.

12. Section 57 of the Corporations Law is amended by omitting subsection (2) and substituting the following subsection:

“(2) If interests in a collective investment scheme are not divided into 2 or more classes, they constitute a class.”.

Entities connected with a corporation

13. At the end of section 64B of the Corporations Law the following subsection is added:

“[Collective investment scheme]

“(5) A collective investment scheme other than a partnership or a trust is connected with a corporation if the corporation is the scheme operator.”.

Excluded issues, offers and invitations

14. Section 66 of the Corporations Law is amended:

- (a) by omitting from paragraph (2)(d) “prescribed interests or units of prescribed interests”; and
- (b) by omitting paragraph (2)(m) and substituting the following paragraph:

“(m) in the case of an issue of interests in a registered collective investment scheme (the ‘**new interests**’):

- (i) it is made only to persons who hold interests (‘**existing interests**’) in the scheme:
 - (A) in whole or partial satisfaction of amounts payable to them in respect of their existing interests, whether the existing interests are of the same class as, or of a different class from, the new interests; or
 - (B) in exchange for existing interests of a different class from the new interests; or

- (ii) each person to whom a new unit is issued exercised the right to have it issued, or acquired that right, by executing a form that had been attached to, or to copies of, a prospectus in relation to the existing interests; or”; and

- (c) by omitting "prescribed interests or units of prescribed interests" from paragraph (3)(d) and substituting "interests in a collective investment scheme or units in such interests".

Repeal of section 68A

15. Section 68A of the Corporations Law is repealed.

16. The Corporations Law is amended by inserting after section 80AA the following section:

MER — management expense ratios

"80AB. 'MER' (management expense ratio), in relation to a period in relation to a collective investment scheme, means the percentage worked out using the formula:

$$\frac{100 \times \text{fees and expenses}}{\text{average scheme value}}$$

where:

'average scheme value' means the value of the scheme property at the end of the period or, if the scheme property was valued more than once during the period, the average of those values;

'fees and expenses' means the total of all amounts paid or payable out of the scheme property in respect of fees, expenses and other charges in relation to the period, including, without limitation, the following:

- (a) amounts paid or payable by way of fees to the scheme operator, whether on account of a person's being issued or allotted, or redeeming, interests in the scheme or on some other basis;
- (b) amounts paid or payable by way of fees to a trustee, custodian or auditor;
- (c) amounts paid or payable to a representative or agent on account of a person's interests in the scheme, whether described as commission or not;
- (d) amounts paid or payable on account of expenses associated with scheme property, for example:
 - (i) brokerage charges;
 - (ii) amounts paid for repair, maintenance and refurbishment in relation to scheme property;
 - (iii) amounts paid by way of tax or duty in relation to scheme property or in relation to the scheme;
 - (iv) amounts paid in relation to acquiring or disposing of scheme property;

but does not include amounts paid or payable in relation only to an investor's account and amounts that, under the scheme's constitution, are to be charged directly to that account."

Offers and invitations to the public

17. Section 82 of the Corporations Law is amended by omitting "prescribed interests" from paragraph (b) and substituting "interests in collective investment schemes".

Repeal of section 85

18. Section 85 of the Corporations Law is repealed.

Proper authority from securities licensee or collective investment scheme operator; invalid securities authority

19. Section 88 of the Corporations Law is amended by adding at the end the following subsection and note:

"(4) In this section:

- (a) a reference to a **securities licensee** includes a reference to the operator of a collective investment scheme; and
- (b) a reference to a **securities licence** includes a reference to a scheme operators licence.

Note: For proper authorities for collective investment scheme operators see section 807A."

20. After section 88 of the Corporations Law the following section is inserted:

Property based schemes

"88AA. (1) A collective investment scheme is a '**property based collective investment scheme**' or a '**property based scheme**' if the value of the property of the scheme that is comprised of estates in land is more than 20% of the value of all the property of the scheme.

"(2) The following are to be disregarded for the purposes of subsection (1):

- (a) estates in land held by a person because the person is, or has exercised rights as, the mortgagee of an estate in land;
- (b) an interest in a collective investment scheme, even if the scheme property is or includes interests in land."

Effect of such a prohibition, order, notice or disqualification

21. Section 91A of the Corporations Law is amended by inserting "Part 2.2A" and" before "sections".

Securities

22. Section 92 of the Corporations Law is amended:

- (a) by omitting paragraphs (1)(c) and (d) and substituting the following paragraphs:

- "(c) interests in a collective investment scheme; or
- (d) units of such shares or interests; or"; and

- (b) by omitting paragraphs (2)(c) and (d) and substituting the following paragraphs:
- “(c) interests in a collective investment scheme of which the body is or is to be the operator; or
 - (d) units of such shares or interests; or”; and
- (c) by omitting subsections (4) and (5).

Solvency and insolvency

23. Section 95A of the Corporations Law is amended by inserting after subsection (2) the following subsections:

“(2A) A collective investment scheme is solvent if, and only if, all the debts incurred by the operator in respect of the scheme can be paid out of the property of the scheme as and when they become due and payable.

“(2B) A collective investment scheme that is not solvent is insolvent.”.

Part 1.2, Division 8 — Miscellaneous interpretation rules

24. After section 109K of the Corporations Law the following sections are inserted:

Defences

“109KA. (1) If the word “*Defence:*” appears separately in an offence provision or a civil penalty provision, it is a defence to a prosecution for an offence against the provision and to a proceeding under Part 9.4B in respect of a contravention of the provision if the matter or matters set out after the word “*Defence:*” is or are established.

“(2) If, because of a provision of this Law, it is a defence in a proceeding, whether civil or criminal, against the operator of a collective investment scheme that the operator was taking all reasonable measures to prevent contraventions of a particular kind, the court is not to find that measures being taken by the operator were all reasonable measures merely because the measures were specified in conditions to which a scheme operators licence is subject.

Fault — where excluded

“109KB. If the word “*Fault:*” appears separately in an offence provision or a civil penalty provision, then, except as indicated, in a prosecution for an

offence against the provision or a proceeding under Part 9.4B in respect of a contravention of the provision, the matters specified after the word "*Fault*:" as excluded need not be established by the prosecution or applicant and cannot be relied on by way of defence.

Note 1: For a number of offences the 'fault' provision specifies that the defendant's state of mind, intentions and belief, and the degree of care that the defendant exercised, are excluded. In these cases, *mens rea* need not be established, and a defence of mistake of fact cannot be raised.

Note 2: The matters specified will continue to be relevant to penalty."

25. After section 109Y of the Corporations Law the following section is inserted:

How notices are given to investors in collective investment schemes

"109Z. (1) A notice required by this Law to be given to a person in his or her capacity as holder of an interest in a collective investment scheme is to be taken to have been given if sent by post to the address of the person that appears in the register of investors for the scheme.

"(2) If there are 2 or more investors appearing in the register in relation to the interest, the notice need only be sent to the investor whose name appears first in the register.

Note: For the register of investors see section 216BA."

Part 2.1 — Restrictions on forming certain entities

26. The Corporations Law is amended by adding at the end of Part 2.1 the following sections:

Collective investment schemes must be registered and operators licensed

"113A. (1) A person must not:

(a) issue a form of application for the issue or allotment of, or an invitation to subscribe for or buy, interests in a collective investment scheme; or

(b) issue or allot interests in a collective investment scheme;

unless the scheme is registered as a collective investment scheme and the person is:

(c) the company that holds the scheme operators licence specifying the scheme; or

(d) the temporary scheme operator of the scheme; or

(e) the administrator of the scheme.

Defence: The defendant is acting as agent of a person whom the defendant believed on reasonable grounds to be licensed as the operator of the scheme.

Fault: Except as provided in the defence, the defendant's state of mind, intentions and beliefs and the degree of care, if any, that the defendant exercised, are excluded.

"(2) A person must not sell, dispose of or otherwise deal with the property of a collective investment scheme unless the scheme is registered as a collective investment scheme and the person is:

- (a) the company that holds the scheme operators licence specifying the scheme; or
- (b) the temporary scheme operator of the scheme; or
- (c) the administrator or liquidator of the scheme.

Fault: The defendant's state of mind, intentions and beliefs and the degree of care, if any, that the defendant exercised, are excluded.

"(3) Subsection (2) does not apply in relation to a collective investment scheme unless the scheme's constitution provides that the scheme operator is to hold the scheme property.

Note: Temporary scheme operators are appointed under section 183E. For administrators see Part 5.3B. For liquidators see section 458MA and Part 5.6A.

Unlawful issues of interests voidable

"113B. (1) If interests in a collective investment scheme are issued or allotted:

- (a) contrary to this Law; or
 - (b) as a result of an offer or invitation that contravenes this Law;
- a contract entered into by a person (the investor) with the operator of the scheme for the issue or allotment of interests to the investor is voidable at the instance of the investor.

"(2) The investor may, by written notice given:

- (a) if the scheme is under administration — to the administrator of the scheme; or
 - (b) if the scheme has been terminated — to the liquidator of the scheme; or
 - (c) in other cases — to the scheme operator;
- avoid the contract and require the interests to be redeemed.

"(3) The value of the interests is to be worked out as at the day on which the notice is given.

"(4) Despite any other provision of this Law or of the scheme constitution, the administrator, liquidator or scheme operator, as the case may be, is to redeem the interests out of the scheme property that is liquid property.

"(5) If the investor suffers loss or damage because of the contravention, the investor may recover the amount of the loss or damage by action against the scheme operator unless it is established that:

- (a) the contravention was minor or insubstantial; and
- (b) the contravention did not significantly prejudice, and is not likely to prejudice significantly, the interests of the investor;

and the court is satisfied that it is just not to order the amount to be paid. The operator is not entitled to recover the amount of such a payment from the scheme property.

“(6) The amount of the loss or damage includes the difference between the amount that the investor paid to the scheme operator for the issue or allotment of the interests and the amount paid in respect of the interests on redemption.

“(7) For the purposes of subsection (1), it may be taken that a contravention that amounts to an offence has occurred if it is established on the balance of probabilities that it has occurred.

“(8) If the interests were issued or allotted after the scheme had terminated:

- (a) the interests are, by force of this subsection, void; and
- (b) the investor may only recover the amount paid to the operator for the issue or allotment of the interest.

The right to such recovery takes priority over the right of other investors to any surplus of the scheme property but is postponed to the rights of other creditors.

Certificate of holding to be issued

“113C. Unless the scheme’s constitution expressly provides otherwise, the operator of a collective investment scheme must, within 2 months after issuing or allotting interests in the scheme to a person, give to the person a certificate evidencing his or her holding of the interests.”.

new Part 2.2A

27. After Part 2.2 of the Corporations Law the following Part is inserted:

“PART 2.2A — REGISTERING COLLECTIVE INVESTMENT SCHEMES AND LICENSING SCHEME OPERATORS

“Division 1 — Applications etc. for registration and licences

Application for scheme registration and scheme operators licence

“158A. (1) A company may apply to the Commission for the issue to the company of a scheme operators licence for a collective investment scheme.

“(2) A company that is the scheme operator of a collective investment scheme may apply to the Commission for the endorsement of its scheme operators licence so that it will be the scheme operator for another collective investment scheme.

"(3) If the scheme is not registered, the application is also an application for registration of the scheme.

"(4) An application is to be in writing and in accordance with a form approved by the Commission.

"(5) An application must include the following:

- (a) the applicant's name and registration number and the address of its registered office;
- (b) in respect of each person who is a director of the applicant:
 - (i) his or her name and address; and
 - (ii) a statement signed by the person consenting to the making of the application; and
 - (iii) a statement signed by the person setting out whether the person is associated, or has at any time during the past 3 years been associated, with the applicant; and
 - (iv) a statement signed by the person setting out whether the person is entitled to or has a right to acquire shares in the applicant or in an entity related to the applicant; and
 - (v) a statement signed by the person certifying that, at the time when the application is made, the person is not a person who may not manage a corporation;
- (c) a statement specifying whether, within the 5 years immediately before the application was made:
 - (i) a person who is an executive officer of the applicant has been convicted of serious fraud; or
 - (ii) a civil penalty has been imposed on an executive officer of the applicant;and if so, particulars of the acts or circumstances that gave rise to the conviction or penalty;
- (d) the name of the scheme to which the application relates;
- (e) the constitution of the scheme;
- (f) the addresses of the places at which the scheme's business is or is to be carried on and a statement which is or will be the principal place;
- (g) a statement specifying the net value of the applicant as at the date of the application, worked out under section 183H;
- (h) a statement specifying whether:
 - (i) the applicant has been convicted of serious fraud; or
 - (ii) a civil penalty has been imposed on the applicant;and if so, setting out the circumstances that gave rise to the conviction or penalty;
- (j) a summary of the compliance measures that the applicant proposes in relation to the scheme to which the application relates and, if those measures involve another body corporate:

- (i) its name; and
- (ii) if it is a company, its registration number, the address of its registered office and the names and addresses of its directors;
- (k) if the applicant is the scheme operator of a collective investment scheme:
 - (i) the name of the other scheme and its registration number; and
 - (ii) whether the applicant proposes to vary the compliance measures specified in a condition of its scheme operators licence and if so, how;
- (m) particulars of such other matters as are prescribed.

“(6) The summary of the compliance measures must include particulars of the matters mentioned in paragraphs 158C(3)(a) to (f) inclusive.

“(7) The constitution of the scheme the subject of the application must:

- (a) be printed; and
- (b) be divided into numbered paragraphs; and
- (c) be certified by the applicant under its common seal; and
- (d) bear the date on which it was so certified.

“(8) The applicant may, at any time before an application is determined, withdraw or amend it, without charge.

Note: For ‘associate’ see Division 2 of Part 1.2.

Commission can ask for more information

“158B. If an application does not have enough information to allow the Commission to consider the matters referred to in section 158C, the Commission may give the applicant a notice requiring further information specified in the notice that is relevant to those matters to be given to it. Until the further information is given, the Commission may decline to deal further with the application.

Considering applications — in particular, the suitability of proposed compliance measures

“158C. (1) When an application is made, the Commission must consider:

- (a) whether the compliance measures as specified in the summary in the application are reasonably likely to detect in advance and prevent relevant contraventions in relation to the scheme the subject of the application; and
- (b) if the applicant is the scheme operator of another collective investment scheme — whether, having regard to the scheme the subject of the application, the compliance measures for the other scheme as

specified in the summary in the application, varied as proposed in the application, are reasonably likely to detect in advance and prevent relevant contraventions in relation to the other scheme.

“(2) The Commission may rely, for the purposes of subsection (1), on the summary in the application, but is not limited to the summary.

“(3) Without limiting the matters that the Commission may take into account in relation to a scheme for the purposes of subsection (1), the Commission must take into account the following matters:

- (a) who will hold the property of the scheme, how the person will hold it and the terms under which the person will hold it;
- (b) the procedures to be adopted by the applicant for deciding:
 - (i) whether to acquire, dispose of or charge property for the scheme; and
 - (ii) whether to reimburse itself out of the property of the scheme for expenses; and
 - (iii) whether to release money of the scheme for the acquisition of property or the reimbursement of expenses;
- (c) how often, and on what basis, the scheme will be audited;
- (d) what records will be made by the applicant in relation to the scheme, who will make them and how they will be made and kept;
- (e) how often the board of directors of the applicant meets;
- (f) whether:
 - (i) the applicant has been convicted of serious fraud; or
 - (ii) a civil penalty has been imposed on the applicant;
- (g) any report submitted by the applicant as to the adequacy of the compliance measures proposed.

Determining applications

“158D. (1) If:

- (a) within the 5 years immediately before the application was made:
 - (i) a person who is an executive officer of the applicant has been convicted of serious fraud; or
 - (ii) a civil penalty has been imposed on an executive officer of the applicant; or
- (b) the applicant is an externally administered corporation or an executive officer of the applicant is an insolvent under administration; or
- (c) an executive officer of the applicant is a person who may not manage a corporation; or
- (d) the name of the scheme the subject of the application is a name that is not available to the applicant for the scheme; or
- (e) the applicant's net value, as worked out in accordance with section 183H, is less than the amount required by that section; or

- (f) more than half in number of the directors of the applicant are internal directors as defined in subsection 183B(2); or
 - (g) information given in connection with the application is false or misleading in a material particular;
- the Commission must refuse the application.

“(2) The Commission may refuse to grant an application on the ground that:

- (a) the applicant’s compliance measures, so far as they are disclosed in the summary in the application or are otherwise known to the Commission, are not reasonably likely to detect in advance and prevent relevant contraventions in relation to the scheme the subject of the application; and
- (b) if the applicant is the scheme operator of another collective investment scheme — having regard to the scheme the subject of the application, the applicant’s compliance measures, so far as they are disclosed in the summary in the application or are otherwise known to the Commission, varied as proposed in the application, are not reasonably likely to detect in advance and prevent relevant contraventions in relation to the other scheme.

“(3) Otherwise, the Commission must notify the applicant that it proposes to grant the application and that the licence, when issued or endorsed, will be subject to specified conditions of 1 or more of the following kinds:

- (a) conditions requiring the applicant to observe some or all of the compliance measures summarised in the application;
- (b) conditions requiring the applicant to observe additional compliance measures or compliance measures substituted for some or all of those summarised in the application;
- (c) conditions limiting or restricting the activities of the operator in relation to a scheme to activities for which the compliance measures that the applicant will observe are appropriate.

If the scheme is in existence, the notice must indicate that the application will not be granted unless evidence satisfactory to the Commission is produced of a resolution of an investors’ meeting that the applicant be appointed replacement scheme operator.

“(4) If the application is refused or the conditions require the applicant to observe compliance measures other than those summarised in the application, the notice is to set out the reasons for the decision.

“(5) If the Commission has not given the applicant the notice:

- (a) within 30 days after the application was received by the Commission; or

(b) if the Commission has given the applicant a notice under section 158B — within 30 days after the further information is given; the Commission is to be taken to have determined the application by refusing it.

Note: A decision refusing an application is subject to review by the Administrative Appeals Tribunal: see Part 9.4A. A decision to send a notice under subsection (3) specifying conditions other than that the applicant observe the compliance measures summarised in the application is not: see paragraph 1317C(g).

Undertaking by directors before application granted

“158E. (1) If each of the directors of the applicant certifies that he or she:

(a) has examined the conditions specified in the notice under subsection 158D(3); and

(b) is satisfied, after due inquiry, that the compliance measures required by those conditions are reasonably likely to detect in advance and prevent:

(i) contraventions of the constitution of the scheme the subject of the application and, if the applicant is the scheme operator of another collective investment scheme, of the constitution of that scheme; and

(ii) contraventions of this Law as it would apply in relation to the scheme the subject of the application and, if the applicant is the scheme operator of another collective investment scheme, as it applies in relation to that scheme; and

(c) is satisfied, after due inquiry, that those measures can be put into effect by the applicant if the licence is issued or endorsed;

and, if the notice indicates that an investors' resolution is needed, the resolution has been made, the Commission must grant the application.

“(2) If the applicant, within 3 months after receiving a notice under subsection 158D(3), notifies the Commission in writing that it does not accept the conditions in the notice, the application is to be taken to have been refused on the day when the Commission receives the notice.

Note: If subsection (2) applies, the applicant may apply for review by the Administrative Appeals Tribunal: see Part 9.4. For investors' resolution see subsection 158D(3) and sections 183D and 183EA.

Issue or endorsement of licences

“158F. If the Commission determines an application for the issue or endorsement of a scheme operators licence in respect of a collective investment scheme by granting it, it must:

(a) issue to the applicant a scheme operators licence, endorsed with the name and registration number of the scheme; or

(b) if the applicant is the scheme operator of another collective investment scheme — endorse its scheme operators licence with the name and registration number of the scheme the subject of the application.

Registration of collective investment schemes

"158G. (1) If the Commission determines an application for registration of a collective investment scheme by granting it, it must register the scheme and allot to it a registration number distinct from the registration number allotted to each other collective investment scheme.

"(2) The Commission must, on registering a collective investment scheme, give to the scheme operator a certificate of registration of the scheme.

"(3) The certificate must be in the prescribed form, and set out the name and registration number of the scheme and the date of its registration.

"(4) The Commission must keep a copy of the certificate, and subsections 1274(2) and (5) apply in relation to the copy as if it were a document lodged with the Commission.

"(5) The certificate, the copy and a certificate given by the Commission stating that a specified collective investment scheme has been registered under this Part are each admissible as evidence that:

- (a) the requirements of this Part as to the registration of the scheme and matters preliminary to or incidental to the registration have been complied with; and
- (b) the scheme is registered as stated in the certificate;

and are each conclusive as to those matters.

Note: Subsection 1274(2) provides for persons to inspect and get copies of documents lodged with the Commission. Subsection 1274(5) provides for the evidentiary effect of copies of and extracts from such documents.

Life of registration and licences

"158H. (1) The registration of a collective investment scheme comes into force on the day that the registration certificate is issued or on a later day specified in the licence.

"(2) A scheme operators licence comes into force on the day that the licence is issued to the scheme operator or on a later day specified in the licence.

"(3) Registration remains in force until cancelled. A licence remains in force until revoked.

Note: For registration certificates see section 158G.

Changing conditions of licences

"158J. (1) The Commission may, by notice given to the operator of a collective investment scheme, vary the conditions of the scheme operators licence by imposing or revoking a condition of the licence or modifying a condition of the licence.

"(2) If the variation was not sought by the operator, the Commission is not to give such a notice unless it has given the operator:

- (a) a written notice setting out the proposed variation, the grounds on which it proposes to act and the relevant facts; and
- (b) an opportunity:
 - (i) to appear before the Commission in a hearing that takes place in private; and
 - (ii) to make submissions to the Commission about the matter.

"(3) The conditions as varied must be of a kind mentioned in subsection 158D(3).

Licence conditions must be complied with

"158K. (1) The operator of a collective investment scheme contravenes this section if it fails to comply with a condition specified for the time being in its scheme operators licence.

"(2) Subsection (1) does not limit the operation of any other provision of this Law.

"(3) Contravention of subsection (1) is not an offence.

Contraventions to be notified to Commission

"158L. Within 1 day after the happening of an event that is a contravention of a condition of a licence, the scheme operator must lodge a written notice setting out particulars of the event.

Defence: Both:

- (a) when the operator was required to lodge the notice, it was unaware of the event; and
- (b) if the operator did not know of the event but has since become aware of it — it lodged the notice as soon as practicable after becoming so aware.

Fault: Except as provided in the defence, the defendant's state of mind, intentions and beliefs and the degree of care, if any, that the defendant exercised, are excluded.

Register of scheme operators

"158M. (1) The Commission must keep a register of operators of collective investment schemes.

"(2) The register is to include the following in relation to each operator:

- (a) a copy of its licence;
- (b) the day on which the licence was issued;
- (c) the conditions of the licence;
- (d) a copy of each instrument that varies or revokes conditions of the licence;

- (e) the name and registration number of, and a copy of the certificate of registration for, each scheme of which it is scheme operator;
- (f) the address of its registered office;
- (g) the names of its directors, and of its secretary;
- (h) the addresses of the places at which its business is carried on, with an indication which is the principal place;
- (i) if its business is carried on under a name or style other than the name of the operator — that name or style;
- (j) any other prescribed matters.

“(3) Anyone may inspect and make copies of, or take extracts from, the register.

“Division 2 — Cancellation of registration and revocation of licences

Operator continues to be operator while its scheme operators licence in force

“158N. The operator of a collective investment scheme remains the scheme operator until:

- (a) its scheme operators licence so far as it relates to the scheme is revoked; or
- (b) the Court appoints a temporary scheme operator for the scheme; or
- (c) the scheme’s registration is cancelled.

Note: One effect of this section is that a scheme operator that wishes to retire cannot do so at will.

Cancellation of scheme registration

“158P. The Commission may, by written instrument, cancel the registration of a collective investment scheme but only if the scheme has been terminated.

Revocation of scheme operators licence

“158Q. (1) If the Commission is satisfied that there is a significant risk that the operator of a collective investment scheme will contravene or fail to comply with this Law or the scheme’s constitution, so far as it relates to the scheme, in relation to a substantial matter, the Commission is to give written notice to the scheme operator revoking its scheme operators licence so far as it relates to that scheme.

“(2) The notice is not to be given unless:

- (a) the Commission has given the operator a written notice setting out the grounds on which the Commission proposes to act and the relevant facts and stating that the licence may be revoked after the end of 30 days after the notice is given; and

- (b) the Commission has given the operator an opportunity:
 - (i) to appear before the Commission in a hearing that takes place in private; and
 - (ii) to make submissions to the Commission about the matter.

“(3) Without limiting the matters that the Commission is to take into account in determining whether it is satisfied as mentioned in subsection (1), the Commission is to take into account any submission made by or on behalf of the operator about the matter.

“(4) Without limiting the matters that the Commission is to take into account in determining whether it is satisfied as mentioned in subsection (1), the Commission may take into account any of the following:

- (a) whether the operator or an executive officer of the operator has been convicted of serious fraud;
- (b) whether a civil penalty has been imposed on the operator or on an executive officer of the operator;
- (c) whether a relevant contravention has occurred in relation to the scheme, including but not limited to a contravention constituted by:
 - (i) a failure to act in accordance with the constitution of the scheme; or
 - (ii) non-compliance with a condition to which the scheme operators licence is subject; or
 - (iii) more than half the directors of the scheme operator being, for more than 14 days and without reasonable excuse, internal directors as defined by subsection 183B(2); or
 - (iv) whether the scheme operator has contravened the minimum net value (minimum capital) requirement in section 183H;
- (c) whether what the operator is doing by way of compliance measures is adequate to detect in advance and prevent relevant contraventions in relation to the scheme;
- (d) whether the operator is able to perform the duties and exercise the powers of the operator;
- (e) whether information given to the Commission in connection with an application in relation to the scheme was false or misleading in a material particular.

“(5) A notice and a hearing can relate to more than one scheme.

Revocation of scheme operators licence without a hearing

“158R. (1) If the operator of a collective investment scheme:

- (a) becomes an externally administered body corporate; or
- (c) has ceased to carry on business;

the Commission is forthwith to give written notice to the scheme operator revoking its scheme operators licence.

“(2) If the operator of a collective investment scheme notifies the Commission in writing that it wants to have its scheme operators licence, so far as it relates to the scheme, revoked, the Commission is forthwith to give written notice to the scheme operator revoking its scheme operators licence so far as it relates to the scheme.

“(3) If:

- (a) a company is the operator of a collective investment scheme; and
- (b) a scheme operators licence for the scheme is granted to another company;

the Commission is forthwith to give written notice to the first scheme operator revoking its scheme operators licence so far as it relates to the scheme.

Commission must apply for temporary scheme operator when revoking licence

“158S. (1) On giving a notice revoking a scheme operators licence so far as it relates to a collective investment scheme, the Commission must apply to the Court for the appointment of a temporary scheme operator for the scheme unless:

- (a) such an application has been made, by itself or by someone else; or
- (b) there is a replacement or temporary scheme operator for the scheme; or
- (c) the scheme has been terminated.

“(2) The notice does not have effect to revoke the licence so far as it relates to the scheme until the Court appoints a temporary scheme operator for the scheme or another scheme operators licence is granted for the scheme, whichever comes first.

Note 1: For termination see Part 5.6A, Division 1.

Note 2: See also sections 1323 and 1324, which allow the Commission to issue stop orders and to seek preservative orders from the Court.

Return of licence etc. on cancellation or revocation

“158T. (1) If the registration of a collective investment scheme is cancelled, the scheme operator must, without delay, give to the Commission the certificate of the scheme’s registration.

Fault: The defendant’s state of mind, intentions and beliefs and the degree of care, if any, that the defendant exercised, are excluded.

“(2) If a scheme operators licence is revoked, the operator must, without delay, give to the Commission the licence instrument.

Fault: The defendant’s state of mind, intentions and beliefs and the degree of care, if any, that the defendant exercised, are excluded.”.

Part 2.3 — Legal capacity, powers and status**Division 1 — Legal capacity and powers**

Persons having dealings with companies and collective investment scheme operators

28. Section 164 of the Corporations Law is amended:

- (a) by inserting after paragraph (3)(a) the following paragraph:
 - (aa) if the dealing is with a company that is the operator of a collective investment scheme, or with property that is property of a collective investment scheme — that the dealing does not contravene the scheme's constitution;"; and
- (b) by adding at the end of subsection (3) the following word and paragraph:
 - "; and (g) if the dealing is with a company that is the operator of a collective investment scheme, or with property that is property of a collective investment scheme — that the company and the directors, the principal executive officer, the secretaries, the employees and the agents of the company properly perform their duties to the investors in the scheme".

Lodgment of documents etc. not to constitute constructive notice

29. Section 165 of the Corporations Law is amended:

- (a) by inserting after paragraph (1)(a) the following word and paragraph:
 - ; or (aa) the constitution of a collective investment scheme or any of its contents; or"; and
- (b) by inserting "the constitution," after "the articles," in paragraph (1)(c).

new Part 2.3A

30. After Part 2.3 of the Corporations Law the following Part is inserted:

"PART 2.3A — REQUIREMENTS FOR CONSTITUTIONS AND OPERATORS OF COLLECTIVE INVESTMENT SCHEMES

Changing the constitution of a collective investment scheme

"183A. (1) An amendment of the constitution of a collective investment scheme is of no effect unless:

- (a) either:
 - (i) a meeting of scheme investors has approved the amendment;
 - or

- (ii) if each of the directors of the scheme operator has certified in writing that he or she is satisfied, after due inquiry, that the amendment is minor and does not prejudice the interests of investors in the scheme — notice of the proposed amendment has been given as required by subsection (3) and the waiting period has ended; and
 - (b) the scheme operator has, in writing under its seal, accepted the amendment; and
 - (c) a copy of the amendment and of the instrument of acceptance has been lodged;
- or the Court has ordered the amendment under section 260AQ.

“(2) Notice of proposed amendments is to be given to the investors and to the Commission. The notice is to include an explanation of the proposed amendment and a statement of the reasons for it.

“(3) The waiting period in relation to an amendment is the period starting on the day on which notice is given to the investors or the Commission, whichever is later, and ending:

- (a) 28 days later; or
- (b) if, within the 28 days, a meeting is called by the operator, or requisitioned by investors or the Commission, to consider the question whether to approve the proposed amendment — on the day on which a resolution approving the proposed amendment is passed by the meeting.

“(4) A meeting of investors is to be taken to have passed a resolution approving a proposed amendment only if:

- (a) votes on the question whether the resolution should be passed are cast in respect of interests the total value of which is more than 25% of the total value of the interests issued in the scheme; and
- (b) the votes in favour of the resolution are cast in respect of interests the total value of which is more than 75% of the total value of all the interests in respect of which votes were cast.

“(5) In this section:
 ‘**amendment**’, in relation to the constitution of a collective investment scheme, includes modification of a provision of the constitution, but does not include an amendment the effect of which is to:

- (a) remove the scheme operator from the position of scheme operator; or
- (b) terminate the scheme.

Note 1: Section 260AQ allows the Court to amend the constitution of a collective investment scheme in a proceeding for oppression.

Note 2: For removal of operator by the investors see section 183C. For the investors’ power to terminate the scheme see section 581AE.

Note 3: For conduct of meeting see Part 3.4A Division 2. Interests held by the operator or a related entity are not counted: see section 260BG.

Note 4: For the investors’ power to requisition meetings see section 260BC; for the Commission’s power to requisition meetings see section 260BD.

Non-executive etc. directors

"183B. (1) The operator of a collective investment scheme contravenes this section if, without reasonable excuse and for a period of more than 14 days, half in number or more of its directors are internal directors.

"(2) In this section:

'internal director', in relation to a collective investment scheme, means a director of the scheme operator who:

- (a) is concerned in the management of the operator otherwise than as a director; or
- (b) is entitled to shares in the operator or in an entity related to the operator; or
- (c) is, or has at any time within the previous 3 years been:
 - (i) an officer or employee of the operator; or
 - (ii) an officer or employee of an entity related to the operator and concerned in the management of that entity otherwise than as a director.

Investors may remove operator

"183C. (1) If a meeting of investors in a collective investment scheme resolves that the scheme operator (the **'present operator'**) be removed, the present operator must forthwith apply to the Court for the appointment of a temporary scheme operator unless:

- (a) a resolution is passed by a meeting of the investors under section 183D that some other company be appointed scheme operator; or
- (b) a similar application is being made by the Commission or someone else.

"(2) A meeting of investors is to be taken to have so resolved only if the votes in favour of a resolution that the present operator be removed are in respect of interests the total value of which is more than 50% of the total value of all the interests issued in the scheme.

Note: For conduct of meeting see Part 3.4A Division 2. Interests held by the operator or a related entity are not counted: see section 260BC.

Investors may resolve that replacement scheme operator be appointed

"183D. (1) If a meeting of investors in a collective investment scheme resolves under section 183C that the scheme operator (the **'present operator'**) be removed, it may resolve that another company specified in the resolution (the **'replacement operator'**) be appointed scheme operator.

"(2) A meeting of investors is to be taken to have so resolved only if the votes in favour of a resolution that the present operator be removed and the

replacement operator be appointed scheme operator are in respect of interests the total value of which is more than 50% of the total value of all the interests issued in the scheme.

Note: For conduct of meeting see Part 3.4A Division 2. Interests held by the operator or a related entity are not counted: see section 260BG.

Court may appoint temporary scheme operator

"183E. (1) The Court may, on application, by order appoint a person to be the temporary scheme operator of a collective investment scheme.

"(2) The application may be made by any of the following:

- (a) the Commission;
- (b) the scheme operator;
- (c) a director of the scheme operator;
- (d) the administrator, or a receiver of property, of the scheme operator or of the scheme;
- (e) a company proposed for appointment as scheme operator;
- (f) an investor in the scheme.

"(3) A temporary scheme operator must give access to the books relating to the scheme to:

- (a) a company specified as replacement operator in a resolution under section 183D; and
- (b) a person acting in good faith for the purpose of making an application under Part 2.2A for a scheme operators licence for the scheme.

"(4) The appointment is for 3 months, or a shorter period specified in the order, but the Court may, on application by the temporary scheme operator, extend the appointment.

"(5) The temporary scheme operator must, as the Court directs but in any case before the end of the appointment, report to the Court recommending a course of action to be taken in relation to the scheme.

"(6) The Court may then make such orders as are just, including orders:

- (a) for the calling of an investors' meeting to consider a proposed resolution nominating a company as replacement scheme operator; and
- (b) for the termination of the scheme.

"(7) A temporary scheme operator:

- (a) has the same powers and rights to deal with the property of the scheme as the operator of the scheme would, but for this section, have; and
- (b) has those powers and rights to the exclusion of the scheme operator; and

- (c) subject to the order of the Court appointing the temporary scheme operator, has the same obligations to the investors as the operator would, but for this section, have; and
- (d) may call meetings of investors for any proper purpose.

“(8) The operator of a collective investment scheme, and an officer of the operator, must not purport to deal with the property of the scheme if there is a temporary scheme operator for the scheme.

“(9) The Court must, in exercising a power under this section in relation to a scheme, have regard to the interests of the investors in the scheme.

Note: A temporary scheme operator does not need a scheme operators licence: see paragraphs 113A(1)(b); (2)(b).

Appointment of replacement scheme operator after temporary scheme operator

“183EA. If a an investors meeting has been called, whether by the temporary scheme operator of the scheme or not, to consider a proposed resolution that a specified company be appointed replacement scheme operator, the resolution is to be taken to have been passed only if votes in favour of the resolution are cast in respect of interests the total value of which is more than 50% of the total value of all the interests in respect of which votes were cast.

Note: For conduct of meeting see Part 3.4A Division 2. Interests held by the operator or a related entity are not counted: see section 260BC.

Scheme property vests in replacement operator

“183F. If a replacement operator is appointed for a collective investment scheme, all the scheme property held by the scheme operator immediately before the appointment (the ‘**present operator**’) vests, by force of this section, in the replacement operator on the same terms as it was held by the present operator.

Certain transfers of property not liable to stamp duty

“183G. A transfer of the property that is property of a collective investment scheme from a company that was the scheme operator to a replacement scheme operator appointed under this Part or under Division 2 of Part 5.1 is not subject to stamp duty under a law of this jurisdiction.

Note: Division 2 of Part 5.1 provides for mergers of schemes.

Minimum net value of scheme operator

“183H. (1) The operator of a collective investment scheme contravenes this subsection if its net value is less than \$100,000.

Defence: At the time when the contravention occurred:

- (a) the defendant was taking all reasonable measures to prevent contraventions of the relevant kind; and

- (b) none of the executive officers of the defendant had reason to suspect that the contravention would occur.

Fault: Except as provided in the defence, the defendant's state of mind, intentions and beliefs and the degree of care, if any, that the defendant exercised, are excluded.

"(2) The operator of a collective investment scheme contravenes this subsection if its net value is, for more than 14 consecutive days, less than the lesser of:

- (a) \$5,000,000; or
(b) 5% of the sum of the values of the property of all the collective investment schemes for which it is scheme operator.

Defence: At the time when the contravention occurred:

- (c) the defendant was taking all reasonable measures to prevent contraventions of the relevant kind; and
(d) none of the executive officers of the defendant had reason to suspect that the contravention would occur.

Fault: Except as provided in the defence, the defendant's state of mind, intentions and beliefs and the degree of care, if any, that the defendant exercised, are excluded.

"(3) If a contravention of subsection (1) or (2), as the case requires, occurs for a period of 2 or more days, the operator is guilty of a further contravention for each day during the period.

"(4) The operator of a collective investment scheme must, forthwith after becoming aware that its net value is less than \$100,000 or the amount worked out under subsection (2), give written notice to the Commission of that fact.

Fault: The defendant's state of mind, intentions and beliefs and the degree of care, if any, that the defendant exercised, are excluded.

"(5) In this section:

'**net value**', in relation to the operator of a collective investment scheme, means the amount worked out by subtracting from the book value of the operator's property the amount of the liabilities in respect of that property; '**operator's property**' means property that the operator owns beneficially, but does not include property that is an interest in the scheme or in a scheme for which the operator, or an associate of the operator, is the scheme operator.

"(6) For the purposes of this section:

- (a) the value of the property of a collective investment scheme; and
(b) the value of property of the operator of a collective investment scheme, and the amount of the liabilities of such an operator;

are to be worked out as at the most recent day as at which accounts for the scheme were required to have been prepared.

Note: Division 11 of Part 3.6 provides for the preparation of financial statements for collective investment schemes.

Constitution etc. not to excuse operator etc. from liability

"183J. The constitution of a collective investment scheme, and a contract between the operator of such a scheme and an investor in such a scheme, is void so far as it purports to limit or exclude the liability of the operator, or of an officer of the operator, for or because of:

- (a) a contravention of this Law or of the scheme's constitution; or
- (b) the operator's neglect, misfeasance or default.

'Golden handshakes' etc. prohibited

"183K. (1) If property of a collective investment scheme is used or applied to make a payment to a person on account of the scheme operator's ceasing, or an officer of the scheme operator's ceasing, for whatever reason, to be the scheme operator or such an officer, the operator contravenes this section unless the payment was:

- (a) on account of reasonable expenses incurred by the operator or the replacement operator in transferring the title to scheme property as a result of the scheme operator's ceasing to be scheme operator; or
- (b) authorised by a meeting of investors.

"(2) A meeting of investors is to be taken to have authorised a payment for the purposes of paragraph (1)(b) only if the votes in favour of a resolution to that effect are cast in respect of interests the value of which is more than 50% of the total value of the interests issued in the scheme.

"(3) This section does not apply in relation to a payment to the scheme operator or another party related to the scheme.

"(4) In this section:

'payment' includes anything that is a financial benefit for the purpose of Part 3.2A;

'related party' has the meaning it has under Part 3.2A.

Note 1: For conduct of meeting see Part 3.4A, Division 2. Interests held by the operator or a related entity, and by the person intended to be paid, are not counted: see section 260BG.

Note 2: Part 3.2A governs payments to related parties.

'Golden handshake' etc. clauses void

"183L. A provision of the constitution of a collective investment scheme is void so far as it purports to authorise or require a payment to be made out of the property of the scheme in circumstances that would contravene section 183K."

new Parts 2.5 and 2.6

31. The Corporations Law is amended by adding at the end of Chapter 2 the following Parts:

**"PART 2.5 — ISSUE, REDEMPTION AND BUY-BACK OF INTERESTS
IN COLLECTIVE INVESTMENT SCHEMES**

"Division 1 — Preliminary

Interpretation

"216AA. In this Part:

'acceptance form' means:

- (a) in relation to an offer to redeem investors' interests — the form that investors must use to accept a redemption offer; and
- (b) in relation to an offer by the operator of a collective investment scheme to buy investors' interests — the form that investors must use to accept a buy-back offer;

'buy-back offer' means an offer under Division 3;

'buy-back period' means the period for which a buy-back offer is open;

"offer document" means:

- (a) in relation to a redemption offer — the document referred to in section 216AG; and
- (b) in relation to a buy-back offer — the document referred to in section 216AO;

'redemption offer' means an offer under Division 2;

'redemption period' means the period for which a redemption offer is open.

Interests not to be issued etc. except for proper price

"216AB. The operator of a collective investment scheme must not issue, allot or sell an interest in the scheme except for a consideration worked out in accordance with the scheme's constitution.

Defence: At the time when the contravention occurred:

- (a) the defendant was taking all reasonable measures to prevent contraventions of the relevant kind; and
- (b) none of the executive officers of the defendant had reason to suspect that the contravention would occur.

Fault: Except as provided in the defence, the defendant's state of mind, intentions and beliefs and the degree of care, if any, that the defendant exercised, are excluded.

“Division 2 — Redemption of interests

Division does not apply to fully liquid schemes

“216AC. This Division (except paragraph 216AD(b) and subsection 216AF(2)) does not apply to a collective investment scheme the property of which is all liquid property.

Note: Paragraph 216AD(b) requires interests to be redeemed for value worked out under the scheme constitution. Section 216AF requires redemption offers to be made on a non-discriminatory basis.

Redemptions to be in accordance with this Division

“216AD. The operator of a collective investment scheme must not redeem an interest in the scheme out of scheme property except:

- (a) in accordance with the procedure set out in this Division; and
- (b) at a value worked out in accordance with the scheme's constitution.

Defence: At the time when the contravention occurred:

- (c) the defendant was taking all reasonable measures to prevent contraventions of the relevant kind; and
- (d) none of the executive officers of the defendant had reason to suspect that the contravention would occur.

Fault: Except as provided in the defence, the defendant's state of mind, intentions and beliefs and the degree of care, if any, that the defendant exercised, are excluded.

Overview of redemption procedure

“216AE. The procedure to be followed for redeeming interests in a collective investment scheme is as follows:

- (a) the scheme operator lodges an offer document;
- (b) while the redemption offer is open, investors can accept the offer, specifying how many of their interests they want redeemed;
- (c) when the redemption offer closes, the operator redeems the interests out of the liquid property of the scheme, but if there is not enough liquid property to meet all the acceptances, they are met on a *pro rata* basis.

Redemption offers

“216AF. (1) A redemption offer must apply to:

- (a) all interests in the scheme; or
- (b) if the offer is made in respect of interests in a particular class — all interests in that class;

but a redemption offer may not relate to interests in more than one class.

“(2) A redemption offer must apply on the same terms to all the interests in respect of which it is made.

“(3) If 2 or more redemption offers apply at the same time for interests in a particular class, the scheme operator contravenes this subsection.

Redemption offer documents

“216AG. The offer document for a redemption offer must:

- (a) specify the redemption period, which must be at least 28 days; and
- (b) set out all the other terms of the offer;

but must not include any indication of the value of the liquid property that is available or is expected to be available at the end of the offer period.

When the redemption period starts

“216AH. The redemption period for a redemption offer starts on the day that the offer document is lodged or a later day specified for the purpose in the offer document.

Scheme operator must give investors offer document and acceptance forms

“216AI. (1) If, during a redemption period, an investor who holds interests to which the offer applies asks the operator for his or her interests to be redeemed, the operator must give the investor, within 2 days after being asked, a copy of the offer document and the relevant acceptance form. The investor may ask orally or in writing.

“(2) If an investor asks the scheme operator in writing for his or her interests to be redeemed but not while a redemption offer for those interests applies, the operator must, within 2 business days after the next redemption period that applies to those interests starts, give to the investor a copy of the offer document and the relevant acceptance form.

“(3) The acceptance form must include a prominent statement to the effect that:

- (a) interests will only be redeemed out of liquid property; and
- (b) the extent to which interests will be redeemed will be determined at the end of the offer period and in the light of how many other acceptances are received; and
- (c) it may be that not all the interests that investors want to have redeemed can be redeemed and, if that occurs, they will be redeemed on a *pro rata* basis.

“(4) Copies and forms given under this section are to be given free.

Accepting a redemption offer

“216AJ. (1) An investor to whom a redemption offer is made may, before the end of the redemption period and in accordance with the scheme’s constitution, notify the operator that he or she accepts the offer in respect of all or a specified number of his or her interests.

“(2) An acceptance is ineffective unless made on the relevant acceptance form and in accordance with the instructions on the form (for example, as to surrender of certificates).

Making the pay out

“216AK. (1) As soon as practicable after the end of a redemption period, but in any event not later than 21 days after the end of the period, the operator must redeem out of the scheme property that is liquid property the interests for which an acceptance has been notified.

“(2) However, if the total of the values of all the interests for which acceptances were notified is more than the value of the property of the scheme that is liquid property, the operator must redeem, for each investor who notified an acceptance, the number of interests (rounded down, if necessary, to the nearest whole number) the total value of which is the value worked out in accordance with the formula

$$\frac{\text{investor's acceptances} \times \text{total liquid property}}{\text{total acceptances}}$$

where:

‘**investor's acceptances**’ means the value, on the day immediately after the end of the offer period, of the investor's interests in respect of which the investor has notified an acceptance;

‘**total acceptances**’ means the value, on the day immediately after the end of the offer period, of the interests in respect of which investors have notified acceptances;

‘**total liquid property**’ means the value, on the day immediately after the end of the offer period, of the scheme property that is liquid property.

“(3) If, in relation to a particular redemption period, subsection (2) applies, the operator must, within 5 business days after the end of the period, lodge a notice to that effect.

“Division 3 — Scheme operator buying interests from investors (buy-back)”

Restriction on operator buying interests from investors

“216AL. The operator of a collective investment scheme must not buy an interest in the scheme from an investor in the scheme except:

- (a) in accordance with the procedure set out in this Division; and
- (b) for a consideration worked out in accordance with the scheme's constitution.

Defence: At the time when the contravention occurred:

- (c) the defendant was taking all reasonable measures to prevent contraventions of the relevant kind; and

- (d) none of the executive officers of the defendant had reason to suspect that the contravention would occur.

Fault: Except as provided in the defence, the defendant's state of mind, intentions and beliefs and the degree of care, if any, that the defendant exercised, are excluded.

Overview of buy-back procedure

"216AM. The procedure to be followed for the operator buying interests in a collective investment scheme from investors is as follows:

- (a) the scheme operator of the scheme gives written notice to the investors offering to buy investors' interests, setting out how long the offer is open for and how much it will spend;
- (b) while the offer is open, investors can accept the offer, specifying how many of their interests they want bought;
- (c) when the offer closes, the operator buys the interests, but if the amount it has said that it will spend is not enough to buy all the interests, the acceptances are met on a *pro rata* basis.

Buy-back offers

"216AN. (1) A buy-back offer must apply to:

- (a) all interests in the scheme; or
- (b) if the offer is made in respect of interests in a particular class — all interests in that class;

but a buy-back offer may not relate to interest in more than one class.

"(2) A buy-back offer must apply on the same terms to all the interests in respect of which it is made.

"(3) If 2 or more buy-back offers apply at the same time for interests in a particular class, the scheme operator contravenes this subsection.

Buy-back offer documents

"216AO. The offer document for a buy-back offer must:

- (a) specify the buy-back period, which must be at least 28 days; and
- (b) specify an amount of money as the total amount of money that the operator will spend in buying interests under the offer; and
- (c) set out all the other terms of the offer.

When the buy-back period starts

"216AP. (1) The buy-back period for a buy-back offer starts on the day when:

- (a) the offer document; and
- (b) a statement signed by each director of the scheme operator, certifying that he or she is satisfied that the operator has available to spend on

buying interests under the offer the amount specified in the offer document as the total amount of money that the operator will spend in buying interests under the offer;
is lodged or a later day specified for the purpose in the offer document.

“(2) The statement must set out the date on which each director of the scheme operator signed it.

“(3) The day on which the buy-back period starts must not be more than 21 days after the first of the days on which the statement was signed by a director of the scheme operator.

Scheme operator to notify investors when offer period starts

“216AQ. (1) The operator of a collective investment scheme must send to each investor who has interests of a class to which a buy-back offer applies written notice of the offer. The notice must be sent not later than 3 business days after the offer period starts.

“(2) The notice must:

- (a) be accompanied by the offer document and the relevant acceptance form; or
- (b) include prominent statements to the effect that:
 - (i) the maximum amount that the operator will spend on buying interests under the offer is set out in the offer document and the acceptance form; and
 - (ii) the offer can only be accepted on the acceptance form which accompanies or is attached to the offer document ; and
 - (iii) the extent to which interests will be bought by the operator will be determined at the end of the offer period and in the light of the number of other acceptances received; and
 - (iv) it may be that not all the interests that investors want to have bought can be bought and, if that occurs, they will be bought on a *pro rata* basis; and
 - (v) the scheme operator will, if asked orally or in writing within the offer period, give the investor a copy of the offer document and an acceptance form.

Scheme operator must give investors offer document and acceptance forms

“216AR. (1) The scheme operator must, within 2 business days after being asked, within the offer period, by an investor for interests of the investor to be bought by the operator or for a copy of the offer document and an acceptance form, give the investor a copy of the offer document and an acceptance form. The investor may ask orally or in writing.

“(2) The acceptance form must include a prominent statement:

- (a) of the maximum amount that the operator will spend buying back investors’ interests under the offer; and
- (b) to the effect that how many of each investor’s interests the operator will buy will be determined at the end of the offer period and in the light of how many other acceptances are received; and
- (c) to the effect that it may be that the operator will not buy all the interests that an investor wants it to buy.

“(3) Copies and forms given under this section are to be given free.

Accepting a buy-back offer

“216AS. (1) An investor to whom a buy-back offer is made may, before the end of the buy-back period and in accordance with the scheme’s constitution, notify the operator that he or she accepts the offer in respect of all or a specified number of his or her interests.

“(2) An acceptance is ineffective unless made on the relevant acceptance form and in accordance with the instructions on the form (for example, as to surrender of certificates).

Making the pay out

“216AT. (1) As soon as practicable after the end of a buy-back period but in any event not later than 21 days after the end of the period, the operator must buy the interests for which an acceptance has been notified.

“(2) However, if the total of the prices payable for all the interests for which acceptances were notified is more than the amount specified in the offer notice as the amount that the operator will spend, the operator must buy-back, for each investor who notified an acceptance, the number of interests (rounded down, if necessary, to the nearest whole number) the total value of which is the value worked out in accordance with the formula

$$\frac{\text{investor's acceptances} \times \text{stated cash}}{\text{total acceptances}}$$

where:

‘**investor’s acceptances**’ means the value, on the day immediately after the end of the offer period, of the investor’s interests in respect of which the investor has notified an acceptance;

‘**total acceptances**’ means the value, on the day immediately after the end of the offer period, of the interests in respect of which investors have notified acceptances;

'stated cash' means the amount specified in the offer document as the total amount of money that the operator will spend in buying interests under the offer.

"(3) If, in relation to a particular offer period, subsection (2) applies, the operator must, within 5 business days after the end of the offer period, lodge a notice to that effect.

"Division 4 — Avoiding the buy-back restrictions

Arrangements to avoid buy-back restrictions prohibited

"216AU. (1) The object of this Division is to prevent scheme operators entering into arrangements to avoid the restrictions in Division 3.

"(2) The operator of a collective investment scheme must not make a payment to a person on account of the person's buying interests in the scheme from an investor.

Defence 1: The purchase was made in circumstances such that, if the operator had been the buyer of the interests, it would not have contravened Division 3.

Defence 2: The payment was on account of expenses properly and reasonably incurred by the person in connection with the purchase of the interests.

Defence 3: At the time when the contravention occurred:

- (a) the defendant was taking all reasonable measures to prevent contraventions of the relevant kind; and
- (b) none of the executive officers of the defendant had reason to suspect that the contravention would occur.

Fault: Except as provided in defence 3, the defendant's state of mind, intentions and beliefs and the degree of care, if any, that the defendant exercised, are excluded.

"(3) The operator of a collective investment scheme must not enter into a contract or arrangement the effect of which is that the operator will make a payment to another person on account of the person's buying interests in the scheme from an investor. It does not matter whether the contract or arrangement is conditional.

Defence 1: The contract or arrangement provides that the scheme operator may only pay the other party on account of a purchase of interests made in circumstances such that, if the operator had been the buyer of the interests, it would not have contravened Division 3.

Defence 2: The payment was on account of expenses properly and reasonably incurred by the person in connection with the purchase of the interests.

Fault: The defendant's state of mind, intentions and beliefs and the degree of care, if any, that the defendant exercised, are excluded.

“(4) A contract or arrangement to which the operator of a collective investment scheme is a party is void so far as it makes provision contrary to subsection (2).

“PART 2.6 — COLLECTIVE INVESTMENT SCHEMES: REGISTERS TO BE KEPT ETC.

Register of investors

“216BA. (1) The operator of a collective investment scheme must keep a register of investors, which must set out:

- (a) the name and address of each investor; and
- (b) the number and class of interests that each investor holds; and
- (c) the date and time at which each investor’s name was entered on the register in respect of the interests that the investor holds; and
- (d) the amount paid for the interests; and
- (e) such other information as is prescribed.

Fault: The defendant’s state of mind, intentions and beliefs and the degree of care, if any, that the defendant exercised, are excluded.

“(2) The operator must make an entry in the register to bring it up to date in respect of an investor:

- (a) within 2 business days after interests in the scheme are issued or allotted to the investor; and
- (b) if the operator receives an instrument of transfer of interests made out in accordance with the scheme’s constitution and in favour of the investor — within 2 business days after receiving the instrument; and
- (c) if the operator redeems an interest or buys an interest from an investor — within 2 business days after the transaction takes place.

Fault: The defendant’s state of mind, intentions and beliefs and the degree of care, if any, that the defendant exercised, are excluded.

“(3) If there are more than 50 investors in the scheme, the scheme operator must keep an index to the register that will enable information about each investor to be found readily.

Defence: The register is kept in such a way that it is itself an index of the entries in it.

Fault: The defendant’s state of mind, intentions and beliefs and the degree of care, if any, that the defendant exercised, are excluded.

“(4) If an entry is made in the register, the operator must, within 14 days after the entry is made, change the index to bring it up to date.

Fault: The defendant’s state of mind, intentions and beliefs and the degree of care, if any, that the defendant exercised, are excluded.

“(5) In any proceeding a copy of the register is admissible as evidence of any matters disclosed in it that must, under this Law, be entered in it.

Substantial investors in listed schemes to notify scheme operator

"216BB. (1) An investor in a scheme must notify the scheme operator within 14 days after receiving a report under subsection 323KA(1) if:

- (a) the value of the interests that the investor is entitled to is 30% or more of the total value of the voting interests in the scheme unless the percentage entitlement:
 - (i) is the same as that notified in the immediately preceding report given under this paragraph; or
 - (ii) subject to paragraph (c), has changed from that notified in the immediately preceding report given under this paragraph by less than 5%; or
- (b) the percentage of the value of the interests to which the investor is entitled is more than, or less than, by less than 5% of the total value of the voting interests, the percentage of the interests to which the investor was entitled when the investor last gave a notice under paragraph (a); or
- (c) the investor was entitled to 30% or more of the total value of the voting interests in the scheme on the date of the immediately preceding report under subsection 323KA(1) but, on the day when the most recent such report is received, is entitled to less than 30% of the value of the interests.

"(2) The notice in each case is to set out the number and value of the interests of the investor and the associates of the investor.

"(3) The scheme operator must, on receiving a notice under this section or on receiving a notice of entitlement to interests in the scheme from an investor at any other time, enter the information in the notice on the register kept under section 216BA.

"(4) The scheme operator must record separately in the register:

- (a) if it was entitled to less than 30%, but is now entitled to 30% or more, of the total value of the interests in the scheme — the percentage entitlement; or
- (b) if its entitlement has increased or decreased by 5% or more since the immediately preceding record made under paragraph (a) — the percentage entitlement;

within 2 business days after becoming aware of the facts that gave rise to the entitlement or change in entitlement.

"(5) The scheme operator must change the register by deleting its name when the value of its entitlement falls below 30% of the total value of interests in the scheme. The change must be made within 2 business days after the operator becomes aware of the facts that gave rise to the change in entitlement.

“(6) If the interests in a scheme are divided into 2 or more classes, references to interests in the scheme are to be taken to be references to interests in one of those classes.

“(7) The entitlement of a person for the purposes of this section, except subsections (4) and (5), is to be worked out on the basis of the information in the most recent report under subsection 323KA(1).

“(8) In this section:

‘**scheme**’ means a collective investment scheme the interests in which are listed for quotation on a stock exchange as defined for the purposes of Chapter 6;

‘**voting interest**’ means an interest other than an interest to which the scheme operator or an associate of the scheme operator is entitled, being interests in respect of which votes may not, under subsection 260BG(4), be cast at an investors’ meeting.

Note 1: Reports under subsection 323KA(1) are annual reports required to be sent to investors with the accounts of the scheme.

Note 2: For stock exchanges as defined for the purposes of Chapter 6 see section 9.

Register of scheme property and valuations

“216BC. (1) The operator of a collective investment scheme must keep a register of the property of the scheme that is real property or property of a prescribed kind.

Fault: The defendant’s state of mind, intentions and beliefs and the degree of care, if any, that the defendant exercised, are excluded.

“(2) The register must:

(a) in respect of real property:

- (i) identify the property; and
- (ii) set out the prescribed particulars of its acquisition by the scheme operator for the scheme; and
- (iii) set out the prescribed particulars of each valuation of the property; and
- (iv) set out such other information about the property as is prescribed; and

(b) in respect of other property — set out such other particulars as are prescribed.

“(3) The operator must make such entries in the register as will keep the register up to date.

Fault: The defendant’s state of mind, intentions and beliefs and the degree of care, if any, that the defendant exercised, are excluded.

Where registers to be kept

"216BD. The operator of a collective investment scheme must keep each register that this Part requires to be kept at its registered office or principal place of business in Australia or at some other place in Australia approved by the Commission.

Fault: The defendant's state of mind, intentions and beliefs and the degree of care, if any, that the defendant exercised, are excluded.

Inspecting registers

"216BE. (1) The operator of a collective investment scheme must allow anyone who asks to inspect a register kept under this Part. It must also, within 21 days, or such longer time as the Commission allows, after being asked, give a copy of or an extract from such a register to the person who asked.

Defence: The Commission had given an exemption that permitted the operator to deny access to the register.

"(2) The operator may charge a fee, which must not be more than the prescribed amount, for doing so, but must not charge an investor a fee for inspecting a register.

Court may rectify register etc.

"216BF. (1) The Court may, on application and if it is just to do so, order that a register kept under this Part be rectified as specified in the order.

"(2) The Court may also, on such an application, if satisfied that a party to the application has suffered loss or damage by an error or defect in the register, order the operator to pay to the party the amount of the party's loss or damage."

Part 3.1 — Registered office and name

32. After section 219 of the Corporations Law the following section is inserted:

Use of registration number

"219A. (1) If the operator of a collective investment scheme signs, issues or publishes a public document, or an eligible negotiable instrument, in connection with the scheme, being a document or instrument that does not set out, in legible characters:

- (a) the name of the scheme; and
- (b) one of the following expressions:
 - (i) 'Collective Investment Scheme Number';
 - (ii) 'Collective Investment Scheme No.';
 - (iii) 'Collective Investment Scheme No';

- (iv) 'C.I.S. No.';
- (v) 'CIS No.';
- (vi) 'CIS No.';

and the scheme's registration number;

the operator, and each person, whether or not an officer of the operator, who signed or issued the document or instrument, or authorised the document to be signed or issued, contravene this section.

Fault: The defendant's state of mind, intentions and beliefs and the degree of care, if any, that the defendant exercised, are excluded.

"(2) The persons who signed or issued, and the persons who authorised to be signed or issued, a negotiable instrument in contravention of subsection (1) are jointly and severally liable to the holder of the instrument for the amount due on it unless that amount is paid by the operator.

"(3) The operator of a collective investment scheme must paint or affix and keep painted or affixed, in a conspicuous position and in easily legible letters, on the outside of its registered office 1 of the following expressions:

- (a) 'Registered Office: Collective Investment Scheme Number';
- (b) 'Registered Office: Collective Investment Scheme No.';
- (c) 'Registered Office: Collective Investment Scheme No.';

followed by the scheme's registration number.

Fault: The defendant's state of mind, intentions and beliefs and the degree of care, if any, that the defendant exercised, are excluded."

Part 3.2 — Officers

Certain persons not to manage corporations

33. Section 229 of the Corporations Law is amended by adding "232AA," after "232," in paragraph (3)(c).

Court may order person not to manage corporation

34. Section 230 of the Corporations Law is amended by inserting after paragraph (d) of the definition of "prescribed person" in subsection (6) the following word and paragraph:

"; or (e) if the body corporate is the operator of a collective investment scheme:

- (i) the body corporate; or
- (ii) a director of the body corporate; or
- (iii) an investor in the scheme; or
- (iv) the administrator or liquidator of the scheme; or
- (v) the administrator of a deed of arrangement for the scheme".

35. After section 232 of the Corporations Law the following section is inserted:

Additional duties and liabilities of officers of collective investment scheme operators

"232AA. (1) Each officer of the operator of a collective investment scheme must take reasonable steps to ensure that the operator complies with the obligations of the operator under this Law.

"(2) Each officer of the operator of a collective investment scheme must, in relation to the exercise of his or her powers as such an officer of the operator of such a collective investment scheme, use the degree of diligence and care that a reasonable person in a like position would exercise in similar circumstances.

"(3) Each officer of the operator of a collective investment scheme must act honestly in all matters concerning the scheme.

"(4) Each officer of the operator of a collective investment scheme must not exercise his or her powers, or perform his or her duties, as such an officer in the interest of himself or herself or of anyone else if that interest is not identical to the interests of the scheme investors generally.

Defence: The defendant did not know and could not reasonably have known that the interests of the person in whose interests he or she acted were not identical to the interests of the investors in the scheme generally.

"(5) Subsection (3) does not apply to an exercise of powers or performance of duties in accordance with the constitution of the scheme or with this Law.

"(6) Each officer of the operator of a collective investment scheme, and each former officer of such an operator, must not, in relevant circumstances, make improper use:

- (a) of his or her position as such an officer; or
- (b) of information acquired by virtue of his or her position as such an officer;

to gain, directly or indirectly, an advantage for himself or herself or for any other person or to cause detriment to the interests of investors in the scheme.

"(7) The duties imposed on a person by this section:

- (a) are in addition to the duties that the person owes to the operator because he or she is an officer of the operator; and
- (b) prevail over those duties to the extent of any inconsistency.

“(8) In this section:

‘officer’, in relation to a body corporate, means a director, secretary or other executive officer of the body corporate.

Note: This section imposes obligations owed directly to investors. They are enforced as civil penalty provisions: see Part 9.4B.”.

Register of directors' shareholdings etc.

36. Section 235 of the Corporations Law is amended:

- (a) by omitting “or prescribed interests made available by” from paragraphs (1)(b), (c) and (d) and subsection (6) and substituting “or collective investment scheme interests of”; and
- (b) by omitting “prescribed interests” from subsection (4) and substituting “collective investment scheme interests”; and
- (c) by adding at the end the following subsection:

“(5) In this section, a reference to collective investment scheme interests of a company is a reference to interests in a collective investment scheme of which the company is scheme operator.”.

General duty to make disclosure

37. Section 236 of the Corporations Law is amended:

- (a) by omitting “prescribed interests” from paragraph (1)(a) and subparagraph (2)(a)(ii) and substituting “collective investment scheme interests”; and
- (b) by omitting “prescribed interest” from subsection (7) and substituting “collective investment scheme interest”; and
- (c) by adding at the end the following subsection:

“(9) In this section, a reference to collective investment scheme interests of a company is a reference to interests in a collective investment scheme of which the company is scheme operator.”.

38. After section 241A of the Corporations Law the following section is inserted:

Collective investment scheme property not to be used to pay insurance premiums or indemnities

“241B. (1) Despite any other provision of this Law, the operator of a collective investment scheme contravenes this section if property of the scheme is used or applied, directly or indirectly:

- (a) to indemnify a person who is or has been an officer or auditor of the scheme operator, or an auditor of the scheme, against a liability incurred by the person as such an officer or auditor; or
- (b) to indemnify a person against a liability for costs and expenses incurred by the person as mentioned in subsection 241(3); or
- (c) in payment of a premium in respect of a contract insuring the person against a liability incurred by the person as such an officer or auditor

Defence: At the time when the contravention occurred.

- (d) the defendant was taking all reasonable measures to prevent contraventions of the relevant kind; and
- (e) none of the executive officers of the defendant had reason to suspect that the contravention would occur.

Fault: Except as provided in the defence, the defendant's state of mind, intentions and beliefs and the degree of care, if any, the defendant exercised, are excluded.

"(2) A contract or arrangement, or the constitution of a collective investment scheme, is void so far as it provides or purports to provide for a scheme operator to do something that subsection (1) prohibits.

"(3) In this section:

'officer' has the same meaning as in section 241;

'indemnify' includes indemnify indirectly through one or more interposed entities;

'pay' includes pay indirectly through one or more interposed entities."

Part 3.2A — Financial benefits to related parties of public companies

Division 1 — Object and outline of Part

Amendment of heading of Part 3.2A

39. The heading of Part 3.2A of the Corporations Law is amended by adding at the end "**and collective investment schemes**".

Object

40. Section 243A of the Corporations Law is amended:

- (a) by inserting "as it applies to public companies" after "this Part"; and
- (b) by adding at the end the following subsection:

"(2) The object of this Part, so far as it relates to collective investment schemes, is to protect:

- (a) the property of the scheme; and
- (b) the interests of the investors as investors;

by requiring that, in general, financial benefits to parties related to the scheme that could diminish or endanger that property or adversely affect those interests are disclosed and approved by a meeting of investors before they are given."

Part 3.2A, Division 2 — The meaning of expressions

Entities

41. Section 243C of the Corporations Law is amended:

- (a) by inserting after paragraph (1)(c) the following paragraph:
“(d) a collective investment scheme;” and
- (b) in subsection (3) by inserting “or collective investment schemes” after “companies”.

Related parties

42. Section 243F of the Corporations Law is amended:

- (a) by inserting after subsection (1) the following subsection:
“(1A) A person or entity that is, or has at any time within the previous 6 months been, any of the following is **related** to a collective investment scheme:
 - (a) the operator of the scheme;
 - (b) a director of the operator;
 - (c) a parent entity or a sibling entity of the operator;
 - (d) a director of a body corporate that is a parent entity or a sibling entity of the operator;
 - (e) one of the persons constituting an entity, other than a body corporate, that is a parent entity or a sibling entity of the operator;
 - (f) a spouse or a de facto spouse of such a director or person;
 - (g) a parent, son or daughter of such a director, person, spouse or de facto spouse;
 - (h) an entity over which one of the persons mentioned in paragraphs (a) to (f), inclusive, or 2 or more of those persons together, have control.”; and
- (b) by inserting “or a collective investment scheme” in subsection (3) after “a public company”; and
- (c) by inserting “or the scheme” in paragraph (3)(b) after “the public company”; and
- (d) by adding at the end the following subsection:
“(6) If, at a particular time, an entity:
 - (a) is or was a related party of a collective investment scheme because of subsection (1A) or (3); and
 - (b) acted, or proposes to act, with another entity (**‘the associate’**) in respect of the giving of a financial benefit out of property of the scheme (**‘the primary benefit’**) by the operator of the scheme to the associate; and

- (c) so acted, or proposes so to act, for the reason, or for reasons that include the reason, that the primary benefit has or is expected to be given;
the associate is a related party to the collective investment scheme.”.

Giving a financial benefit

43. Section 243G of the Corporations Law is amended by adding at the end the following subsection:

“(5) A few examples of an operator of a collective investment scheme giving a financial benefit to a person or entity out of scheme property are:

- (a) the operator lending to the person or entity money that is property of the scheme or giving security over property of the scheme for a loan to the person or entity;
- (b) the operator forgiving a debt owed by the person or entity to the operator in respect of the scheme or of scheme property;
- (c) the operator releasing, or neglecting to enforce, an obligation of the person or entity to the operator in respect of the scheme or of scheme property;
- (d) the operator assuming, as scheme operator, an obligation of the person or entity;
- (e) the operator buying or leasing, as scheme operator, an asset from the person or entity or selling or leasing property of the scheme to the person or entity;
- (f) the operator acquiring services from the person or entity in relation to the scheme or supplying, as scheme operator, services to the person or entity;
- (g) the operator issuing interests in the scheme, or granting an option in relation to such interests, to the person or entity;
- (h) the operator giving scheme property to the person or entity.”.

Part 3.2A, Division 3 — The prohibitions

Prohibited financial benefit to related parties of public companies

44. Section 243H of the Corporations Law is amended by adding at the end the following subsection:

“(3) Subsections (1) and (2) do not apply to or in relation to a public company that is the operator of a collective investment scheme giving a financial benefit out of the property of the scheme.”.

45. Division 3 of Part 3.2A of the Corporations Law is amended by adding at the end the following section:

Restriction on collective investment scheme operators giving financial benefits out of the scheme property to related parties

"243HA. (1) The operator of a collective investment scheme must not use or apply property of the scheme to give a financial benefit to a party related to the scheme.

Defence: At the time when the contravention occurred:

- (a) the defendant was taking all reasonable measures to prevent contraventions of the relevant kind; and
- (b) none of the executive officers of the defendant had reason to suspect that the contravention would occur.

Fault: Except as provided in the defence, the defendant's state of mind, intentions and beliefs and the degree of care, if any, that the defendant exercised, are excluded.

"(2) The operator of a collective investment scheme must not use or apply property of the scheme to give a financial benefit to a party related to the scheme if the operator:

- (a) knows that the party is a party related to the scheme; or
- (b) is aware of facts that would lead a reasonable person in the operator's position to suspect that the party is a party related to the scheme but does not take such measures as would have been reasonable to find out whether the party is so related.

"(3) Divisions 4A and 5A set out the circumstances in which this section will not prevent a financial benefit being given.

"(4) Subsections (1) and (2) do not affect any other restriction or prohibition on the operator's giving the financial benefit: for example, one arising under the scheme's constitution or under the principles and rules of the common law and of equity.

Note: For the day on which this section comes into operation in relation to a collective investment scheme see section 1397."

Part 3.2A, Division 4 — General exceptions

Heading to Part 3.2A Division 4

46. The heading to Division 4 of Part 3.2A of the Corporations Law is amended by adding at the end "**: public companies**".

47. Division 4 of Part 3.2A of the Corporations Law is amended by inserting before section 243J the following section:

Application of Division

"243HB. This Division does not apply to the giving of a financial benefit by the operator of a collective investment scheme out of the scheme property."

Part 3.2A, new Division 4A

48. Part 3.2A of the Corporations Law is amended by inserting after Division 4 the following Division:

*"Division 4A — General exceptions: collective investment schemes***Financial benefit under contract made before section 243HA begins to apply**

"243PC. Section 243HA does not prevent the operator of a collective investment scheme from giving a financial benefit out of the scheme property if giving the benefit out of the property:

- (a) is required by a contract made before the day on and after which that section applies in relation to the scheme; and
- (b) is permitted or authorised by the constitution of the scheme as in force when the contract was made.

Note: Section 1397 sets out when section 243HA commences in relation to a scheme.

Financial benefit on arm's length terms

"243PD. Section 243HA does not prevent the operator of a collective investment scheme from giving a financial benefit out of the scheme property if it is given on terms and conditions no more favourable to the related party than those on which it is reasonable to expect that the operator would give the benefit if dealing with the related party at arm's length.

Financial benefits to investors as such

"243PE. Section 243HA does not prevent the operator of a collective investment scheme from giving a financial benefit out of the scheme property to an investor in the scheme if giving the benefit:

- (a) is authorised or required by the constitution of the scheme or this Law; and
- (b) does not, either directly or indirectly, discriminate unfairly in favour of a person to whom the benefit is given.

Financial benefit under court order

"243PF. Section 243HA does not prevent the operator of a collective investment scheme from giving a financial benefit out of the scheme property to an investor in the scheme if giving the benefit out of scheme property is done in direct compliance with an order of a court."

Part 3.2A, Division 5, Subdivision A — Exceptions from the prohibitions

49. Subdivision A of Division 5 of Part 3.2A of the Corporations Law is amended by inserting before section 243Q the following section:

Application of Subdivision

"243PG. This Division does not apply to the giving of a financial benefit by the operator of a collective investment scheme out of the scheme property."

Part 3.2A, new Division 5A

50. After Division 5 of Part 3.2A of the Corporations Law the following Division is inserted:

"Division 5A — Financial benefits given by collective investment scheme operator out of scheme property approved by investors' meeting

Financial benefit given by collective investment scheme operator approved by investors' meeting

"243ZDA. (1) Section 243HA does not prevent the operator of a collective investment scheme from giving a financial benefit out of the scheme property if:

- (a) giving the benefit is authorised by resolution of a meeting of investors in the scheme held within 15 months before the operator gave the benefit; and
- (b) the conditions prescribed by the other provisions of this Division have been satisfied in relation to the resolution.

"(2) A resolution may specify a particular thing or things in a class or kind of things.

Investors meeting to authorise related party transaction — notice and explanatory statement to be lodged

"243ZDB. (1) The operator of a collective investment scheme must, before the start of the prescribed period before calling a meeting of investors in a collective investment scheme to consider a resolution or resolutions in relation to giving a financial benefit to a person or entity related to the scheme, lodge:

- (a) a copy of the proposed notice of meeting, which must set out the resolution or resolutions to be considered at the meeting to approve the giving of the financial benefit; and
- (b) an explanatory statement; and

- (c) if the operator:
- (i) has given or intends to give; or
 - (ii) is aware that the related party or an associate of the operator or the related party has given or intends to give; to investors any written or other material that contains information relevant to the question whether giving the benefit should be approved by the investors — a copy of the material.

Fault: Except as provided in paragraph (c), the defendant's state of mind, intentions and beliefs have the degree of care, if any, that the defendant exercised, are excluded.

"(2) The **prescribed period** is the period of 14 days before the notice calling the meeting is sent to investors, but the Commission may, on application by the operator, fix a shorter period.

"(3) The explanatory statement must identify the person or entity to whom the financial benefit is proposed to be given and set out:

- (a) the nature of the benefit; and
- (b) in relation to each director of the scheme operator:
 - (i) if the director wants to make a recommendation to investors about the matter — the recommendation and his or her reasons for it; or
 - (ii) if not — why not; or
 - (iii) if the director was not available to consider the matter — why not;
- (c) in relation to each such director:
 - (i) whether the director has an interest in the matter; and
 - (ii) if so — what it is; and
- (d) all other information that:
 - (i) is relevant to the question whether or not giving the benefit is in the investors' interests; and
 - (ii) is known to the operator.

Note 1: The kind of information referred to in paragraph (2)(d) includes, for example, information about what, from an economic and commercial point of view, are the true potential costs and detriments of, or flowing from, giving the benefit. It would include opportunity costs, taxation consequences, such as liability to fringe benefits tax, and benefits forgone by the operator.

Note 2: Information known to directors and other officers is known to the operator: see section 1345E.

Commission may comment

"243ZDC. (1) The Commission may, within 14 days after documents are lodged under section 243ZDB, give to the operator written comments on the matters to which they relate, but may not comment on the question whether giving the benefit concerned is in the interests of the scheme investors.

“(2) The Commission may consult anyone for the purpose of giving those comments, including, if the scheme is included in the official list of the Exchange or of a securities exchange that is a subsidiary of the Exchange, the Exchange.

“(3) The Commission must keep a copy of the written comments, and subsections 1274(2) and (5) apply as if the copy were a document lodged with the Commission.

“(4) This section does not affect any of the Commission’s other powers.

Note: Subsection 1274(2) provides for persons to inspect and get copies of documents lodged with the Commission. Subsection 1274(5) provides for the evidentiary effect of copies of and extracts from such documents.

Calling the meeting

“243ZDD. (1) The notice to the investors convening the meeting:

- (a) must be the same, in all relevant respects, as the notice lodged under section 243ZDB; and
- (b) must be accompanied by:
 - (i) a copy of the explanatory statement lodged under that section; and
 - (ii) if the Commission has given written comments on the matter to the scheme operator — a copy of those comments.

“(2) If an entity that is:

- (a) the operator; or
- (b) the person or entity to whom the financial benefit is to be given; or
- (c) an associate of the operator or of that person or entity;

gives to investors, before the vote on the question whether giving the financial benefit should be approved is taken, a document that contains information relevant to the question but is not the same as the information in the explanatory statement, the entity contravenes this subsection. If the entity is not the operator, the operator also contravenes this subsection.

Defence 1: The document was required to be given under some other provision of this Law.

Defence 2: If the defendant is the operator of the scheme but the document was given by someone else — at the time when the contravention occurred, the defendant was taking all reasonable measures to prevent contraventions of the relevant kind.

Fault: Except as provided in defence 2, the defendant’s state of mind, intentions and beliefs and the degree of care, if any, that the defendant exercised, are excluded.

Vote needed to authorise giving a benefit to a related party

“243ZDE. (1) A meeting of investors is to be taken to have authorised the giving of a benefit only if the votes cast in favour of a resolution to that effect are cast in respect of interests the total value of which is:

- (a) if the benefit is proposed to be paid or made to:
 - (i) the scheme operator; or
 - (ii) an entity that is, for the purposes of this Part, related to the scheme operator;

in relation to the scheme operator's ceasing, for whatever reason, to be scheme operator — more than 50% of the value of the interests issued in the scheme; or
- (b) in other cases — more than 50% of the total value of the interests in respect of which votes are cast.

“(2) The resolution on which the votes are cast must be the same as the resolution included in the notice convening the meeting and in the documents lodged under section 243ZDB.

Note: For conduct of meeting see Part 2.3A. Interests held by the operator or a related entity, or by the related party who is to receive the benefit, are not counted: see section 260BG.

Notice of resolution when passed

“243ZDF. Within 14 days after a resolution authorising the giving of a financial benefit is passed, the scheme operator must notify the Commission of that fact.

Defence: At all times during the 14 days:

- (a) the defendant was taking all reasonable measures to prevent contraventions of this section; and
- (b) none of the executive officers of the defendant had reason to suspect that the contravention would occur.

Fault: Except as provided in the defence, the defendant's state of mind, intentions and beliefs and the degree of care, if any, that the defendant exercised, are excluded.

Substantial compliance

“243ZDG. The Court may, on application by an interested person, declare that this Part has been complied with in relation to a particular financial benefit if it finds that it has been substantially complied with.”.

Part 3.2A, Division 6 — Enforcement

51. After section 243ZE of the Corporations Law the following section is inserted:

Consequences of scheme operator giving financial benefit out of scheme property when not permitted

“243ZEA. If the operator of a collective investment scheme gives a financial benefit to a party related to the scheme in contravention of section 243HA, each of the following also contravenes this Law:

- (a) the related party;
- (b) each person involved in the contravention or in the contravention of this subsection by the related party; and
- (c) each person who, by act or omission, is directly or indirectly concerned in or party to the contravention or in the contravention of this subsection by the related party.

Defence: The party or person did not know and could not reasonably have known any of the facts because of which giving the financial benefit was a contravention of section 243HA.”.

52. After section 243ZH of the Corporations Law the following section is inserted:

Recovery of financial benefits paid out of collective investment scheme property in contravention of this Part

“243ZHA. (1) If the operator of a collective investment scheme gives a financial benefit to a party related to the scheme in contravention of section 243HA, the related party is liable to pay to the operator the amount of the difference between the amount that the related party paid or is to pay for the benefit and the amount that it is reasonable to expect that the related party would have paid for the benefit if the operator had dealt with the related party at arm’s length.

“(2) An amount payable under subsection (1) may be recovered by action against the related party in a court of competent jurisdiction on application by any of the following:

- (a) the operator;
- (b) a director of the operator;
- (c) an investor in the scheme;
- (d) the Commission.

“(3) Amounts payable under this section are property of the relevant collective investment scheme.”.

Effect of Part

53. Section 243ZI of the Corporations Law is amended:

- (a) by inserting “243HA,” in subsection (1) after “Section 243H,”; and
- (b) by inserting “or a collective investment scheme’s” in subsection (3) after “body corporate’s”.

new Part 3.4A

54. After Part 3.4 of the Corporations Law the following Part is inserted:

"PART 3.4A — CONDUCT OF COLLECTIVE INVESTMENT SCHEMES***"Division 1 — Conducting collective investment schemes*****Operator holds scheme property for investors**

"260AA. (1) If the operator of a collective investment scheme holds property of the scheme, it holds it for the use and benefit of the investors in the scheme.

"(2) If, by arrangement with the scheme operator, a person other than the scheme operator holds property of a collective investment scheme as trustee for the scheme operator, the scheme operator holds the interest in the property that it has as beneficiary of the trust for the use and benefit of the investors in the scheme.

Property must be kept separate

"260AB. The operator of a collective investment scheme must keep the property of the scheme separate from its own property.

Defence: At the time when the contravention occurred:

- (a) the defendant was taking all reasonable measures to prevent contraventions of the relevant kind; and
- (b) none of the executive officers of the defendant had reason to suspect that the contravention would occur.

Fault: Except as provided in the defence, the defendant's state of mind, intentions and beliefs and the degree of care, if any, that the defendant exercised, are excluded.

Scheme property to be separately identified

"260AC. (1) The operator of a collective investment scheme must at all times make and keep records that clearly identify the property of the scheme and identify it as property of the scheme.

Defence: At the time when the contravention occurred:

- (a) the defendant was taking all reasonable measures to prevent contraventions of the relevant kind;
- (b) none of the executive officers of the defendant had reason to suspect that the contravention would occur.

Fault: Except as provided at the defence, the defendant's state of mind, intentions and belief of the degree of care, if any, that the defendant exercised, are excluded.

“(2) Subsection (1) does not apply in relation to property if:

- (a) the property is registered, or documents of title to the property are deposited or registered, in a register maintained under a law of the State or Territory in which the property is that provides for the registration of title to property of that kind; and
- (b) the terms in which the property is so registered clearly indicate that it is property of the scheme.

“(3) Despite any other provision of a law of this jurisdiction, a law of the kind mentioned in paragraph (2)(a) does not prevent the registration of title to property in a way that clearly identifies the property as property of a collective investment scheme, but the fact that property is so identified is to be disregarded in working out the obligations or liabilities of purchasers or persons who acquire security interests in property so identified.⁵

Operator must act honestly

“260AD. The operator of a collective investment scheme must act honestly in all matters concerning the scheme.

Operator must act in the interests of investors

“260AE. (1) The operator of a collective investment scheme must not knowingly, intentionally or recklessly exercise its powers, or perform its duties, as scheme operator in the interest of itself or of anyone else if that interest is not identical to the interests of the scheme investors generally.

“(2) The operator of a collective investment scheme must not exercise its powers, or perform its duties, as scheme operator in the interest of itself or of anyone else if that interest is not identical to the interests of the scheme investors generally.

Defence: The defendant did not know, and could not reasonably have known, that the interests of the person in whose interests it was acting were not identical to the interests of the investors in the scheme.

“(3) This section does not apply to an exercise of powers or performance of duties required by the constitution of the scheme or by this Law.

Equal and fair treatment of scheme investors

“260AF. The operator of a collective investment scheme must not knowingly, intentionally or recklessly exercise its powers, or perform its duties and functions, as scheme operator so as to:

- (a) treat the holders of interests of the same class unequally; or
- (b) treat the holders of interests of different classes unfairly.

5. The definition of ‘security interest’ should accord with the definition proposed in *Personal Property Securities* (ALRC 64, 1993).

Improper use of position or information

"260AG. The operator of a collective investment scheme, or a company that is a former operator of a collective investment scheme, must not make improper use:

- (a) of its position as scheme operator; or
- (b) of information acquired because of its position as scheme operator; to gain, directly or indirectly, an advantage for itself or for any other person or to cause detriment to the investors in the scheme.

Valuers not to be related to schemes

"260AH. If a valuer engaged by the operator of a collective investment scheme to value property of the scheme is an associate of the operator, or related to the scheme for the purposes of Part 3.2A, the operator contravenes this section.

Defence: At the time when the contravention occurred:

- (a) the defendant was taking all reasonable measures to prevent contraventions of the relevant kind; and
- (b) none of the executive officers of the defendant had reason to suspect that the contravention would occur.

Fault: Except as provided in the defence, the defendant's state of mind, intentions and beliefs and the degree of care, if any, that the defendant exercised, are excluded.

Schemes not to borrow more than 10% of their value

"260AI. (1) The operator of a collective investment scheme contravenes this section if it borrows an amount such that the total amount outstanding on all its borrowings in relation to the scheme is more than 10% of the value of the property of the scheme.

Defence: At the time when the contravention occurred:

- (a) the defendant was taking all reasonable measures to prevent contraventions of the relevant kind; and
- (b) none of the executive officers of the defendant had reason to suspect that the contravention would occur.

Fault: Except as provided in the defence, the defendant's state of mind, intentions and beliefs and the degree of care, if any, that the defendant exercised, are excluded.

"(2) Subsection (1) does not apply in relation to a scheme the name of which includes the word 'geared' or some other word, approved by the Commission, that indicates that the scheme will or can have liabilities in respect of borrowings.

"(3) For the purposes of this section, an operator borrows an amount if:

- (a) it borrows the amount or otherwise receives financial accommodation or credit in that amount; or

- (b) it enters into an arrangement under which it becomes liable to pay that amount if:
- (i) it contravenes or fails to comply with a provision of the arrangement; or
 - (ii) another person contravenes or fails to comply with an obligation specified in the arrangement; or
 - (iii) an event or state of affairs specified for the purpose in the arrangement occurs;

whether or not the operator gives security, either over its own property or over the scheme property.

“(4) In this section:

‘**arrangement**’ includes contract and understanding, whether written or not and whether enforceable or not.

Operator not to guarantee or indemnify other liabilities

“260AJ. (1) The operator of a collective investment scheme must not enter into an arrangement under which it becomes or may become liable to pay an amount on account of a debt owed or to be owed by another person.

Defence: At the time when the contravention occurred:

- (a) the defendant was taking all reasonable measures to prevent contraventions of the relevant kind; and
- (b) none of the executive officers of the defendant had reason to suspect that the contravention would occur.

Fault: Except as provided in the defence, the defendant’s state of mind, intentions and beliefs and the degree of care, if any, that the defendant exercised, are excluded.

“(2) It does not matter whether the operator’s liability is conditional, who the other person is or whether the operator is entitled to recover the amount of the payment from the other person or from someone else.

“(3) In this section:

‘**arrangement**’ includes contract and understanding, whether written or not and whether enforceable or not.

Expenses and charges not to be paid except in accordance with constitution

“260AK. The operator of a collective investment scheme contravenes this section if property of the scheme is used or applied to pay for fees, charges or expenses incurred in connection with the scheme (including its own fees or charges) contrary to the constitution of the scheme.

Defence: At the time when the contravention occurred:

- (a) the defendant was taking all reasonable measures to prevent contraventions of the relevant kind; and

- (b) none of the executive officers of the defendant had reason to suspect that the contravention would occur.

Fault: Except as provided in the defence, the defendant's state of mind, intentions and beliefs and the degree of care, if any, that the defendant exercised, are excluded.

Payment of investment managers' and investment advisers' fees

"260AL. The operator of a collective investment scheme must not, directly or indirectly, use or apply the property of the scheme to discharge its obligation to pay any fees or charges to persons engaged by it as investment manager or investment adviser, however they may be described

Defence: At the time when the contravention occurred:

- (a) the defendant was taking all reasonable measures to prevent contraventions of the relevant kind; and
 (b) none of the executive officers of the defendant had reason to suspect that the contravention would occur.

Fault: Except as provided in the defence, the defendant's state of mind, intentions and beliefs and the degree of care, if any, that the defendant exercised, are excluded.

Informal dispute resolution arrangements

"260AM. (1) The operator of a collective investment scheme must at all times maintain arrangements under which:

- (a) investors may make enquiries into, or complaints about, the operation or management of the scheme in relation to the investor making the enquiry or complaint; and
 (b) such enquiries and complaints will be properly considered and dealt with within a reasonable period.

"(2) Contravention of this section is not an offence.

Valuation etc. requirements for property based schemes

"260AN. (1) If:

- (a) real property that is property of a property based scheme is disposed of; or
 (b) real property is acquired by the operator of a property based scheme in its capacity as operator, or is acquired by a custodian or trustee for such an operator in that capacity;

the operator contravenes this subsection unless, within 6 months before the transaction is completed, the real property has been valued and a report of the valuation that complies with the requirements, if any, of the regulations, has been given to the scheme operator

Fault: The defendant's state of mind, intentions and beliefs and the degree of care, if any, that the defendant exercised, are excluded.

“(2) Paragraph (1)(b) does not apply in relation to the acquisition of real property if no consideration is given by anyone for the acquisition.

“(3) If, without reasonable excuse, real property that is scheme property of a property based scheme is not valued at least once every twelve months and a report of the valuation that complies with the requirements, if any, of the regulations, given to the scheme operator, the scheme operator contravenes this subsection.

Fault: The defendant’s state of mind, intentions and beliefs and the degree of care, if any, that the defendant exercised, are excluded.

“(4) If the scheme operator of a property based scheme reasonably believes that there has been a significant change in the value of real property that is scheme property, the operator must without delay arrange for the property to be valued and a report of the valuation that complies with the requirements, if any, of the regulations, given to the scheme operator.

“(5) If, without reasonable excuse, more than 2 consecutive valuations of real property that is scheme property of a property based scheme are conducted by the same valuer, the operator contravenes this subsection.

Fault: The defendant’s state of mind, intentions and beliefs and the degree of care, if any, that the defendant exercised, are excluded.

“(6) If a valuation under this section is carried out by a valuer who has:

- (a) less than 5 years continuous experience in valuing real property; or
- (b) a pecuniary interest that could conflict with the proper valuation of the property;

the scheme operator contravenes this subsection.

Defence: The operator, before engaging the valuer in relation to the valuation:

- (c) made reasonable enquiries in relation to the experience and pecuniary interests of the valuer; and
- (d) was not aware of the relevant facts.

Fault: Except as provided by the defence, the defendant’s state of mind, intentions and beliefs and the degree of care, if any, that the defendant exercised, are excluded.

“(7) The operator must give the valuer all the information relevant to the valuation that the operator has or has in its control.

Fault: The defendant’s state of mind, intentions and beliefs and the degree of care, if any, that the defendant exercised, are excluded.

“(8) In this section:

‘**disposal**’, in relation to property, includes the creation of a charge over the property and disposal of an interest in the property.

Court may order operator to comply with scheme constitution or this Law

"260AO. (1) If the operator of a collective investment scheme fails or refuses to comply with a provision of this Law so far as it relates to the scheme or with a provision of the scheme's constitution, the Court may, by order, give directions to the operator concerning compliance with or enforcement of the provision.

"(2) If it appears that a state of affairs will exist because of which the operator of a collective investment scheme will contravene:

- (a) a provision of this Law so far as it relates to the scheme; or
- (b) a provision of the scheme's constitution;

the Court may, by order, give directions to the operator to take specified steps with a view to preventing the contravention.

"(3) The Court must not make an order under this section in relation to a collective investment scheme except on application by:

- (a) the Commission; or
- (b) a director of the operator; or
- (c) an investor in the scheme.

"(4) The power of the Court under this section does not limit its other powers.

Court may order scheme operator to pay compensation for loss caused by contravention

"260AP. (1) The Court may, on application by the Commission or by an investor in the scheme, if it finds that:

- (a) the operator has contravened the constitution of the scheme or a provision of this Law so far as it relates to the scheme; and
- (b) the value of the scheme property has been reduced because of the contravention;

order the operator of a collective investment scheme to pay a specified amount, or do some other thing specified in the order, or both, to redress the reduction.

"(2) The Court may find that a contravention has occurred on the balance of probabilities.

"(3) Amounts paid or obtained in consequence of an order under this section are property of the relevant collective investment scheme.

Remedy in cases of oppression etc. — collective investment schemes

"260AQ. (1) The Court may, on application by an investor in a collective investment scheme or by the Commission, make an order under this section in relation to the scheme if it finds:

- (a) that:
- (i) the affairs of the scheme are being conducted in a way that is; or
 - (ii) an act or omission, or a proposed act or omission, by or on behalf of the scheme operator was or would be; or
 - (iii) a resolution, or a proposed resolution, of a meeting of investors or of a class of investors in the scheme was or would be;
- oppressive or unfairly prejudicial to, or unfairly discriminatory against, 1 or more investors (the ‘oppressed investor or investors’), whether as investor or otherwise; or
- (b) that the scheme is being conducted in a way that is contrary to the interests of the investors as a whole.

“(2) The Court may make such orders as are just. Some examples of the kinds of orders that the Court can make are:

- (a) an order that the scheme be terminated;
- (b) an order for regulating the conduct of affairs of the scheme in the future;
- (c) an order amending the constitution of the scheme;
- (d) an order for the redemption of interests of any of the investors;
- (e) an order requiring the scheme operator to buy specified interests in the scheme from an investor;
- (f) an order directing the scheme operator to institute, prosecute, defend or discontinue specified proceedings;
- (g) an order restraining a person from engaging in specified conduct or from doing a specified act or thing;
- (h) an order requiring a person to do a specified act or thing.

“(3) A person who has notice of an order that applies to the person must not knowingly contravene it.

“(4) The Court must not make an order that the scheme be terminated if terminating it would unfairly prejudice the oppressed investor or investors.

“(5) If an order amends the scheme’s constitution, then, despite anything else in this Law but subject to the order, the constitution is not capable of being further amended so that it is inconsistent with the amendment ordered unless the Court gives leave.

“(6) If:

- (a) 1 or more investors make an application under this section; and
- (b) an office copy of the order disposing of the application made by the Court is not lodged with the Commission within 14 days after it is made;

the applicant, or each of the applicants, is guilty of an offence.

“(7) This section and an order under this section have effect despite anything else in the scheme’s constitution or in this Law.

Effect of other laws

“260AR. (1) The duties imposed on a scheme operator by the preceding provisions of this Division are in addition to the duties that the operator has under any other Australian law.

“(2) This Division applies despite any inconsistent provision in a law of this jurisdiction.

“(3) The preceding provisions of this Part do not prevent the operator of a collective investment scheme from engaging or authorising persons to do acts or things on behalf of the operator.

“Division 2 — Meetings of investors

Effect of Division

“260BA. This Division applies subject to the other provisions of this Law; in particular, subject to Part 3.4A.

Note: Part 3.4A regulates related party transactions.

Operator may call meeting

“260BB. (1) The operator of a collective investment scheme may call a meeting of investors in the scheme by giving written notice of the meeting to the investors.

“(2) The operator must, within 1 day after giving the notice, give a copy of the notice to the Commission.

Investors may requisition investors meeting

“260BC. (1) This section applies if, within a period of 28 days:

- (a) at least 100 investors in a collective investment scheme; or
 - (b) at least 10% by number of investors in a collective investment scheme;
- or
- (c) investors who together hold interests the value of which is at least 10% of the value of all the interests issued in the scheme;

by a notice or notices in writing given to the scheme operator, have requisitioned a meeting of investors to consider 1 or more specified resolutions.

“(2) A notice is to be signed by the investor or investors concerned and dated. It must set out a resolution or resolutions to be considered at the meeting. It may set out or be accompanied by an explanatory statement relating to any of the resolutions.

“(3) Two notices are not to be taken to differ merely because one specifies an extra resolution.

“(4) The operator of the scheme must, within 14 days after a meeting has been requisitioned, call a meeting of investors by giving written notice of the meeting to the investors.

Fault: The defendant’s state of mind, intentions and beliefs and the degree of care, if any, that the defendant exercised, are excluded.

“(5) The meeting must be held not later than 2 months after the requisition is made.

Note: The resolutions that may be considered at a requisitioned meeting include, for example, resolutions to amend the constitution of the scheme (section 183A) and to change operators (sections 183C and 183D).

Commission may requisition meeting

“260BD. (1) This section applies if the Commission, by notice in writing given to the operator of a collective investment scheme, requisitions a meeting of investors to consider 1 or more specified resolutions.

“(2) The notice may include, or be accompanied by, an explanatory statement relating to any of the resolutions.

“(3) The operator of the scheme must, within 14 days after receiving the notice, call a meeting of investors by giving written notice of the meeting to the investors.

Fault: The defendant’s state of mind, intentions and beliefs and the degree of care, if any, that the defendant exercised, are excluded.

“(4) The meeting must be held not later than 2 months after the day on which the Commission’s notice is given to the operator.

Note: The resolutions that may be considered at a requisitioned meeting include, for example, resolutions to amend the constitution of the scheme (section 183A) and to change operators (sections 183C and 183D).

Notice of meeting

“260BE. (1) A notice of a meeting of investors called under this Law must be in writing and set out the resolutions to be considered at the meeting.

“(2) The notice must be given to the investors at least 21 days before the day fixed for the meeting.

“(3) The notice may include, or be accompanied by, an explanatory statement prepared by the operator about the resolutions.

“(4) If the meeting was requisitioned by investors or by the Commission, the notice must also include any explanatory statement in or accompanying the notice of requisition.

Conduct of meetings

“260BF. (1) A meeting of investors in a collective investment scheme is to be presided over by:

- (a) a person appointed in writing for the purpose by the operator of the scheme; or
- (b) if no such person has been appointed — a person appointed for the purpose by a majority of the investors present at the meeting and entitled to vote.

“(2) The meeting is to be conducted in a way that is fair to all the participants in the meeting. Subject to this obligation, the meeting is to be conducted in accordance with the provisions of the constitution of the scheme or, so far as the constitution makes no provision, as directed by the person presiding.

“(3) A member of the Commission, or a staff member authorised in writing by the Commission for the purpose, may be present at a meeting of investors and address the meeting in connection with any business to be dealt with by the meeting.

Operators' etc. interests not counted

“260BG. (1) For all purposes in relation to a meeting of investors in a collective investment scheme called under this Law:

- (a) the value of an interest, and the number of interests issued in the scheme, are to be worked out as at the close of business on the business day immediately before the day of the meeting; and
- (b) the number and value of interests in the scheme to which the operator, or an associate of the operator, is entitled must be disregarded.

“(2) For all purposes in relation to the consideration by an investor's meeting of a question about giving a financial benefit, the number and value of interests in the scheme to which the person or entity to be given the benefit, or an entity associated with such a person or entity, is entitled must also be disregarded.

“(3) For all purposes in relation to the consideration by an investors' meeting of a question whether a particular company should be appointed scheme operator, the number and value of interests in the scheme to which the company, or an associate of the company, is entitled must also be disregarded.

“(4) If:

- (a) although the scheme operator or associate is entitled to an interest in the scheme, it may not give any direction or exercise any judgment or discretion in relation to a vote cast at an investors’ meeting in respect of the interest; and
- (b) in the case of:
 - (i) a question whether giving a financial benefit to a person or entity related to the scheme should be approved — the related party or an associate of the related party may not give any direction or exercise any judgment or discretion in relation to a vote cast on the question at an investors’ meeting in respect of the interest; and
 - (ii) a question whether a particular company should be appointed scheme operator — the company or an associate of the company may not give any direction or exercise any judgment or discretion in relation to a vote cast on the question at an investors’ meeting in respect of the interest;

paragraph (1)(b) and subsections (2) and (3) do not apply in relation to the interest.

Note: For meetings in relation to financial benefits see Part 3.2A. For meetings in relation to removal and replacement of operator see sections 183C, 183EA and 183D.

Voting by proxy

“260BH. (1) Subject to subsection (4), an investor in a collective investment scheme who is entitled to vote on a question at an investors’ meeting may, by writing signed by the investor, appoint an individual as his or her proxy, in respect of such of his or her interests in the scheme as are specified in the instrument, to vote on the question at the meeting.

“(2) If:

- (a) the proxy or the investor gives the scheme operator the instrument appointing the proxy at least 2 days before the meeting; and
 - (b) the instrument is still in force at the time of the meeting;
- the proxy has the same right as the investor to attend and speak at the meeting and to vote on the question.

“(3) A provision of this Law or of the scheme’s constitution that relates to votes cast at the meeting applies to a vote cast by a proxy as if:

- (a) the proxy held, and the investor did not hold, the interests in the scheme in respect of which the proxy was appointed; and
- (b) if the proxy has also been appointed as a proxy for 1 or more other investors — the proxy in his or her capacity as proxy for one of the investors were a different person from the proxy in his or her capacity as proxy for any other of those investors; and

- (c) if, apart from the effect of paragraph (a), the proxy holds interests in the scheme, the proxy in his or her capacity as the investor were a different person from the proxy in his or her capacity as proxy for an investor.

Voting by post

"260BI. (1) For the purposes of an investors' meeting for a collective investment scheme, an investor in the scheme may cast a vote in respect of his or her interest by post.

"(2) The vote must be cast in accordance with the provisions, if any, of the regulations and the provisions of the scheme's constitution, so far as they are not inconsistent with the regulations.

Copies of resolutions to be lodged

"260BJ. (1) The operator of a collective investment scheme must, within one month after passing of a resolution at an investors meeting, lodge a printed copy of the resolution.

"(2) If the meeting is adjourned, the resolution is to be taken to have been passed on the day on which it was in fact passed and not on an earlier day.

Minutes of meetings

"260BK. (1) If, within 1 month after a meeting of investors in a collective investment scheme, the person presiding at the meeting has not signed minutes of the meeting and certified that they are a true record of proceedings at the meeting, the scheme operator contravenes this section.

"(2) The operator of the scheme must then cause the minutes to be entered in books kept for the purpose.

"(3) Minutes so signed and certified, or that purport to be so signed and certified, are admissible as evidence of the proceedings to which they relate.

"(4) If minutes have been so signed, certified and entered, then, unless the contrary is established:

- (a) the meeting is to be taken to have been duly held and convened; and
- (b) the proceedings that are recorded in the minutes as having taken place at the meeting shall be taken to have duly taken place.

"(5) The books containing the minutes must be kept at the principal place of business in Australia of the scheme operator or at such other place in Australia as the Commission approves.

"(6) An investor in the scheme may at any reasonable time inspect the books and take copies of them.

“(7) The scheme operator may impose a reasonable charge for making copies, not exceeding the amount worked out as prescribed.

“Division 3 — Reports to the Commission

Giving information on request to the Commission

“260CA. (1) The Commission may give a written direction to the operator of a collective investment scheme requiring the operator to lodge, in writing and by a specified time, specified information or statements about any matter related to its activities as scheme operator, or about the affairs of the scheme.

“(2) The direction may require that a specified statement be audited by a registered company auditor.

“(3) The Commission may extend the time for compliance, either before or after it has ended.

“(4) The operator must comply with the direction.

Protection for whistleblowers

“260CB. (1) Any person, including:

- (a) a director, employee or other officer of the operator of a collective investment scheme;
- (b) a custodian or trustee of property of a collective investment scheme;
- (c) a director, employee or other officer of a custodian or trustee of property of a collective investment scheme;

is not, in the absence of malice on the person’s part, to be subject to any civil liability, however arising, in relation to:

- (d) any statement made to the Commission about the scheme; or
- (e) the giving of any document, so far as it contains information about the scheme, to the Commission;

whether in response to a direction by the Commission or not.

“(2) A provision of a contract or arrangement, or of the constitution of a collective investment scheme, is void so far as it purports to prevent or restrict a person from making a statement to, or providing information to, the Commission about the scheme.

“(3) In this section:

‘malice’ includes ill will or other improper motive.”.

Part 3.6 — Accounts**Division 1 — Accounting standards**

Application of accounting standards: financial years

55. Section 285 of the Corporations Law is amended by omitting paragraph (3A)(b) and substituting the following paragraph:

- “(b) if the enterprise is a collective investment scheme — by the scheme operator.”.

Part 3.6, Division 2 — Accounting records

Accounting records

56. Section 289 of the Corporations Law is amended by inserting in subparagraph (1)(b)(i) “and, if the company is the operator of a collective investment scheme, of the scheme” after “company”.

Part 3.6, Division 7 — Financial statements and directors' reports

Members and investors entitled to financial statements and reports

57. Section 315 of the Corporations Law is amended:

- (a) by inserting after subsection (3) the following subsection:

“(3A) A company that is the operator of a collective investment scheme must furnish to an investor in the scheme, on written request from the investor, a copy of the latest accounts and consolidated accounts, if any, laid or to be laid before the company at its annual general meeting, together with copies of the other documents required under subsection (2) to be sent to eligible persons. The company may impose a charge for furnishing the copies, which is not to be more than the prescribed amount.”; and

- (b) by omitting “subsection (2) or (3)” from subsection (4) and substituting “subsection (2), (3) or (3A)”.

Part 3.6, Division 11

Heading to Division 11 of Part 3.6

58. The heading to Division 11 of Part 3.6 of the Corporations Law is omitted and the following heading substituted:

“Division 11 — Accounts and reports in relation to collective investment schemes”.

59. Section 323B of the Corporations Law is repealed and the following section substituted:

Introduction

“323B. This Division, except section 323L, sets out the various disclosure requirements that the operator of a collective investment scheme the interests in which are ED securities must comply with.

Note: Section 22G provides that interests in a collective investment scheme are ED securities if a prospectus is required for the scheme: see section 1018.”.

Profit and loss account

60. Section 323C of the Corporations Law is amended:

- (a) by omitting “trustee” and substituting “operator of a collective investment scheme”; and
- (b) by omitting “undertaking” and substituting “scheme”.

Balance-sheet

61. Section 323D of the Corporations Law is amended:

- (a) by omitting “trustee” and substituting “operator of a collective investment scheme”; and
- (b) by omitting “undertaking” and substituting “scheme”.

Accounts to comply with regulations

62. Section 323E of the Corporations Law is amended by omitting “trustee” and substituting “operator”.

Accounts to comply with applicable accounting standards

63. Section 323F of the Corporations Law is amended by omitting “trustee” and substituting “operator”.

Additional information to give a true and fair view

64. Section 323G of the Corporations Law is amended by omitting “trustee” and substituting “operator”.

Audit or review of accounts

65. Section 323H of the Corporations Law is amended:

- (a) by omitting “trustee” from subsections (1) and (3) and substituting “operator”; and
- (b) by inserting after subsection (2) the following subsection:
 - “(2A) The report must also state whether, in the auditor’s opinion, the scheme operator has, during the accounting period, complied, in relation to the scheme, with the conditions to which its scheme operators licence is subject.” and

(c) by adding at the end the following subsection:

"(4) The auditor engaged by a scheme operator to give the report has a right of access at all reasonable times to the accounting records and the other records, including registers, of the scheme operator that relate to the scheme, and is entitled to require from any officer of the scheme operator any information and explanations for the purpose of the audit."

Scheme operator's report for accounting period

66. Section 323J of the Corporations Law is amended:

(a) by omitting "trustee" and substituting "operator"; and
 (b) by omitting from paragraphs (a) and (b) "undertaking" and substituting "scheme"; and

(c) by adding at the end the following subsections:

"(2) Without limiting the generality of subsection (1), if the report is in respect of an accounting period that is a half-year, it must include the following particulars:

- (a) *changes in directors*: whether a person has become, or has ceased to be, a director of the scheme operator during the accounting period to which the report relates;
- (b) *redemption and buy-back obligations*: whether the scheme operator was, during the accounting period to which the report relates, under an obligation to redeem investors' interests out of scheme property or buy investors' interests from them;
- (c) *redemption history*: particulars of redemptions of interests during the accounting period to which the report relates, in particular, whether, and if so, how often subsection 216AG(2) was applied;
- (d) *buy-back history*: particulars of purchases of interests from investors by the operator, and issues of interests to the operator, during the accounting period to which the report relates, in particular, whether, and if so, how often, subsection 216AJ(2) was applied.

"(3) Without limiting the generality of subsection (1), if the report is in respect of an accounting period that is a financial year, it must include the following particulars:

- (a) *borrowings*: if subsection 408AI(2) applies in relation to the scheme:
 - (i) particulars of the limits specified in the constitution of the scheme on the operator's borrowings in relation to the scheme; and
 - (ii) the amount outstanding on all the operator's borrowings in relation to the scheme as at the date of the prospectus;

-
- (b) **valuation:** in relation to valuations of scheme property sought during the previous accounting period:
 - (i) what instructions were given by the operator to the valuer of scheme property; and
 - (ii) what valuation method was used; and
 - (c) **informal dispute resolution:** particulars of the arrangements under section 260AM maintained during the previous accounting period;
 - (d) **total voting interests:** if, at any time during the accounting period to which the report relates:
 - (i) the scheme property was not all liquid property; or
 - (ii) interests in the scheme were listed for quotation on a stock exchange as defined for the purposes of Chapter 6;
the total number of interests on issue at the date of the report other than interests held beneficially by the scheme operator or an associate of the operator;
 - (e) **unit values:** the value of each interest in the scheme or, if the interests in the scheme are in 2 or more classes, the value of each interest in each class, as at the start and at the end of the accounting period;
 - (f) **changes in unit values:** the change in value of the interests or, if the interests in the scheme are in 2 or more classes, the change in value of interests in each class, over the accounting period, expressed as a percentage of the value at the start of the period;
 - (g) **how unit values are worked out:** for interests that are not listed for quotation on a stock exchange as defined for the purposes of Chapter 6 — an explanation of how the value of the interests is worked out;
 - (h) **highest and lowest unit values:** the highest and lowest values of the interests or, if the interests in the scheme are in 2 or more classes, the highest and lowest value of the interests in each class, during the accounting period;
 - (j) **significant scheme assets:** the nature and value of scheme property the value of which, at the end of the accounting period, was more than 5% of the value of all the scheme property;
 - (k) **investment policy and performance:** the investment policy of the operator for the scheme and the performance achieved in relation to the scheme during the accounting period as compared with that policy;
 - (m) **changes in directors:** whether a person has become, or has ceased to be, a director of the scheme operator during the previous financial year;

- (n) *enhanced disclosure notices*: particulars of disclosure notices lodged during the accounting period under:
 - (i) if, during the accounting period, the scheme was a disclosing entity — Part 3.6 or 3.7 as those Parts apply in relation to the scheme; or
 - (ii) Division 2 of Part 7.12A;
 - (o) *MER*: the MERs for the scheme for the financial year to which the report relates and for each of the 4 financial years before that or, if the scheme is less than 5 years old, for each of the financial years during which the scheme has been in existence;
 - (p) *redemption procedure*: the way in which investors may apply to have interests redeemed out of scheme property;
 - (q) *redemption and buy-back obligations*: whether the scheme operator was, during the accounting period to which the report relates, under an obligation to redeem investors' interests out of scheme property or buy investors' interests from them;
 - (r) *redemption history*: particulars of redemptions of interests during the accounting period to which the report relates, in particular, whether, and if so, how often subsection 216AG(2) was applied;
 - (s) *buy-back history*: particulars of:
 - (i) issues of interests to the operator during the financial year to which the report relates; and
 - (ii) purchases of interests from investors by the operator during the financial year to which the report relates and the immediately previous financial year, in particular, whether, and if so, how often, subsection 216AJ(2) was applied.
- “(4) A report must also contain:
- (a) a copy of the certificate under section 323H(2A) that relates to the relevant accounting period; and
 - (b) particulars of such other matters as are prescribed.
- “(5) In this section:
- ‘value’, in relation to:
- (a) an interest in a collective investment scheme, means the value of the interest as worked out in accordance with the scheme's constitution; and
 - (b) scheme property, means the value of the property when last valued by an authorised valuer.

Note: For stock exchange as defined for the purposes of Chapter 6 see section 9; Part 3.6 and 3.7 deal with accounts and audit; Division 2 of Part 7.12A requires disclosure of 'notifiable events' (for the definition see section 1084A); subsection 216AG(2) requires *pro rata* payments of redemption

acceptances in some circumstances; subsection 216AJ(2) requires *pro rata* payments of buy-back acceptances in some circumstances; section 260AM requires scheme operators to have informal dispute resolution procedures; subsection 323H(2A) requires the auditor of a collective investment scheme to certify whether, in his or her opinion, the scheme operator has complied with the conditions of its scheme operators licence.”.

67. The Corporations Law is amended by inserting after section 323J the following section:

Report may omit prejudicial information

“323JA. (1) If, in the opinion of the scheme operator’s directors, it would prejudice the scheme’s interests to include in the report particular information about the future operations of the scheme:

- (a) the information need not be included in the report; and
- (b) if it is not included — the report must state that information of that kind has not been included.”.

Lodging accounts etc.

68. Section 323K of the Corporations Law is amended:

- (a) by omitting “manager”, wherever occurring, and substituting “operator”; and
- (b) by omitting subsection (2) and substituting the following subsection:

“(2) If the accounting period is a financial year, the operator must lodge the copies:

 - (a) within the prescribed period after the end of the financial year; or
 - (b) if the scheme is terminated — within the prescribed period after the termination.”.

69. The Corporations Law is amended by inserting after section 323K the following sections:

Investors entitled to financial statements and reports

“323KA. (1) The operator of a collective investment scheme must, within 7 days after the day on which it is required, because of section 323K, to lodge accounts and reports that relate to an accounting period that is a financial year, give to each investor in the scheme a copy of the accounts and the reports.

“(2) The operator of a collective investment scheme must, within 7 days after receiving a written request from an investor in the scheme, give to the investor a copy of the accounts and the reports last lodged as required by section 323K (whether they relate to an accounting period that is a financial year or a half-year.

Defence: The operator had, within the 3 months before the request was received, given copies of the accounts and reports to the investor.

Contravention of Part

"323KB. If a director of the operator of a collective investment scheme fails to take all reasonable steps to comply with, or to secure compliance with, or has knowingly been the cause of any default under, any of the provisions of this Division, the director contravenes this section.

Note: This section is a civil penalty provision; Part 9.4B provides for civil and criminal consequences of contravening it, or of being involved in a contravention of it.

Inspection of records

"323KC. (1) The Court may, on application made in good faith by an investor in a collective investment scheme and if the Court is satisfied that the inspection will be made for a proper purpose:

- (a) make an order authorising a registered company auditor, or a lawyer, acting on behalf of the investor, at such time as is specified in the order, to inspect, and to make copies of, or take extracts from, specified books of the company that relate to the scheme; and
- (b) make such other order as is just.

"(2) Subsection (1) does not affect any other right that the investor has to inspect those books."

Regulations may make additional provision based on Divisions 2 to 8

70. Section 323L of the Corporations Law is amended:

- (a) by inserting in subsection (1) ", not inconsistent with this Division," after "provision"; and
- (b) by omitting paragraphs (1)(a) and (b) and substituting the following paragraphs:
 - "(a) interests in collective investment schemes that are ED securities; or
 - (b) without limiting paragraph (a), accounting periods of collective investments schemes;"
- (c) by omitting "the holders of prescribed interest," from subsection (2) and substituting "the holders of those interests,".

Part 3.7 — Audit**Division 1 — Appointment and removal of auditors**

Qualifications of auditors

71. Section 324 of the Corporations Law is amended by adding at the end the following subsection:

"(17) A reference in this section to a company is to be read, if the company is the operator of a collective investment scheme, as a reference to the scheme as well as to the company."

72. After section 329 of the Corporations Law the following section is inserted:

Resignation of auditors of collective investment schemes

“329A. (1) An auditor of a collective investment scheme may not resign as auditor unless the Commission has, on application by the auditor, consented to the auditor’s resigning.

“(2) The application is to state the reasons for the resignation.

“(3) At or about the same time as the auditor applies to the Commission for consent, the auditor must give a copy of the application to the scheme operator.

“(4) The Commission must determine the application as soon as practicable after receiving it.

“(5) A statement made by the auditor to the Commission in or in connection with the application:

- (a) is not admissible in any proceeding, civil or criminal, against the auditor unless adduced by or with the consent of the auditor; and
- (b) may not be made the ground of any prosecution, action or suit against the auditor.

“(6) The resignation of the auditor of a collective investment scheme takes effect on the day when the Commission’s consent is given or on a later day specified for the purpose in the application for consent.

“(7) If:

- (a) a member or members of a firm act as auditor for a collective investment scheme; and
- (b) a member retires or withdraws from the firm; and
- (c) because of the retirement or withdrawal, the firm is no longer qualified to act as auditor of the scheme;

the retirement or withdrawal is to be taken, for the purposes of this section, to be the resignation of the auditor of the scheme.”.

Part 3.7, new Division 2A

73. After Division 2 of Part 3.7 of the Corporations Law the following Division is inserted:

“Division 2A — Auditor’s report on collective investment schemes

Collective investment schemes — auditor to report breaches to the Commission

“331G. (1) If an auditor of a collective investment scheme becomes aware that the scheme operator has not complied with section 323K or 323KA, the auditor must immediately give written notice to the Commission and, if financial statements have been prepared and audited or reviewed in accordance with this Law, give a copy of them, and of the auditor’s report on the financial statements, to the Commission.

“(2) If the auditor of a collective investment scheme:

- (a) forms, in the course of performing duties as auditor of the scheme, a suspicion on reasonable grounds that there has been a contravention of this Law in relation to the scheme or in relation to another scheme of which the scheme operator of the first mentioned scheme is operator; and
- (b) is of the opinion that the circumstances are such that the matter cannot adequately be dealt with by comment in the auditor’s report under section 323H or by bringing the matter to the notice of the directors of the scheme operator;

the auditor must forthwith give written notice of the matter to the Commission.

Note: Section 323K provides that the scheme operator must lodge the accounts, auditor’s report and operator’s report with the Commission. Section 323KA requires the operator to send a copy of the accounts and reports to investors.”.

Part 3.7, Division 3 — Certain powers and duties of auditors

Auditor may obtain information and attend company meetings

74. Section 332 of the Corporations Law is amended by inserting after subsection (10) the following subsection:

“(10A) Subsection (11) does not apply if the contravention is in relation to a collective investment scheme of which the company is scheme operator.”.

Board to be informed of non-compliance with accounting standard

75. Section 332A of the Corporations Law is amended by adding at the end the following subsection and note:

“(2) If the auditor of a collective investment scheme:

- (a) is not satisfied that the scheme’s financial statements for an accounting period have been drawn up in accordance with a particular applicable accounting standard; or
- (b) is of the opinion that the scheme’s financial statements for an accounting period have not been drawn up in accordance with a particular applicable accounting standard;

the auditor must, within 7 days after giving the scheme operator the report required by section 323H, send a copy of the report to the Board by post.

Note: Section 323H provides for an auditor’s report on an audit or review of collective investment scheme accounts.”.

Obstruction of auditor

76. Section 333 of the Corporations Law is amended by adding at the end the following subsection:

“(4) In this section:

‘**auditor of a company**’ includes an auditor of a collective investment scheme of which the company is scheme operator.”.

Part 3.8 — Annual return

77. After section 338 of the Corporations Law the following section is inserted:

Annual returns — collective investment schemes

“338A. (1) The operator of a collective investment scheme must, within 2 month after 30 June in each year, lodge a return in the prescribed form that contains:

- (a) a list of the names of all the persons who were, at the end of the year that ended on that 30 June, investors in the scheme; and
- (b) such other particulars about the scheme as are prescribed.

The return must be accompanied by such documents as are prescribed.

“(2) The return must be signed by at least 1 director of the scheme operator.”.

Part 4.2 — Names and registration numbers**Division 1 — Names**

78. After section 367 of the Corporations Law the following section is inserted:

Names available to companies for proposed collective investment schemes

"367A. (1) A name is not available for a company to use for a proposed collective investment scheme if the name:

- (a) is the name of another collective investment scheme or of a body corporate; or
- (b) is reserved by another company; or
- (c) is a name, or a name of a kind, that is declared by the regulations to be unacceptable for registration under this Part.

"(2) A company may lodge an application to reserve a specified name for a proposed collective investment scheme.

"(3) If the name is available, the Commission must reserve it for the company for 2 months after the day on which the application is lodged.

"(4) The Commission is to cancel the reservation if the company, in writing, asks the Commission to do so.

"(5) Reservation of a name for a company does not of itself entitle the company to have a collective investment scheme registered by that name."

Applications under section 367A and sections 373 to 377

79. Section 378 of the Corporations Law is amended by inserting "section 367A or" before "sections 373 to 377".

Cancellation of registration

80. Section 380 of the Corporations Law is amended by adding at the end the following subsection

"(3) If a name is registered in respect of a collective investment scheme and the scheme ceases to be registered under Part 2.2A, the Commission must cancel the reservation of the name in respect of the scheme."

Registration number remains in force until cancelled

81. Section 381 of the Corporations Law is amended by inserting "and reservation" after "registration".

82. After section 382 of the Corporations Law the following section is inserted:

Collective investment schemes — change of name

“382A. (1) The operator of a collective investment scheme may, by notice lodged with the Commission, change the name of the scheme.

“(2) The change of name does not become effective until the Commission approves it.

“(3) A change of name does not:

- (a) affect title to property or the rights or the obligations of the scheme operator or of anyone else; or
- (b) render defective any legal proceeding by or against the scheme operator;

and any such proceeding that could have been continued or begun in relation to the scheme by its former name may be continued or begun under or using the new name.”.

Part 4.2, Division 2 — Exemptions from requirements to publish registration numbers

Transport documents

83. Section 383C of the Corporations Law is amended by omitting the definition of “body” in subsection (12) and substituting the following definition:

“‘body’ means a company, a registrable body or a collective investment scheme;”.

Part 5.1 — Arrangements and reconstructions

Insertion of Division heading in Part 5.1

84. Part 5.1 of the Corporations Law is amended by inserting before section 410 the following heading:

“Division 1 — Corporations”.

Interpretation

85. Section 410 of the Corporations Law is amended by omitting “Part” and substituting “Division”.

Acquisition of shares from shareholders dissenting from scheme or contract approved by majority

86. Section 414 of the Corporations Law is amended by omitting "Part" from subsection (15) and substituting "Division".

Notification of appointment of scheme manager and power of Court to require report

87. Section 415 of the Corporations Law is amended by omitting "Part", wherever occurring, and substituting "Division".

Part 5.1, new Division 2

88. At the end of Part 5.1 of the Corporations Law the following Division is inserted:

"Division 2 — Collective investment schemes

Interpretation

"415B. (1) In this Division:

'**explanatory statement**', in relation to a proposed merger of collective investment schemes, means a statement:

- (a) setting out the effect of the proposed merger; and
- (b) stating:
 - (i) whether the directors of any of the operators of the schemes proposed to be merged have any material interests, whether as directors or members of any of the operators, as investors or creditors in any of the schemes or otherwise; and
 - (ii) if they do, the effect on those interests of the proposed merger in so far as the effect is different from the effect on the like interests of other persons; and
- (c) setting out any other information that may reasonably be expected to be relevant to the investors' making a decision whether or not to approve the proposed merger, being information that is within the knowledge of the directors of the scheme operator and has not previously been disclosed to the investors; and
- (d) setting out such other information, or information about such other matters, as is or are prescribed;

'**merger**', in relation to collective investment schemes, includes a reference to a merger of schemes that have the same operator.

"(2) In this Division, a reference to the directors, in relation to the operator of a collective investment scheme, is a reference to the directors of the operator or to any one or more of them.

When merger takes effect

"415C. A merger of two or more collective investment schemes is binding on the members of the schemes if and only if:

- (a) meetings of investors in each of the schemes, convened in accordance with an order of the Court under section 415D, approve the proposed merger; and
- (b) the proposed merger is approved by the Court.

Court may order meetings

"415D. (1) If a merger between 2 or more collective investment schemes is proposed, the Court may, on application, by order:

- (a) direct the operator or operators of the schemes to convene:
 - (i) a meeting or meetings of the investors; or
 - (ii) if there is more than 1 class of investors — a meeting or meetings of each class of investors;in each of the schemes to consider whether to approve the proposed merger; and
- (b) approve the explanatory statement to be sent to investors with the notice convening the meetings.

"(2) The application may be made in a summary way by the Commission or by the operator of, or an investor in, any of the schemes.

"(3) The Court must not make an order unless:

- (a) 14 days notice of the hearing of the application, or such lesser period as the Court or the Commission permits, has been given to the Commission; and
- (b) the Court is satisfied that the Commission has had a reasonable opportunity:
 - (i) to examine the terms of the proposed merger to which the application relates and the proposed explanatory statement; and
 - (ii) to make submissions to the Court about the matter.

"(4) Without limiting the matters that the Court must take into account in determining whether to make an order for a meeting to be held in another jurisdiction, the matters that the Court must take into account include the addresses of the investors.

Explanatory statement to be lodged

"415E. The explanatory statement must be lodged before being sent to investors.

Holding and voting at meetings

"415F. (1) The meetings are to be held as the Court directs.

“(2) If the Court orders 2 or more meetings of investors or of a class of investors in a collective investment scheme, the meetings are to be taken to be a single meeting. The votes approving the proposed merger cast at each meeting must be added up, and the votes against the proposed merger must be added up, and the question decided accordingly.

When an investors' meeting approves a proposed merger

“415G. A meeting of investors in a scheme is to be taken to have approved a proposed merger only if:

- (a) votes in favour of the proposed merger are cast in respect of interests the total value of which is more than 75% of the total value of all the interests in respect of which votes were cast; and
- (b) if the interests are divided into 2 or more classes — votes in favour of the proposed merger are cast in respect of interests in each of the classes the total value of which is more than 75% of the total value of all the interests in that class in respect of which votes were cast.

Application to Court for approval of merger

“415H. The application for approval of a merger must:

- (a) set out the proposed constitution of each scheme to be created as a result of the merger; and
- (b) identify the company proposed to be the scheme operator for each schemes to be created as a result of the merger; and
- (c) set out the amendments to be made to the constitutions of existing schemes as a result of the merger; and
- (d) a statement signed by each director of each proposed operator consenting to the company's being operator of the relevant scheme.

Court's approval of merger

“415J. (1) On an application to approve a proposed merger of collective investment schemes, the Court may, by order, approve the merger and, if it approves the merger, may make order in relation to any of the following:

- (a) the transfer to the new scheme operator or operators, or to other specified persons, of the property and liabilities of any of the merged schemes;
 - (b) the issue or allotment of interests in the new scheme or schemes for the purposes of giving effect to the merger;
 - (c) the continuation, by or against a new scheme operator, of proceedings pending in relation to any of the merged schemes;
 - (d) investors in any of the merged schemes who dissent from the merger;
- and may make any other order necessary or convenient to be made for giving effect to the merger.

“(2) The Court's approval may be conditional, and the Court may approve a proposed merger subject to changes without the need for a further meeting of investors.

“(3) If the Court approves a merger as a result of which a scheme is to be created, it must appoint a temporary scheme operator for the scheme.

“(4) An order under subsection (1) has effect according to its tenor and despite anything else in this Law or the constitution of a scheme.

“(5) If the order provides for the transfer of property or liabilities, then, by force of this section, that property is transferred to and vests in, and the liabilities are transferred to and become liabilities of, the person specified in the order free, if the order so directs, from any charge that is, under the terms of the merger, to cease to have effect.

“(6) Each scheme operator to which an order relates must, within 14 days after the order is made, lodge an office copy of the order.

“(7) The Court’s approval does not take effect until an office copy of the order of the Court approving the merger is lodged.

“(8) In this section:

‘**liabilities**’ includes duties of any description, including duties that are of a personal character or are incapable under the general law of being assigned or performed vicariously;

‘**property**’ includes rights and powers of any description, including rights and powers that are of a personal character and are incapable under the general law of being assigned or performed vicariously.

Note 1: For temporary scheme operators see section 183E.

Note 2: Transfers of property under these orders are not liable to stamp duty: see section 183G.”.

Part 5.2 — Receivers, and other controllers of property of corporations

89. The Corporations Law is amended by inserting after section 424 the following section:

Controller of property of scheme operator to apply for temporary scheme operator

“424A. If a person is appointed controller of property of, or liquidator or provisional liquidator of, the operator of a collective investment scheme, the operator must, as soon as practicable after the control day or appointment of the liquidator or provisional liquidator, apply to the Court for appointment of a temporary scheme operator for each of the schemes for which the operator holds a scheme operators licence.

Note: For applications for temporary scheme operators see section 183E.”.

new Part 5.3B

90. After Part 5.3A of the Corporations Law the following Part is added:

"PART 5.3B — ADMINISTRATION OF THE AFFAIRS OF A COLLECTIVE INVESTMENT SCHEME WITH A VIEW TO EXECUTING A DEED OF ARRANGEMENT

"Division 1 — Preliminary

Object of Part

"458AA. The object of this Part is to provide for the business, property and affairs of an insolvent collective investment scheme to be administered in a way that:

- (a) maximises the chances of the scheme, or as much as possible of its business, continuing in existence; or
- (b) if it is not possible for the scheme or its business to continue in existence — results in a better return for the scheme's creditors than would result from the immediate termination and winding up of the scheme.

Interpretation

"458AB. In this Part, unless the contrary appears: 'receiver' includes a receiver and manager.

When administration of a scheme begins and ends

"458AC. (1) The administration of a collective investment scheme:

- (a) begins when an administrator of the scheme is appointed; and
- (b) ends on the happening of whichever event of a kind referred to in subsection (2) or (3) happens first after the administration begins.

"(2) The normal outcome of the administration of a scheme is that:

- (a) a deed of arrangement is executed; or
- (b) the scheme's creditors resolve that the administration should end; or
- (c) the scheme is terminated.

"(3) However, the administration of a scheme may also end because:

- (a) the Court orders, under section 458NA or otherwise, that the administration is to end, for example, because the Court is satisfied that the scheme is solvent; or
- (b) the convening period for a meeting of the scheme's creditors ends:
 - (i) without the meeting being convened; and
 - (ii) without an application being made for the Court to extend the period; or

- (c) an application for the Court to extend the convening period for such a meeting is finally determined or otherwise disposed of otherwise than by the Court extending the convening period; or
- (d) the convening period for such a meeting is extended and ends without the meeting being convened; or
- (e) such a meeting ends, whether or not it was earlier adjourned, without a resolution under section 458EC being passed at the meeting; or
- (f) the scheme operator contravenes subsection 458KB(1) by failing to execute a proposed deed of arrangement for the scheme; or
- (g) the Court orders that the scheme be terminated.

“(4) During the administration of a scheme, the scheme is taken to be under administration.

Notes: For appointment of administrator see sections 458BA, 458BB and 458BC; for creditors’ resolution to end administration see paragraph 458EC(b); for creditors’ resolution to terminate scheme see paragraph 458EC(c); for meetings of creditors see section 458EA.

“Division 2 — Appointment of administrator and first meeting of creditors

Operator may appoint administrator if board thinks the scheme is or will become insolvent

“458BA. (1) The operator of a collective investment scheme may, by writing under its common seal, appoint an administrator of the scheme if the board has resolved to the effect that:

- (a) in the opinion of the directors voting for the resolution, the scheme is insolvent or is likely to become insolvent at some future time; and
- (b) an administrator of the scheme should be appointed.

“(2) Subsection (1) does not apply to a scheme that has been terminated.

Temporary scheme operator may appoint administrator

“458BB. (1) A temporary scheme operator of a collective investment scheme may by writing appoint an administrator of the scheme if of the opinion that the scheme is insolvent or is likely to become insolvent at some future time.

“(2) Subject to Division 14, the temporary scheme operator may not appoint himself, herself or itself without leave of the Court.

Chargee may appoint administrator

“458BC. (1) A person who is entitled to enforce a charge on the whole, or substantially the whole, of the property of a collective investment scheme may by writing appoint an administrator of the scheme if the charge has become, and is still, enforceable.

“(2) Subsection (1) does not apply to a scheme that has been terminated.

Scheme already under administration

"458BD. An administrator cannot be appointed under section 458BA, 458BB or 458BC to a scheme that is already under administration.

Purpose and timing of first meeting of creditors

"458BE. (1) The administrator of a scheme under administration must convene a meeting of the scheme's creditors to determine whether to appoint a committee of creditors and, if it is resolved to appoint such a committee, who its members are to be.

"(2) The meeting must be held not later than 5 business days after the administration begins.

"(3) The administrator must convene the meeting by:

- (a) giving written notice of the meeting to as many of the scheme's creditors as reasonably practicable; and
- (b) causing notice of the meeting to be published:
 - (i) in a national newspaper; or
 - (ii) in a daily newspaper that circulates generally in each jurisdiction in which the scheme operator has its registered office or carries on the business of the scheme;

at least 2 business days before the day fixed for the meeting.

"(4) At the meeting, the scheme's creditors may also, by resolution, remove the administrator from office and appoint someone else as administrator of the scheme.

Functions of committee of creditors

"458BF. (1) The functions of a committee of creditors of a scheme under administration are:

- (a) to give advice to the administrator about matters relating to the administration; and
- (b) to receive and consider reports by the administrator.

"(2) As and when a committee reasonably directs, the administrator must report to the committee about matters relating to the administration.

"(3) A committee cannot give any other direction to the administrator.

Membership of committee

"458BG. A person can be a member of a committee of creditors of a scheme under administration if, and only if, he or she is:

- (a) a creditor of the scheme; or
- (b) the attorney of such a creditor because of a general power of attorney; or
- (c) authorised in writing by such a creditor to be such a member.

“Division 3 — Administrator assumes control of scheme’s affairs

Role of administrator

“458CA. While a scheme is under administration, the administrator has, except as provided by this Part, all the powers, functions, duties and liabilities of the scheme operator.

Administrator acts as scheme operator’s agent

“458CB. When performing a function, or exercising a power, as administrator of a scheme under administration, the administrator is to be taken to be acting as the agent of the scheme operator.

Powers of other officers suspended

“458CC. (1) While a collective investment scheme is under administration, a person other than the administrator must not, without the administrator’s written approval:

- (a) perform or exercise a function or power as scheme operator; or
- (b) perform or exercise, in connection with the scheme, a function or power as an officer of the scheme operator.

“(2) If, while a collective investment scheme is under administration, an officer of the scheme operator purports, without the administrator’s written approval, to perform or exercise, in connection with the scheme, a function or power as an officer of the scheme operator, the officer contravenes this subsection.

Defence: The defendant did not know and could not reasonably have known that the scheme was under administration.

“(4) Subsections (1) and (3) do not remove an officer of a company from his or her office.

“(5) Section 458CD does not limit the generality of subsection (1) or (3) of this section.

“(6) In this section:

‘officer’, in relation to a scheme operator, includes:

- (a) a receiver of property of the scheme who is not also a manager; and
- (b) a receiver and manager appointed by a court; and
- (c) a liquidator or provisional liquidator appointed by the Court before the administration began;

but a person is not an officer of a company for the purposes of this section merely because he or she is an employee of the company.

Only administrator can deal with scheme property

“458CD. (1) This section applies if:

- (a) the operator of a collective investment scheme under administration purports to enter into; or
 - (b) a person purports to enter into, on behalf of the operator of a collective investment scheme under administration;
- a transaction or dealing affecting property of the scheme.

“(2) The transaction or dealing is void unless:

- (a) the administrator entered into it on the operator's behalf; or
- (b) the administrator consented to it in writing before it was entered into; or
- (c) it was entered into under an order of the Court.

“(3) Subsection (2) does not apply to a payment made:

- (a) by an Australian bank out of an account kept by the scheme operator in relation to the scheme with the bank; and
- (b) in good faith and in the ordinary course of the bank's banking business; and
- (c) after the administration began and on or before the day on which:
 - (i) the administrator gives to the bank, under subsection 458RA(3) or otherwise, written notice of the appointment that began the administration; or
 - (ii) the administrator complies with paragraph 458RA(1)(b) in relation to that appointment;
 whichever happens first.

“(4) Subsection (2) has effect subject to an order that the Court makes after the purported transaction or dealing.

“(5) If, because of subsection (2), the transaction or dealing is void, or would be void apart from subsection (4), an officer of the scheme operator who was in any way, by act or omission, directly or indirectly, knowingly concerned in, or party to, the transaction or dealing contravenes this subsection.

Defence: The defendant did not know and could not reasonably have known that the scheme was under administration.

Fault: Except as provided in the defence, the defendant's state of mind, intentions and beliefs and the degree of care, if any, that the defendant exercised, are excluded.

Order for compensation if officer involved in void transaction

“458CE. (1) If:

- (a) a court finds a person guilty of an offence constituted by a contravention of subsection 458CD(5), including such an offence that is taken to have been committed because of section 5 of the *Crimes Act 1914* or that section as it applies as a law of this jurisdiction; and

- (b) the court is satisfied that the scheme operator or another person has suffered loss or damage because of the act or omission constituting the offence;

the court may, whether or not it imposes a penalty, order the first-mentioned person to pay compensation to the scheme operator or other person, as the case may be, of such amount as the order specifies.

“(2) An order under subsection (1) may be enforced as if it were a judgment of the court.

“(3) The power of a court under section 1318 to relieve a person from liability as mentioned in that section extends to relieving a person from liability to be ordered under this section to pay compensation.

Note: Section 73A defines when a court is taken to find a person guilty of an offence.

Effect of administration on scheme investors

“458CF. If a collective investment scheme is under administration:

- (a) a transfer of interests in the scheme otherwise than under a will or other testamentary instrument; and
(b) an alteration in the status of an investor in the scheme as investor;
is void except so far as the Court otherwise orders.

“Division 4 — Administrator investigates scheme's affairs

Administrator to investigate affairs and consider possible courses of action

“458DA. As soon as practicable after the administration of a scheme begins, the administrator must:

- (a) investigate the scheme's business, property, affairs and financial circumstances; and
(b) form an opinion about each of the following matters:
(i) whether it would be in the interests of the scheme's creditors for the scheme operator to execute a deed of arrangement for the scheme;
(ii) whether it would be in the creditors' interests for the administration to end;
(iii) whether it would be in the creditors' interests for the scheme to be terminated.

Directors to help administrator

“458DB. (1) As soon as practicable after the administration of a scheme begins, each director of the scheme operator must:

- (a) deliver to the administrator all books in the director's possession that relate to the scheme, other than books that the director is entitled, as against the scheme operator and the administrator, to keep; and

- (b) if the director knows where other books relating to the scheme are — tell the administrator where those books are.

“(2) Within 7 days after the administration of a scheme begins or such longer period as the administrator allows, the directors of the scheme operator must give to the administrator a statement about the scheme’s affairs.

“(3) A director of the operator of a scheme under administration must:
(a) attend on the administrator at such times; and
(b) give the administrator such information about the scheme’s affairs; as the administrator reasonably requires.

“(4) A person must not, without reasonable excuse, fail or refuse to comply with subsection (1), (2) or (3).

Administrator’s rights to operator’s books about the scheme

“458DC. (1) A person is not entitled, as against the administrator of a collective investment scheme under administration:

- (a) to keep possession of books of the scheme operator that relate to the scheme; or
(b) to claim or enforce a lien on such books; but such a lien is not otherwise prejudiced.

“(2) Paragraph (1)(a) does not apply in relation to books of which a secured creditor of the scheme is entitled to possession otherwise than because of a lien, but the administrator is entitled to inspect, and make copies of, such books at any reasonable time.

“(3) The administrator of a scheme under administration may give to a person a written notice requiring the person to deliver to the administrator, as specified in the notice, books so specified that are in the person’s possession.

“(4) A notice under subsection (3) must specify a period of at least 3 business days as the period within which the books must be produced.

“(5) A person must comply with a notice under subsection (3) given to the person except so far as the person is entitled, as against the scheme operator and the administrator, to keep possession of the books.

“(6) A reference in this section to books that relate to a collective investment scheme includes a reference to books that relate to a collective investment scheme even if they also relate to something else.

Reports by administrator

"458DD. (1) If it appears to the administrator of a scheme under administration that any of the following persons:

- (a) the scheme operator;
- (b) a person who is or has been an officer or member of the scheme operator;
- (c) a person who is or has been a custodian of scheme property under an arrangement with the scheme operator;
- (d) a person who has taken part in:
 - (i) the formation, promotion, management or winding up of the scheme operator; or
 - (ii) the establishment or registration of the scheme or in matters concerned with the scheme operator's licence in relation to the scheme;

may have:

- (e) committed an offence in relation to the scheme; or
- (f) misapplied or kept, or become liable or accountable for, property of the scheme (in Australia or elsewhere); or
- (g) been guilty of negligence, default, breach of duty or breach of trust in relation to the scheme;

the administrator must:

- (h) lodge a report about the matter as soon as practicable; and
- (j) give the Commission such information, and such access to and facilities for inspecting and taking copies of documents, as the Commission requires.

"(2) The administrator may also lodge further reports specifying any other matter that, in his or her opinion, it is desirable to bring to the Commission's notice.

"(3) Failure to comply with subsection (1) is not an offence, but if it appears to the Court, on application by an interested person or of its own motion, that the administrator of a scheme has failed to comply with subsection (1), the Court may, by order, direct the administrator to lodge the report.

"Division 5 — Meeting of creditors decides scheme's fate

Administrator to convene meeting and inform creditors

"458EA. (1) The administrator of a collective investment scheme under administration must, within the convening period as fixed by subsection (5) or extended under subsection (6), convene a meeting of the scheme's creditors.

"(2) The meeting must be held not later than 5 business days after the end of the convening period.

“(3) The administrator must convene the meeting by:

- (a) giving written notice of the meeting to as many of the scheme’s creditors as reasonably practicable; and
- (b) causing notice of the meeting to be published:
 - (i) in a national newspaper; or
 - (ii) in a daily newspaper that circulates generally in each jurisdiction in which the scheme operator has its registered office or carries on the business of the scheme;

at least 5 business days before the day fixed for the meeting.

“(4) The notice given to a creditor under paragraph (3)(a) must be accompanied by a copy of:

- (a) a report by the administrator about the scheme’s business, property, affairs and financial circumstances; and
- (b) a statement setting out the administrator’s opinion about each of the following matters:
 - (i) whether it would be in the creditors’ interests for the scheme operator to execute a deed of arrangement for the scheme;
 - (ii) whether it would be in the creditors’ interests for the administration to end;
 - (iii) whether it would be in the creditors’ interests for the scheme to be terminated; and

his or her reasons for those opinions; and

- (c) if a deed of arrangement is proposed — a statement setting out details of the proposed deed.

“(5) The convening period is:

- (a) if the administration begins on a day that is in December, or is less than 28 days before Good Friday — the period of 28 days beginning on that day; or
- (b) otherwise — the period of 21 days beginning on the day when the administration begins.

“(6) The Court may, on application made before the end of the convening period, extend the convening period, and may do so more than once.

Conduct of meeting

“458EB. (1) At a meeting convened under section 458EA, the administrator is to preside.

“(2) The meeting may be adjourned from time to time, but cannot be adjourned to a day that is more than 60 days after the first day on which the meeting was held, even if no resolution under section 458EC has been passed at the meeting.

What creditors may decide

"458EC. (1) At a meeting convened under section 458EA, the creditors may resolve:

- (a) that the scheme operator execute a deed of arrangement specified in the resolution in relation to the scheme, even if the deed differs from the proposed deed, if any, details of which accompanied the notice of meeting; or
- (b) that the administration should end; or
- (c) that the scheme be terminated.

"(2) If the creditors resolve that the scheme be terminated, it is thereupon terminated.

"Division 6 — Protection of scheme property during administration**Terminating and winding up scheme**

"458FA. (1) A scheme under administration cannot be terminated by action of the investors, but if section 458MA applies, an investors' meeting is to be taken to have resolved to terminate the scheme.

"(2) The Court is to adjourn the hearing of an application for an order to terminate a scheme if the scheme is under administration and the Court is satisfied that it is in the interests of the scheme's creditors for the scheme to continue under administration rather than be terminated.

"(3) The Court is not to appoint a liquidator of a scheme if the scheme is under administration and the Court is satisfied that it is in the interests of the scheme's creditors for the scheme to continue under administration rather than have a liquidator appointed.

Charges unenforceable

"458FB. During the administration of a scheme, a person cannot enforce a charge on property of the scheme, except:

- (a) with the administrator's written consent; or
- (b) with the leave of the Court.

Owner or lessor cannot recover property used by scheme

"458FC. During the administration of a scheme, the owner or lessor of property that is used or occupied by, or is in the possession of, the scheme operator that is scheme property cannot take possession of the property or otherwise recover it, except:

- (a) with the administrator's written consent; or
- (b) with the leave of the Court.

Stay of proceedings

"458FD. (1) During the administration of a scheme, a proceeding in a court against the scheme operator in relation to the scheme, or in relation to any of the scheme property, cannot be begun or proceeded with except:

- (a) with the administrator's written consent; or
- (b) with the leave of the Court and in accordance with such terms, if any, as the Court imposes.

"(2) Subsection (1) does not apply to:

- (a) a criminal proceeding; or
- (b) a prescribed proceeding.

Administrator not liable in damages for refusing consent

"458FE. The administrator of a collective investment scheme is not liable to an action or other proceeding for damages in respect of a refusal to give an approval or consent for the purposes of this Division.

Suspension of enforcement process

"458FF. During the administration of a scheme, no enforcement process in relation to property of the scheme can be begun or proceeded with except with the leave of the Court and in accordance with such terms, if any, as the Court imposes.

Duties of court officer in relation to scheme property

"458FG. (1) This section applies if an officer of a court receives written notice that a collective investment scheme is under administration.

"(2) During the administration, an officer of the court cannot:

- (a) take action to sell property of the scheme under a process of execution; or
- (b) pay to a person other than the administrator:
 - (i) proceeds of selling property of the scheme under a process of execution; or
 - (ii) money of the scheme seized at any time under a process of execution; or
 - (iii) money paid at any time to avoid seizure or sale of property of the scheme under a process of execution;whenever the property was sold or the money seized or paid; or
- (c) take action in relation to the attachment of a debt due to the scheme operator in relation to the scheme; or
- (d) pay to a person other than the administrator money received because of the attachment of such a debt.

"(3) The court officer must deliver to the administrator any property of the scheme that is in the court officer's possession under a process of execution, whenever the process was begun.

“(4) The court officer must pay to the administrator all proceeds or money of a kind referred to in paragraph (2)(b) or (d) that:

- (a) are in the court officer’s possession; or
- (b) have been paid into the court and have not since been paid out.

“(5) The costs of the execution or attachment are a first charge on property delivered under subsection (3) or proceeds or money paid under subsection (4).

“(6) In order to give effect to a charge under subsection (5) on proceeds or money, the court officer may keep, on behalf of the person entitled to the charge, so much of the proceeds or money as the court officer thinks necessary.

“(7) The Court may, if it is satisfied that it is appropriate to do so, permit the court officer to take action, or to make a payment, that subsection (2) would otherwise prevent.

“(8) A person who buys property in good faith under a sale under a process of execution gets a good title to the property as against the scheme operator and the administrator, despite anything else in this section.

“(9) In this section:
‘court officer’ means”:

- (a) a sheriff; or
- (b) the registrar or other appropriate officer of a court.

***Lis pendens* taken to exist**

“458FH. (1) This section has effect only for the purposes of a law about the effect of a *lis pendens* on purchasers or mortgagees.

“(2) During the administration of a scheme, an application to terminate the scheme is to be taken to be pending, and that application is to be taken to constitute a *lis pendens*.

Administration not to trigger liability of director or relative under guarantee of scheme’s liability

“458FI. (1) During the administration of a scheme:

- (a) a guarantee of a liability of the scheme operator in relation to the scheme cannot be enforced against a natural person who is:
 - (i) a director of the scheme operator; or
 - (ii) a spouse, de facto spouse or relative of such a director; and
- (b) without limiting paragraph (a), a proceeding in relation to such a guarantee cannot be begun against such a person except with the leave of the Court and in accordance with such terms, if any, as the Court imposes.

“(2) While subsection (1) prevents a person (**‘the creditor’**) from:

- (a) enforcing as against another person (**‘the guarantor’**) a guarantee of a liability of a scheme; or
- (b) beginning a proceeding against another person (**‘the guarantor’**) in relation to such a guarantee;

section 1323 applies in relation to the creditor and the guarantor as if:

- (c) a civil proceeding against the guarantor had begun under this Law; and
- (d) the creditor were the only person of a kind referred to in that section as an aggrieved person.

“(3) The effect that section 1323 has because of a particular application of subsection (2) is additional to, and does not prejudice, the effect that the section otherwise has.

“(4) In this section:

‘guarantee’, in relation to a liability of a scheme, includes a relevant agreement, as defined in section 9, because of which a person other than the scheme operator has incurred, or may incur, whether jointly with the scheme operator or otherwise, a liability in respect of the liability of the scheme;

‘liability’ means a debt, liability or other obligation.

Note: Under section 1323 the Court can make a range of orders to ensure that a person can meet the person's liabilities.

“Division 7 — Rights of chargee, owner or lessor

Where chargee acts before or during decision period

“458GA. (1) This section applies if:

- (a) the whole, or substantially the whole, of the property of a scheme under administration is subject to a charge; and
- (b) before or during the decision period, the chargee enforced the charge in relation to all property of the scheme subject to the charge, whether or not the charge was enforced in the same way in relation to all that property.

“(2) This section also applies if:

- (a) a scheme is under administration; and
- (b) the same person is the chargee in relation to each of 2 or more charges on property of the scheme; and
- (c) the property of the scheme (the **‘charged property’**) subject to the respective charges together constitutes the whole, or substantially the whole, of the scheme's property; and
- (d) before or during the decision period, the chargee enforced the charges in relation to all the charged property:
 - (i) whether or not the charges were enforced in the same way in relation to all the charged property; and

- (ii) whether or not any of the charges was enforced in the same way in relation to all the property of the scheme subject to that charge; and
- (iii) in so far as the charges were enforced in relation to property of the scheme in a way referred to in paragraph (a), (b) or (d) of the definition of 'enforce' in section 9 — whether or not the same person was appointed in respect of all of the last-mentioned property.

“(3) Section 458CC and 458FB, and an order under subsection 458KF(2), do not prevent any of the following from enforcing the charge, or any of the charges:

- (a) the chargee;
- (b) a receiver or person appointed as mentioned in paragraph (a), (b) or (d) of the definition of 'enforce' in section 9 as that definition applies in relation to the charge, or any of the charges, even if appointed after the end of the decision period.

“(4) Section 458CD does not apply in relation to a transaction or dealing that affects property of the scheme and is entered into by:

- (a) the chargee; or
- (b) a receiver or person of a kind referred to in paragraph (3)(b) of this section;

in the performance or exercise of a function or power as chargee, or as such a receiver or person, as the case may be.

Where enforcement of charge begins before administration

“458GB. (1) This section applies if, before the beginning of the administration of a scheme, a chargee, receiver or other person:

- (a) entered into possession, or assumed control, of property of the scheme; or
- (b) entered into an agreement to sell such property; or
- (c) made arrangements for such property to be offered for sale by public auction; or
- (d) publicly invited tenders for the purchase of such property; or
- (e) exercised any other power in relation to such property;

for the purpose of enforcing a charge on that property.

“(2) Sections 458CC and 458FB do not prevent the chargee, receiver or other person from enforcing the charge in relation to that property.

“(3) Section 458CD does not apply in relation to a transaction or dealing that affects that property and is entered into:

- (a) in the exercise of a power of the chargee as chargee; or
- (b) in the performance or exercise of a function or power of the receiver or other person;

as the case may be.

Charge on perishable property

"458GC. (1) This section applies if perishable property of a scheme under administration is subject to a charge.

"(2) Sections 458CC and 458FB do not prevent:

- (a) the chargee; or
- (b) a receiver or person appointed at any time as mentioned in paragraph (a), (b) or (d) of the definition of 'enforce' in section 9; from enforcing the charge so far as it is a charge on perishable property.

"(3) Section 458CD does not apply in relation to a transaction or dealing that affects perishable property of the scheme and is entered into by:

- (a) the chargee; or
- (b) a receiver or person appointed at any time as mentioned in paragraph (a), (b) or (d) of the definition of 'enforce' in section 9; in the performance or exercise of a function or power as chargee, or as such a receiver or person, as the case may be.

Court may limit powers of chargee, etc. in relation to charged property

"458GD. (1) This section applies if:

- (a) for the purpose of enforcing a charge on property of a scheme, the chargee, or a receiver or other person, does an act of a kind referred to in a paragraph of subsection 458GB(1); and
- (b) the scheme is under administration when the chargee, receiver or other person does the act, or the scheme later begins to be under administration;

but does not apply if section 458GA applies.

"(2) On application by the administrator, the Court may order the chargee, receiver or other person not to perform specified functions, or exercise specified powers, except as permitted by the order.

"(3) The Court may only make an order if satisfied that what the administrator proposes to do during the administration will adequately protect the chargee's interests.

"(4) An order may only be made, and only has effect, during the administration.

"(5) An order has effect despite sections 458GB and 458GC.

Giving a notice under a charge

"458GE. Sections 458CC and 458FB do not prevent a person from giving a notice under the provisions of a charge.

Where recovery of property begins before administration

"458GF. (1) This section applies if, before the beginning of the administration of a scheme, a receiver or other person:

- (a) entered into possession, or assumed control, of property used or occupied by, or in the possession of, the scheme operator in relation to the scheme; or
- (b) exercised any other power in relation to such property; to enforce a right of the owner or lessor of the property to take possession of the property or otherwise recover it.

"(2) Sections 458CC and 458FC do not prevent the receiver or other person from performing a function, or exercising a power, in relation to the property.

"(3) Section 458CD does not apply in relation to a transaction or dealing that affects the property and is entered into in the performance or exercise of a function or power of the receiver or other person.

Recovering perishable property

"458GG. (1) Sections 458CC and 458FC do not prevent a person from taking possession of, or otherwise recovering, perishable property.

"(2) Section 458CD does not apply in relation to a transaction or dealing that affects perishable property and is entered into for the purpose of enforcing a right of the owner or lessor of the property to take possession of the property or otherwise recover it.

Court may limit powers of receiver etc. in relation to property used by scheme

"458GH. (1) This section applies if:

- (a) for the purpose of enforcing a right of the owner or lessor of property of a collective investment scheme to take possession of the property or otherwise recover it, a person:
 - (i) enters into possession, or assumes control, of the property; or
 - (ii) exercises any other power in relation to the property; and
- (b) the scheme is under administration when the person does so, or the scheme later begins to be under administration.

"(2) On application by the administrator, the Court may order the person not to perform specified functions, or exercise specified powers, in relation to the property, except as permitted by the order.

"(3) The Court may only make an order if satisfied that what the administrator proposes to do during the administration will adequately protect the interests of the owner or lessor.

"(4) An order may only be made, and only has effect, during the administration.

"(5) An order has effect despite sections 458GF and 458GG.

Giving a notice under an agreement about property

"458GI. Sections 458CC and 458FC do not prevent a person from giving a notice to a scheme operator under an agreement relating to property of the scheme.

Effect of Division

"458GJ. Except as expressly provided, nothing in this Division limits the generality of anything else in it.

"Division 8 — Powers of administrator

Additional powers of administrator

"458HA. Without limiting section 458CA, the administrator of a scheme under administration has power to do any of the following:

- (a) remove from office a director of the scheme operator;
- (b) appoint a person as such a director, whether to fill a vacancy or not;
- (c) execute a document, bring or defend proceedings or do anything else, in the scheme operator's name and on its behalf in relation to the scheme;
- (d) whatever else is necessary for the purposes of this Part in relation to the scheme.

Dealing with property subject to a floating charge that has crystallised

"458HB. (1) This section applies if a charge on property of a scheme under administration was a floating charge when created but has since become a fixed or specific charge.

"(2) Subject to sections 458HC and 458HD, the administrator may deal with any of that property as if the charge were still a floating charge.

When administrator may dispose of encumbered property

"458HC. (1) The administrator of a scheme under administration or of a deed of arrangement must not dispose of:

- (a) property of the scheme that is subject to a charge; or
- (b) property that is used or occupied by, or is in the possession of, the scheme operator but of which someone else is the owner or lessor.

“(2) Subsection (1) does not prevent a disposal:

- (a) in the ordinary course of the scheme’s business; or
- (b) with the written consent of the chargee, owner or lessor, as the case may be; or
- (c) with the leave of the Court.

“(3) The Court may only give leave under paragraph (2)(c) if satisfied that arrangements have been made to protect adequately the interests of the chargee, owner or lessor, as the case may be.

Administrator’s powers subject to powers of chargee, receiver etc.

“458HD. (1) If section 458GA applies, the administrator’s functions and powers are subject to the functions and powers of a person as:

- (a) the chargee; or
- (b) a receiver or person of a kind referred to in paragraph 458GA(3)(b), even if appointed after the decision period.

“(2) If section 458GC applies, then, so far as concerns perishable property of the scheme, the administrator’s functions and powers are subject to the functions and powers of a person as:

- (a) the chargee; or
- (b) a receiver or person appointed at any time as mentioned in paragraph (a), (b) or (d) of the definition of ‘enforce’ in section 9.

“(3) If section 458GB, 458GF or 458GG applies, then, so far as concerns the property referred to in subsection 458GB(1), 458GF(1) or 458GG(1), the administrator’s functions and powers are subject to the functions and powers of the chargee, receiver or other person.

Protection of persons dealing with administrator

“458HE. (1) Sections 164 and 166 apply in relation to a collective investment scheme under administration as if:

- (a) a reference in those sections to the company, or to an officer of the company, were a reference to the administrator; and
- (b) subsection 164(3) were omitted and the following subsection substituted:

‘(3) The assumptions that a person is, because of subsection (1) or (2), entitled to make in relation to dealings with the administrator of a collective investment scheme or of a deed of arrangement for a collective investment scheme, or in relation to an acquisition or purported acquisition from the administrator of title to property of the scheme, are:

- (a) an assumption that the administrator is acting within his or her functions and powers as administrator; and

- (b) in particular, an assumption that the administrator is complying with the Corporations Law so far as it relates to the scheme.; and
- (c) the references in section 166 to 'person referred to in paragraph 164(3)(b), (c) or (e)' and to 'officer, agent or employee of the company referred to in paragraph 164(3)(d) or (f)' were references to the administrator of the scheme.

"(2) The effect that sections 164 and 166 have because of subsection (1) of this section is additional to, and does not prejudice, the effect that they otherwise have in relation to a scheme under administration.

"Division 9 — Administrator's liability and indemnity for debts of administration

"Subdivision A — Liability

General debts

"458JA. (1) The administrator of a scheme under administration is liable for debts he or she incurs in the performance or exercise, or purported performance or exercise, of any of his or her functions and powers as administrator for:

- (a) services rendered; or
- (b) goods bought; or
- (c) property hired, leased, used or occupied.

"(2) Subsection (1) has effect despite any agreement to the contrary, but without prejudice to the administrator's rights against the scheme operator or anyone else.

Payments for property used or occupied by, or in the possession of, the scheme

"458JB. (1) This section applies if, under an agreement made before the administration of a scheme began, the scheme operator continues to use or occupy, or to be in possession of, for the purposes of the scheme, property of which someone else is the owner or lessor.

"(2) Subject to this section, the administrator is liable for so much of the rent or other amounts payable by the scheme operator under the agreement as is attributable to a period:

- (a) that begins more than 7 days after the administration began; and
- (b) throughout the whole of which:
 - (i) the scheme operator continues to use or occupy, or to be in possession of, the property in connection with the scheme; and
 - (ii) the administration continues.

“(3) Within 7 days after the beginning of the administration, the administrator may give to the owner or lessor a notice that specifies the property and states that the scheme operator does not propose to exercise rights in relation to the property.

“(4) Despite subsection (2), the administrator is not liable for so much of the rent or other amounts payable by the scheme operator under the agreement as is attributable to a period during which a notice under subsection (3) is in force, but such a notice does not affect a liability of the scheme operator.

“(5) A notice under subsection (3) ceases to have effect if:

- (a) the administrator revokes it by writing given to the owner or lessor; or
- (b) the scheme operator exercises, or purports to exercise, a right in relation to the property.

“(6) For the purposes of subsection (5), the scheme operator does not exercise, or purport to exercise, a right in relation to the property merely because it continues to occupy, or to be in possession of, the property, unless it:

- (a) also uses the property; or
- (b) asserts a right, as against the owner or lessor, so to continue.

“(7) Subsection (2) does not make the administrator liable for rent or other amounts payable by the scheme operator attributable to the period that starts when:

- (a) a receiver of the property is appointed; or
- (b) a chargee appoints an agent, under the provisions of a charge on the property, to enter into possession, or to assume control, of the property; or
- (c) a chargee takes possession, or assumes control, of the property under the provisions of a charge on the property;

but this subsection does not affect a liability of the scheme operator.

“(8) Subsection (2) does not apply in so far as the Court, by order, excuses the administrator from liability, but an order does not affect a liability of the scheme operator.

“(9) The administrator is not taken because of subsection (2):

- (a) to have adopted the agreement; or
- (b) to be liable under the agreement otherwise than as mentioned in subsection (2).

Administrator not otherwise liable for scheme’s debts

“458JC. The administrator of a scheme under administration is not liable for the scheme’s liabilities except under section 458JA or 458JB.

*"Subdivision B — Indemnity***Right of indemnity**

"458JD. The administrator of a scheme under administration is entitled to be indemnified out of the scheme property for:

- (a) debts for which the administrator is liable under section 458JA or 458JB; and
- (b) his or her remuneration as fixed under section 458QE.

Right of indemnity has priority over other debts

"458JE. (1) A right of indemnity under section 458JD has priority over the scheme operator's right of indemnity out of the scheme property for payment of debts incurred by the operator in connection with the scheme, being:

- (a) unsecured debts; and
- (b) subject to subsections (2) and (3), debts secured by a floating charge.

"(2) If:

- (a) debts of a scheme operator incurred in relation to a scheme that is under administration are secured by a floating charge on property of the scheme; and
- (b) before the beginning of the administration, the chargee:
 - (i) appointed a receiver of property of the scheme under a power contained in an instrument relating to the charge; or
 - (ii) obtained an order for the appointment of a receiver of property of the scheme for the purpose of enforcing the charge; or
 - (iii) entered into possession, or assumed control, of property of the scheme for that purpose; or
 - (iv) appointed a person so to enter into possession or assume control, whether as agent for the chargee or for the scheme operator; and
- (c) the receiver or person is still in office, or the chargee is still in possession or control of the property;

the right of indemnity of the administrator under section 458JD does not have priority over those debts, except so far as the chargee agrees.

"(3) If:

- (a) debts of a scheme operator incurred in relation to a scheme that is under administration are secured by a floating charge on property of the scheme; and
- (b) during the administration, the chargee, consistently with this Part:
 - (i) appoints a receiver of property of the scheme under a power contained in an instrument relating to the charge; or
 - (ii) obtains an order for the appointment of a receiver of property of the scheme for the purpose of enforcing the charge; or

- (iii) enters into possession, or assumes control, of property of the scheme for that purpose; or
- (iv) appoints a person so to enter into possession or assume control, whether as agent for the chargee or for the scheme operator;

the right of indemnity of the administrator under section 458JD has priority over those debts only in so far as it is a right of indemnity for debts incurred, or remuneration accruing, before written notice of the appointment, or of the entering into possession or assuming of control, as the case may be, was given to the administrator.

Lien to secure indemnity

"458JF. (1) To secure a right of indemnity under section 458JD, the administrator has a lien on the scheme's property.

"(2) A lien under subsection (1) has priority over a charge only in so far as the right of indemnity under section 458JD has priority over debts secured by the charge.

"Division 10 — Execution and effect of deed of arrangement for collective investment schemes

Effect of creditors' resolution

"458KA. (1) This section applies if, at a meeting convened under section 458EA, a scheme's creditors resolve that the scheme operator execute a deed of arrangement for the scheme.

"(2) The administrator of the scheme is to be the administrator of the deed, unless the creditors, by resolution passed at the meeting, appoint someone else to be administrator of the deed.

"(3) The administrator of the deed must prepare an instrument setting out the terms of the deed.

"(4) The instrument must also specify the following:

- (a) the administrator of the deed;
- (b) the property of the scheme, whether or not held by the scheme operator when it executes the deed, that is to be available to pay creditors' claims;
- (c) the nature and duration of any moratorium period for which the deed provides;
- (d) to what extent the scheme operator is to be released from its liability to pay the debts of the scheme;
- (e) the conditions, if any, for the deed to come into operation;
- (f) the conditions, if any, for the deed to continue in operation;
- (g) the circumstances in which the deed terminates;

- (h) the order in which proceeds of realising the property referred to in paragraph (b) are to be distributed among creditors bound by the deed;
- (i) the day not later than the day when the administration began on or before which claims must have arisen if they are to be admissible under the deed.

“(5) The instrument is to be taken to include the prescribed provisions except so far as it provides otherwise.

Execution of deed

“458KB. (1) If an instrument is prepared under section 458KA in relation to a collective investment scheme, the scheme operator must execute the instrument within:

- (a) 21 days after the end of the meeting of creditors; or
- (b) such further period as the Court, on application made within the 21 days, allows.

“(2) The board of the scheme operator may, by resolution, authorise the instrument to be executed by or on behalf of the operator.

“(3) Subsection (2) has effect despite section 458CC, but does not limit the functions and powers of the administrator of the scheme.

“(4) The administrator of the deed must execute the instrument before, or as soon as practicable after, the scheme operator executes it.

“(5) When executed by both the scheme operator and the deed’s administrator, the instrument becomes a deed of arrangement for the scheme.

Note: Division 12 provides for consequences of the company contravening subsection (1).

Creditor etc. not to act inconsistently with deed before its execution

“458KC. (1) If, at a meeting convened under section 458EA, a collective investment scheme’s creditors resolve that the scheme operator execute a deed of arrangement for the scheme, this section applies until the sooner of the following:

- (a) the deed is executed by both the scheme operator and the deed’s administrator;
- (b) the period within which subsection 458KB(1) requires the scheme operator to execute the deed ends.

“(2) In so far as a person would be bound by the deed if it had already been so executed, the person:

- (a) must not do anything inconsistent with the deed, except with the leave of the Court; and
- (b) is subject to section 458KE.

Effect of deed on creditors

"458KD. (1) A deed of arrangement for a collective investment scheme binds all creditors of the scheme so far as concerns claims arising on or before the day specified in the deed under paragraph 458KA(4)(i).

"(2) Subsection (1) does not prevent a secured creditor from realising or otherwise dealing with the security except so far as:

- (a) the deed so provides in relation to a secured creditor who voted in favour of the resolution of creditors because of which the scheme operator executed the deed; or
- (b) the Court makes an order under subsection 458KF(2).

"(3) Subsection (1) does not affect a right that an owner or lessor of property has in relation to that property, except so far as:

- (a) the deed so provides in relation to an owner or lessor of property who voted in favour of the resolution of creditors because of which the scheme operator executed the deed; or
- (b) the Court makes an order under subsection 458KF(4).

Protection of scheme property from persons bound by deed

"458KE. (1) Until a deed of arrangement for a collective investment scheme terminates, a person bound by the deed:

- (a) cannot apply for an order to terminate the scheme; and
- (b) cannot apply for an order to wind up the scheme operator on grounds relating to a debt incurred by the operator as operator of the scheme; and
- (c) cannot proceed with an application mentioned in paragraph (a) or (b) made before the deed became binding on the person; and
- (d) cannot, except with the leave of the Court and in accordance with such terms, if any, as the Court imposes, begin or proceed with a proceeding against the scheme operator in respect of:
 - (i) a debt incurred by the operator as operator of the scheme; or
 - (ii) any of the scheme property; and
- (d) cannot, except with the leave of the Court and in accordance with such terms, if any, as the Court imposes, begin or proceed with enforcement process in relation to property of the scheme.

"(2) In subsection (1):
'property', in relation to a collective investment scheme, includes property used or occupied by, or in the possession of, the scheme operator in connection with the scheme.

Court may limit rights of secured creditor or owner or lessor

"458KF. (1) This section applies if:

- (a) it is proposed that the operator of a collective investment scheme execute a deed of arrangement for the scheme; or
- (b) the operator of such a scheme has executed such a deed.

"(2) Subject to subsection 458GA(3), the Court may order a creditor of the scheme operator that has taken security over property of the scheme not to realise or otherwise deal with the security except as permitted by the order.

"(3) The Court may only make the order if satisfied that:

- (a) for the creditor to realise or otherwise deal with the security would have a material adverse effect on achieving the purposes of the deed; and
- (b) having regard to:
 - (i) the terms of the deed; and
 - (ii) the terms of the order; and
 - (iii) any other relevant matter;

the creditor's interests will be adequately protected.

"(4) The Court may order the owner or lessor of property that is used or occupied by, or is in the possession of, the operator of a collective investment scheme in connection with the scheme not to take possession of the property or otherwise recover it.

"(5) The Court may only make the order if satisfied that:

- (a) for the owner or lessor to take possession of the property or otherwise recover it would have a material adverse effect on achieving the purposes of the deed; and
- (b) having regard to:
 - (i) the terms of the deed; and
 - (ii) the terms of the order; and
 - (iii) any other relevant matter;

the interests of the owner or lessor will be adequately protected.

"(6) An order under this section may be made subject to conditions.

"(7) An order under this section may only be made on application by:

- (a) if paragraph (1)(a) applies — the administrator of the scheme; or
- (b) if paragraph (1)(b) applies — the deed's administrator.

Effect of deed on scheme operator, officers and members

"458KG. A deed of arrangement for a collective investment scheme also binds:

- (a) the scheme operator; and

- (b) its officers and members; and
- (c) the deed's administrator; and
- (d) the scheme's investors.

Extent of release of scheme's debts

"458KH. A deed of arrangement for a collective investment scheme releases the scheme operator from a debt only in so far as:

- (a) the deed provides for the release; and
- (b) the creditor concerned is bound by the deed.

"Division 11 - Variation, termination and avoidance of deed

Variation of deed by creditors

"458LA. A deed of arrangement for a collective investment scheme may be varied by a resolution passed at a meeting of the scheme's creditors convened under section 458LF, but only if the variation is not materially different from a proposed variation set out in the notice of the meeting.

Court may cancel variation

"458LB. If a deed of arrangement for a collective investment scheme is varied under section 458LA, the Court may, on application by a creditor of the scheme:

- (a) make an order cancelling the variation or confirming it, either wholly or in part, and on such conditions, if any, as the order specifies; and
- (b) make such other orders as it thinks appropriate.

When deed terminates

"458LC. A deed of arrangement for a collective investment scheme terminates when:

- (a) the Court makes an order terminating the deed; or
- (b) the scheme's creditors pass a resolution terminating the deed at a meeting that was convened under section 458LF by a notice setting out the proposed resolution; or
- (c) if the deed specifies circumstances in which it is to terminate — those circumstances exist;

whichever happens first.

Note: For orders terminating a deed see section 458LD.

When Court may terminate deed

"458LD. (1) The Court may make an order terminating a deed of arrangement for a collective investment scheme if satisfied that:

- (a) information about the scheme's business, property, affairs or financial circumstances that:
 - (i) was false or misleading; and

- (ii) can reasonably be expected to have been material to the scheme's creditors in deciding whether to vote in favour of the resolution that the scheme operator execute the deed;
 - was given to the administrator of the scheme or to such creditors; or
- (b) such information was contained in a report or statement under subsection 458EA(4) that accompanied a notice of the meeting at which the resolution was passed; or
- (c) there was an omission from such a report or statement and the matter omitted can reasonably be expected to have been material to such creditors in so deciding; or
- (d) there has been a material contravention of the deed by a person bound by the deed; or
- (e) effect cannot be given to the deed without injustice or undue delay; or
- (f) the deed or a provision of it is, an act or omission done or made under the deed was or an act or omission proposed to be so done or made would be:
 - (i) oppressive or unfairly prejudicial to, or unfairly discriminatory against, one or more such creditors; or
 - (ii) contrary to the interests of the creditors of the scheme as a whole; or
- (g) the deed should be terminated for some other reason.

"(2) An order may be made on application by:

- (a) a creditor of the scheme; or
- (b) the scheme operator; or
- (c) any other interested person.

Creditors may terminate deed and resolve that scheme be wound up

"458LE. If:

- (a) at a meeting convened under section 458LF, the collective investment scheme's creditors pass a resolution terminating the deed; and
- (b) the notice of the meeting set out a proposed resolution that the scheme be terminated;

the creditors may also resolve at the meeting that the scheme be terminated.

Meeting of creditors to consider proposed variation or termination of deed

"458LF. (1) The administrator of a deed of arrangement for a collective investment scheme:

- (a) may at any time convene a meeting of the scheme's creditors; and
- (b) must convene such a meeting if so asked in writing by creditors the value of whose claims against the scheme is at least 10% of the value of all the creditors' claims against the scheme operator in relation to the scheme.

“(2) A meeting under this section must be convened by the deed’s administrator:

- (a) giving written notice of the meeting to as many of the scheme’s creditors as reasonably practicable; and
- (b) causing notice of the meeting to be published:
 - (i) in a national newspaper; or
 - (ii) in each jurisdiction in which the scheme operator has its registered office or carries on business, in a daily newspaper that circulates generally in that jurisdiction;

at least 5 business days before the day fixed for the meeting.

“(3) The notice given to a creditor under paragraph (2)(a) must:

- (a) set out each resolution, if any, under section 458LA or paragraph 458LC(b) that the deed’s administrator proposes that the meeting vote on; and
- (b) if the meeting is convened under paragraph (1)(b) of this section — set out each proposed resolution under section 458LA or paragraph 458LC(b) that is set out in the request.

“(4) The deed’s administrator is to preside at a meeting convened under this section.

“(5) A meeting convened under this section may be adjourned from time to time.

When Court may void or validate deed

“458LG. (1) If there is doubt, on a specific ground, whether a deed of arrangement for a collective investment scheme was entered into in accordance with this Part or complies with this Part, the administrator of the deed, a creditor of the scheme or the Commission may apply to the Court for an order under this section.

“(2) On an application, the Court may make an order declaring the deed, or a provision of it, to be void or not to be void, as the case requires, on the ground specified in the application or some other ground.

“(3) On an application, the Court may declare the deed, or a provision of it, to be valid, despite a contravention of a provision of this Part, if the Court is satisfied that:

- (a) the provision was substantially complied with; and
- (b) no injustice will result for anyone bound by the deed if the contravention is disregarded.

“(4) If the Court declares a provision of a deed of arrangement in relation to a collective investment scheme to be void, the Court may by order vary the deed, but only with the consent of the deed’s administrator.

Effect of termination or avoidance

"458LH. The termination or avoidance, in whole or in part, of a deed of arrangement for a collective investment scheme does not affect its previous operation.

*"Division 12 — Transition to winding up***Administrator becomes liquidator in certain cases**

"458MA. (1) This section applies if:

- (a) the creditors of a collective investment scheme under administration resolve at a particular time under paragraph 458EC(1)(c) that the scheme be terminated; or
- (b) the operator of a collective investment scheme under administration contravenes subsection 458KB(1) at a particular time; or
- (c) at a meeting convened under section 458LF, the creditors of a collective investment scheme under administration:
 - (i) pass a resolution terminating a deed of arrangement in relation to a scheme executed by the scheme operator; and
 - (ii) also resolve at a particular time under section 458LE that the scheme be terminated; or
- (d) circumstances specified in the regulations for the purposes of this section exist.

"(2) A meeting of investors in the scheme is to be taken to have resolved under section 581AD, at the time referred to in paragraph (1)(a) or (b) or subparagraph (1)(c)(ii), as the case may be, that the scheme be terminated.

"(3) The administrator becomes the liquidator of the scheme.

Note: Section 581BI requires the liquidator to lodge notice of the appointment with the Commission and to publish it.

*"Division 13 — Powers of Court***General power to make orders**

"458NA. (1) The Court may make such order as it thinks appropriate about how this Part is to operate in relation to a particular collective investment scheme.

"(2) For example, if the Court is satisfied that the administration of a scheme should end:

- (a) because the scheme is solvent; or
- (b) because provisions of this Part are being abused; or
- (c) for some other reason;

the Court may order that the administration is to end.

"(3) An order may be made subject to conditions.

“(4) An order may be made on application by any of the following:

- (a) the scheme operator;
- (b) a creditor of the scheme;
- (c) in the case of a scheme under administration — the administrator of the scheme;
- (d) in the case of a scheme for which a deed of arrangement has been executed — the deed’s administrator;
- (e) the Commission;
- (f) any other interested person.

Orders to protect creditors during administration

“458NB. (1) On application by the Commission, the Court may make such order as it thinks necessary to protect the interests of a collective investment scheme’s creditors while the scheme is under administration.

“(2) On the application of a creditor of a collective investment scheme, the Court may make such order as it thinks necessary to protect the creditor’s interests while the scheme is under administration.

“(3) An order may be made subject to conditions.

Court may declare whether administrator validly appointed

“458NC. If there is doubt, on a specific ground, about whether a purported appointment of a person as administrator of a collective investment scheme or of a deed of arrangement for a collective investment scheme is valid, the Court may, on application by the person, the scheme operator or a creditor of the scheme, make an order declaring whether or not the purported appointment was valid on the ground specified in the application or on some other ground.

Administrator may seek directions

“458ND. (1) The administrator of a collective investment scheme under administration or of a deed of arrangement for a collective investment scheme may apply to the Court for directions about a matter arising in connection with the performance or exercise of any of the administrator’s functions and powers.

“(2) The administrator of a deed of arrangement for a collective investment scheme may apply to the Court for directions about a matter arising in connection with the operation of, or giving effect to, the deed.

Supervision of administrator of scheme or deed

“458NE. (1) If the Court is satisfied that the administrator of a collective investment scheme under administration or of a deed of arrangement for a collective investment scheme:

- (a) has managed, or is managing, the scheme's business, property or affairs in a way that is prejudicial to the interests of some or all of the scheme's creditors or investors; or
 - (b) has done an act or made an omission, or proposes to do an act or to make an omission, that is or would be prejudicial to such interests;
- the Court may make such order as it thinks just.

"(2) If the Court is satisfied that:

- (a) a collective investment scheme is under administration but:
 - (i) there is a vacancy in the office of administrator of the scheme; or
 - (i) no administrator of the scheme is acting; or
- (b) a deed of arrangement for a collective investment scheme has not yet terminated but:
 - (i) there is a vacancy in the office of administrator of the deed; or
 - (i) no administrator of the deed is acting;

the Court may make such order as it thinks just.

"(3) An order may only be made on application by the Commission or by a creditor of or an investor in the scheme.

Effect of Division

"458NF. Nothing in this Division limits the generality of anything else in it.

"Division 14 — Qualifications of administrators

Appointee must consent

"458PA. A person cannot be appointed as administrator of a collective investment scheme or of a deed of arrangement for a collective investment scheme unless:

- (a) the person has consented in writing to the appointment; and
- (b) as at the time of the appointment, the person has not withdrawn the consent.

Administrator must be registered liquidator

"458PB. A person must not consent to be appointed, and must not act, as administrator of a collective investment scheme or of a deed of arrangement for a collective investment scheme unless he or she is a registered liquidator.

Disqualification of person connected with scheme

"458PC. (1) Subject to this section, a person must not, except with the leave of the Court, seek or consent to be appointed as, or act as, administrator of a collective investment scheme or of a deed of arrangement for a collective investment scheme if any of the following circumstances exist:

-
- (a) the person, or a body corporate in which the person is a substantial shareholder for the purposes of Part 6.7, is indebted in an amount exceeding \$5,000 to the scheme operator, or to a body corporate related to the scheme operator;
 - (b) the person is a creditor of the scheme operator or of a related body corporate in an amount exceeding \$5,000 but a debt owed to the person in a capacity as administrator or liquidator of, or as administrator of a deed of arrangement executed by, the scheme operator or a related body corporate, is not to be counted for the purposes of this paragraph;
 - (c) the person is an officer of the scheme operator otherwise than because he or she is an administrator or liquidator of, or an administrator of a deed of arrangement executed by, a body corporate related to the scheme operator;
 - (d) the person is an officer of a body corporate that is a mortgagee of:
 - (i) scheme property; or
 - (ii) property of the scheme operator; or
 - (iii) property of a body corporate that is related to the scheme operator;
 - (e) the person is an auditor of the scheme or of the scheme operator;
 - (f) the person is a partner or employee of an auditor of the scheme or of the scheme operator;
 - (g) the person is a partner, employer or employee of an officer of the scheme operator;
 - (h) the person is a partner or employee of an employee of an officer of the scheme operator.

“(2) The reference in paragraph (1)(a) to indebtedness to a body corporate does not, in relation to indebtedness of a natural person, include a reference to indebtedness of that person to a body corporate that is a prescribed corporation for the purposes of Part 4.5 if:

- (a) the indebtedness arose as a result of a loan made to that person by the body corporate in the ordinary course of its ordinary business; and
- (b) the amount of that loan was used by the person to pay the whole or part of the purchase price of premises used by the person as his or her principal place of residence.

“(3) For the purposes of subsection (1), a person is to be taken to be an officer or auditor of a scheme operator if:

- (a) the person is an officer or auditor of the scheme operator or of a related body corporate; or

- (b) unless the Commission, if it thinks fit in the circumstances of the case, directs that this paragraph not apply in relation to the person — the person has, within the previous 2 years, been an officer, auditor or promoter of the scheme operator or of a related body corporate.

Note: Prescribed corporations for the purposes of Part 4.5 are Australian banks, and life insurance companies."

Disqualification of insolvent under administration

"458PD. A person must not consent to be appointed, and must not act, as administrator of a collective investment scheme or of a deed of arrangement for a collective investment scheme if he or she is an insolvent under administration.

"Division 15 — Removal, replacement and remuneration of administrator

Appointment of administrator cannot be revoked

"458QA. The appointment of a person as administrator of a collective investment scheme or of a deed of arrangement for a collective investment scheme cannot be revoked.

Court may remove administrator

"458QB. On application by the Commission or by a creditor of a collective investment scheme, the Court may:

- (a) remove from office the administrator of a collective investment scheme under administration or of a deed of arrangement for a collective investment scheme; and
- (b) appoint someone else as administrator of the scheme or deed.

Vacancy in office of scheme administrator

"458QC. (1) If the administrator of a collective investment scheme under administration:

- (a) dies; or
- (b) becomes prohibited from acting as administrator of the scheme; or
- (c) resigns by notice in writing given to his or her appointer and to the scheme operator;

his or her appointer may appoint someone else as administrator of the scheme.

"(2) In subsection (1):

'**appointer**', in relation to the administrator of a collective investment scheme under administration, means:

- (a) if the administrator was appointed by the Court under section 458QB or subsection (6) of this section — the Court; or
- (b) otherwise:
 - (i) if the administration began because of an appointment under section 458BA — the scheme operator; or

- (ii) if the administration began because of an appointment under section 458BB — a temporary scheme operator of the scheme; or
- (iii) if the administration began because of an appointment under section 458BC — a person who is entitled, or would apart from section 458FB or 458GD be entitled, to enforce the charge.

“(3) An appointment under subsection (1) by the scheme operator must be made in accordance with a resolution of the board of the scheme operator.

“(4) Within 5 business days after being appointed under subsection (1) as administrator of a collective investment scheme otherwise than by the Court, a person must convene a meeting of the scheme’s creditors so that they may:

- (a) determine whether to remove the person from office; and
- (b) if so, appoint someone else as administrator of the scheme.

“(5) A person must convene a meeting under subsection (4) by:

- (a) giving written notice of the meeting to as many of the scheme’s creditors as reasonably practicable; and
- (b) causing notice of the meeting to be published:
 - (i) in a national newspaper; or
 - (ii) in each jurisdiction in which the scheme operator has its registered office or carries on the business of the scheme, in a daily newspaper that circulates generally in that jurisdiction;

at least 2 business days before the day fixed for the meeting.

“(6) If a collective investment scheme is under administration but for some reason no administrator is acting, the Court may, on application by:

- (a) the Commission; or
- (b) an investor in the scheme; or
- (c) the scheme operator; or
- (d) an officer of the scheme operator ; or
- (e) a creditor of the scheme;

appoint a person as administrator.

“(7) Subsections (3) and (6) have effect despite section 458CC.

Vacancy in office of administrator of deed of arrangement for a collective investment scheme

"458QD. (1) If the administrator of a deed of arrangement for a collective investment scheme:

- (a) dies; or
 - (b) becomes prohibited from acting as administrator of the deed; or
 - (c) resigns by notice in writing given to the scheme operator;
- the Court may appoint someone else as administrator of the deed.

"(2) If a deed of arrangement for a collective investment scheme has not yet been terminated but for some reason no administrator is acting, the Court may, on application by:

- (a) the Commission; or
 - (b) an investor in the scheme; or
 - (c) the scheme operator; or
 - (d) an officer of the scheme operator ; or
 - (e) a creditor of the scheme;
- appoint a person as administrator.

Remuneration of administrator

"458QE. (1) The administrator of a collective investment scheme under administration or of a deed of arrangement for a collective investment scheme is entitled to:

- (a) such remuneration as is fixed by a resolution of the scheme's creditors passed at a meeting convened under section 458EA or 458LF, as the case may be; or
- (b) if no remuneration is so fixed — such remuneration as the Court, on application by the administrator, fixes.

"(2) If remuneration is fixed under paragraph (1)(a), the Court may, on application by:

- (a) the Commission; or
 - (b) an investor in the scheme; or
 - (c) the scheme operator; or
 - (d) an officer of the scheme operator ; or
 - (e) a creditor of the scheme;
- confirm, increase or reduce it.

"(3) Subsection (2) has effect despite section 458CC.

Division 16 — Notices about steps taken under Part**Appointment of administrator**

"458RA. (1) If an administrator of a collective investment scheme is appointed under section 458BA, 458BB or 458BC, the administrator must:

- (a) lodge a notice of the appointment before the end of the next business day after the appointment; and
- (b) cause such a notice to be published within 3 business days after the appointment:
 - (i) in a national newspaper; or
 - (ii) in each jurisdiction in which the scheme operator has its registered office or carries on the business of the scheme, in a daily newspaper that circulates generally in that jurisdiction.

“(2) As soon as practicable, and in any event before the end of the next business day, after appointing an administrator of a collective investment scheme under section 458BC, a person must give to the scheme operator written notice of the appointment.

“(3) As soon as practicable, and in any event before the end of the next business day, after an administrator of a scheme is appointed under section 458BA, 458BB or 458BC, he or she must give a written notice of the appointment to:

- (a) each person who holds a charge on the whole, or substantially the whole, of the property of the scheme; and
- (b) if a person holds 2 or more charges on property of the scheme and the property of the scheme subject to the respective charges together constitutes the whole, or substantially the whole, of the scheme property — that person.

“(4) The administrator need not give the notice to the person who appointed the administrator.

Note: Section 458BA, 458BB and 458BC provide that the operator of a collective investment scheme, a temporary scheme operator and some chargees of scheme property may appoint an administrator of the scheme.

Execution of deed of arrangement

“458RB. As soon as practicable after a deed of arrangement for a collective investment scheme is executed, the deed’s administrator must:

- (a) send to each creditor of the scheme a written notice of the execution of the deed; and
- (b) cause such a notice to be published:
 - (i) in a national newspaper; or
 - (ii) in each jurisdiction in which the scheme operator has its registered office or carries on the business of the scheme — in a daily newspaper that circulates generally in that jurisdiction; and
- (c) lodge a copy of the deed.

Failure to execute deed of arrangement

"458RC. As soon as practicable after the operator of a collective investment scheme contravenes subsection 458KB(1), the deed's administrator must:

- (a) lodge a notice that the scheme operator has failed to execute the instrument within the required period; and
- (b) cause a notice of the failure to be published as prescribed.

Termination of deed of arrangement

"458RD. If a deed of arrangement for a collective investment scheme terminates because of paragraph 458LC(b), the administrator must:

- (a) lodge a notice of the termination; and
- (b) send such a notice to each of the scheme's creditors; and
- (c) cause such a notice to be published as prescribed.

Note: Paragraph 458LC(b) refers to a scheme's creditors resolving to terminate a deed of arrangement for the scheme.

Notice in public documents etc. of scheme

"458RE. (1) The operator of a collective investment scheme under administration must set out, in every public document, and in every eligible negotiable instrument, of the operator in connection with the scheme, after the scheme's name where it first appears, the expression '(administrator appointed)'.

"(2) Until a deed of arrangement for a collective investment scheme terminates, the scheme operator must set out, in every public document, and in every eligible negotiable instrument, of the operator in connection with the scheme, after the scheme's name where it first appears, the expression '(subject to deed of arrangement)'.

Effect of contravention of this Division

"458RF. A contravention of this Division does not affect the validity of anything done or omitted under this Part, except so far as the Court otherwise orders.

*"Division 17 — Miscellaneous***Appointment of 2 or more administrators of collective investment scheme**

"458SA. (1) If a provision of this Law provides for an administrator of a collective investment scheme to be appointed, 2 or more persons may be appointed as administrators of the scheme.

“(2) If there are 2 or more administrators of a collective investment scheme:

- (a) a function or power of an administrator of the scheme may be performed or exercised by any one of them, or by any 2 or more of them together, except so far as the instrument or resolution appointing them otherwise provides; and
- (b) a reference in this Law to an administrator, or to the administrator, of a scheme is, in the case of the first-mentioned scheme, a reference to whichever one or more of those administrators the case requires.

Appointment of 2 or more administrators of deed of arrangement for collective investment scheme

“458SB. (1) If a provision of this Law provides for an administrator of a deed of arrangement for a collective investment scheme to be appointed, 2 or more persons may be appointed as administrators of the deed.

“(2) If there are 2 or more administrators of a deed of arrangement for a collective investment scheme:

- (a) a function or power of an administrator of the deed may be performed or exercised by any one of them, or by any 2 or more of them together, except so far as the deed, or the resolution or instrument appointing them, otherwise provides; and
- (b) a reference in this Law to an administrator, or to the administrator, of a deed of arrangement for a collective investment scheme is, in the case of the first-mentioned deed, a reference to whichever one or more of those administrators the case requires.

Effect of things done during administration

“458SC. A payment made, a transaction entered into and any other act or thing done, in good faith, by, or with the consent of, the administrator of a collective investment scheme under administration:

- (a) is valid and effectual for the purposes of this Law; and
- (b) is not liable to be set aside in a winding up of the scheme.

Qualified privilege for administrators

“485SD. The administrator of a collective investment scheme or of a deed of arrangement for a collective investment scheme has qualified privilege in respect of:

- (a) any statement made to the Commission about the scheme; and
- (b) the giving of any document, so far as it contains information about the scheme, to the Commission;

whether in response to a direction by the Commission or not.

Note: For qualified privilege see section 89.

Time for doing act does not run while act prevented by this Part

"458SE. If:

- (a) for any purpose, for example, the purposes of a law, agreement or instrument, an act must or may be done within a particular period or before a particular time; and
- (b) this Part prevents the act from being done within that period or before that time;

the period is extended, or the time is deferred, by force of this section, according to how long this Part prevented the act from being done."

Part 5.4B — Winding up in insolvency or by the Court

Division 3 — General powers of the Court

Court may make order to prevent officer or related entity from avoiding liability to company

91. Section 486A of the Corporations Law is amended by omitting subsections (3) to (10), both inclusive.

92. The Corporations Law is amended by inserting after section 486A the following sections:

Court may make order to prevent officer of collective investment scheme operator, or related entity, from avoiding liability in relation to scheme

"486AA. (1) The Court may, on application by the liquidator of a collective investment scheme, make one or more of the following orders:

- (a) an order prohibiting, either absolutely or subject to specified conditions, an officer of the scheme operator or a related entity of the scheme from taking or sending out of this jurisdiction or out of Australia property of the scheme or money or other property of the officer or entity;
- (b) an order appointing:
 - (i) a receiver or trustee, with specified powers, of property of an officer of the scheme operator, or of property of a related entity of the scheme that is a natural person; or
 - (ii) a receiver, or a receiver and manager, with specified powers, of property of a related entity of the scheme that is not a natural person;
- (c) an order requiring an officer of the scheme operator, or a related entity of the scheme that is a natural person, to surrender to the Court his or her passport and other specified documents;
- (d) an order prohibiting an officer of the scheme operator, or a related entity of the scheme that is a natural person, from leaving Australia without the Court's consent.

- "(2) The Court may only make the order under subsection (1) if:
- (a) either:
 - (i) the scheme has been terminated; or
 - (ii) an application has been made to the Court for the scheme to be wound up; or
 - (iii) a meeting of investors has been requisitioned to consider a resolution that the scheme be wound up; and
 - (b) the Court is satisfied that there is at least a *prima facie* case that the officer or entity is or will become liable:
 - (i) to pay money to the company in respect of the scheme, whether in respect of a debt, by way of damages or compensation or otherwise; or
 - (ii) to account for property of the scheme; and
 - (c) the Court is satisfied that there is substantial evidence that the officer or entity:
 - (i) has concealed or removed money or other property, has tried to do so or intends to do so; or
 - (ii) has tried to leave Australia, or intends to do so; to avoid that liability or its consequences; and
 - (d) the Court thinks it necessary or desirable to make the order to secure the payment of the money or the account of property.

Provisions about applications and orders under section 486A or 486AA

"486AB. (1) Without limiting the matters that the Court must have regard to on an application under section 486A or 486AA, the Court must have regard to any relevant application under section 1323.

"(2) Before considering an application under subsection (1), the Court may, if in the Court's opinion it is desirable to do so, grant an interim order of the kind applied for that is expressed to have effect until the application is determined.

"(3) The Court must not require an applicant under section 486A or 486AA, or any other person, as a condition of granting an interim order under subsection (2), to give an undertaking as to damages.

"(4) On application by a person who applied for, or is affected by, an order under section 486A or 486AA, the Court may make a further order discharging or varying the first-mentioned order.

"(5) An order under section 486A or 486AA may be expressed to operate for a specified period or until it is discharged by a further order.

"(6) A person must not contravene an order under section 486A or 486AA that is applicable to the person.

Defence: The person did not know and could not reasonably have known that what the person did was contrary to the order.

"(7) Sections 486A and 486AA, and this section, have effect subject to the *Bankruptcy Act 1966*.

"(8) Sections 486A and 486AA, and this section, do not affect any other powers of the Court.

Note: Section 1323 allows the Court to take preventative action to preserve assets."

Warrant to arrest person who is absconding, or who has dealt with property or books, to avoid obligations in connection with winding up

93. Section 486B of the Corporations Law is amended:

(a) by omitting paragraph (1)(a) and substituting the following paragraph:

"(a) either:

(i) a company is being wound up in insolvency or by the Court, or an application has been made for a company to be so wound up; or

(ii) a collective investment scheme of which a company is the operator is being wound up; and"

(b) by omitting paragraphs (3)(a) and (b) and substituting the following paragraphs:

"(a) in the case of the winding up of a collective investment scheme — the liquidator of the scheme; or

(b) in the case of the winding up of a company — by the liquidator or provisional liquidator of the company; or

(c) in any case — by the Commission."

Part 5.6 — Winding up generally

Division 3 — Liquidators

Supervision of liquidators

94. Section 536 of the Corporations Law is amended by adding "and the liquidator of a collective investment scheme" at the end of the definition of "liquidator" in subsection (1A).

Regulations relating to money etc. received by liquidator

95. Section 538 of the Corporations Law is amended:

(a) by inserting after "of a company" in paragraph (1)(c) "or a collective investment scheme"; and

- (b) by adding after “or its liquidator” in paragraph (1)(c) “or to the scheme operator in connection with the scheme or to the scheme’s liquidator, as the case requires”.

96. Division 3 of Part 5.6 of the Corporations Law is amended by adding at the end the following section:

Application of section 539 and 540 to collective investment schemes

“540A. Sections 539 and 540 apply in relation to the liquidator of a collective investment scheme:

- (a) as if subsection 539(5) were omitted and the following section substituted:
“(5) The liquidator must give notice that the account has been made up to every creditor of, and investor in, the scheme when next forwarding a report or other document.”; and
- (b) as if the words ‘of any contributory or creditor of the company or the Commission’ were omitted from subsection 540(1) and the words ‘by the Commission or by a creditor of or an investor in the scheme’ were substituted.”.

new Part 5.6A

97. After Part 5.6 of the Corporations Law the following Part is added:

“PART 5.6A — TERMINATION AND WINDING UP COLLECTIVE INVESTMENT SCHEMES

“Division 1 — Termination of collective investment schemes

Scheme terminates in accordance with constitution

“581AA. (1) A collective investment scheme is terminated when an event, date or state of affairs specified for the purpose in the scheme’s constitution occurs.

“(2) A provision in the constitution of a collective investment scheme, so far as it purports to provide or has the effect of providing that the scheme terminates if the scheme operator is removed as scheme operator, is of no effect.

Scheme operator may terminate scheme

“581AB. (1) The operator of a collective investment scheme may, by instrument in writing, terminate the scheme on the ground that the purpose of the scheme has been, or cannot be, accomplished.

“(2) The operator must not do so unless notice has been given as required by subsection (3) and the waiting period has ended.

"(3) Notice is to be given to the investors and to the Commission. The notice must include:

- (a) an explanation of the proposal; and
- (b) a statement of the circumstances because of which the purpose of the scheme has been, or cannot be, accomplished; and
- (c) a statement of the right of the investors to requisition a meeting of investors.

"(4) The waiting period in relation to a proposal is the period starting on the day on which notice is given to the investors or the Commission, whichever is later, and ending:

- (a) 28 days later; or
- (b) if, within the 28 days, a meeting is called by the operator, or requisitioned by investors or the Commission, to consider the question relating to the termination of the scheme — on the day on which a resolution approving the proposal to terminate the scheme is passed by the meeting.

Court may terminate scheme

"581AC. The Court may, on application by the operator of a collective investment scheme or by:

- (a) the Commission; or
- (b) an investor in the scheme; or
- (c) a director of the operator; or
- (d) a temporary scheme operator for the scheme;

by order, terminate the scheme if it just and equitable to do so.

Note: Temporary scheme operators are appointed under section 183E.

Court may terminate insolvent schemes

"581AD. (1) Any of the following:

- (a) a creditor of a collective investment scheme;
- (b) the scheme operator;
- (c) a director of the scheme operator;
- (d) a liquidator or provisional liquidator of the scheme operator;
- (e) the administrator of the scheme or of a deed of arrangement in relation to the scheme;
- (f) the Commission;

may apply to the Court for an order terminating a collective investment scheme on the ground that it is insolvent.

"(2) The application is to be made by leave of the Court.

"(3) The Court may, on the application:

- (a) make an order terminating the scheme; or
- (b) dismiss the application, with or without costs; or
- (b) adjourn the hearing, conditionally or unconditionally; or

(c) make any interim or other order that it thinks fit; whether or not it has been made out that scheme is insolvent.

“(4) The Court may give any appropriate directions in relation to the matter, including but not limited to:

- (a) directions as to notice or dispensing with notice; and
- (b) directions restraining or staying further proceedings against the scheme operator in relation to the scheme until the application is determined.

“(5) For the purpose of an application under this section, it is to be presumed, unless the contrary is established, that a collective investment scheme is insolvent if, during or after 3 months ending on the day when the application is made:

- (a) execution or other process issued on a judgment, decree or order of an Australian court against the scheme operator in respect of a liability of the scheme was returned wholly or partly unsatisfied; or
- (b) a controller of property of the scheme has been appointed or has entered into possession, or assumed control, of property of the scheme for the purpose of enforcing a charge over the property, whether or not as agent for the scheme operator or the chargee.

“(6) Without limiting what the Court may take into account, the Court may take into account contingent or prospective liabilities of the scheme.

“(7) The Court may:

- (a) give directions as to the steps to be taken in the proceedings; and
- (b) stay or restrain civil proceedings against the scheme operator in relation to the affairs of the scheme;

on such terms as are just.

Investors may terminate scheme

“581AE. (1) A collective investment scheme is terminated if a meeting of investors in a collective investment scheme resolves that it be terminated.

“(2) A meeting of investors is to be taken to have so resolved only if the votes in favour of a resolution to that effect are cast in respect of interests the total value of which is:

- (a) if a registered company auditor who is not the scheme’s auditor and not the scheme operator’s auditor has certified in writing that the scheme is insolvent — more than 75% of the total value of all the interests in respect of which votes are cast; and
- (b) otherwise — more than 50% of the total value of all the interests issued in the scheme.

Note: For conduct of meeting, in particular, for the circumstances in which the operator’s interests are to be counted, see Part 3.4A, Division 2.

"Division 2 — Appointment of liquidator after termination of scheme**Application of Division**

"581BA. This Division applies in relation to a collective investment scheme the constitution of which provides that the scheme operator is to hold the scheme property.

Liquidator must be appointed

"581BB. (1) If a collective investment scheme is terminated by order of the Court, the Court must appoint a registered liquidator to wind up the scheme.

"(2) If a collective investment scheme is terminated otherwise than by an order of the Court, the scheme operator must, as soon as practicable thereafter, appoint a registered liquidator to wind up the scheme.

Appointee must consent

"581BC. A person cannot be appointed as liquidator of a collective investment scheme unless:

- (a) the person has consented in writing to the appointment; and
- (b) as at the time of the appointment, the person has not withdrawn the consent.

Disqualification of person connected with scheme

"581BD. (1) Subject to this section, a person must not, except with the leave of the Court, seek or consent to be appointed as, or act as, liquidator of a collective investment scheme if any of the following circumstances exist:

- (a) the person, or a body corporate in which the person is a substantial shareholder for the purposes of Part 6.7, is indebted in an amount exceeding \$5,000 to the scheme operator, or to a body corporate related to the scheme operator;
- (b) the person is a creditor of the scheme operator or of a related body corporate in an amount exceeding \$5,000 but a debt owed to the person in a capacity as administrator or liquidator of, or as administrator of a deed of arrangement executed by, the scheme operator or a related body corporate, is not to be counted for the purposes of this paragraph;
- (c) the person is an officer of the scheme operator otherwise than because he or she is an administrator or liquidator of, or an administrator of a deed of arrangement executed by, a body corporate related to the scheme operator;
- (d) the person is an officer of a body corporate that is a mortgagee of:
 - (i) scheme property; or
 - (ii) property of the scheme operator; or
 - (iii) property of a body corporate that is related to the scheme operator;
- (e) the person is an auditor of the scheme or of the scheme operator;

- (f) the person is a partner or employee of an auditor of the scheme or of the scheme operator;
- (g) the person is a partner, employer or employee of an officer of the scheme operator;
- (h) the person is a partner or employee of an employee of an officer of the scheme operator.

“(2) The reference in paragraph (1)(a) to indebtedness to a body corporate does not, in relation to indebtedness of a natural person, include a reference to indebtedness of that person to a body corporate that is a prescribed corporation for the purposes of Part 4.5 if:

- (a) the indebtedness arose as a result of a loan made to that person by the body corporate in the ordinary course of its ordinary business; and
- (b) the amount of that loan was used by the person to pay the whole or part of the purchase price of premises used by the person as his or her principal place of residence.

“(3) For the purposes of subsection (1), a person is to be taken to be an officer or auditor of a scheme operator if:

- (a) the person is an officer of the scheme operator or of a related body corporate; or
- (b) unless the Commission, if it thinks fit in the circumstances of the case, directs that this paragraph not apply in relation to the person — the person has, within the previous 2 years, been an officer, auditor or promoter of the scheme operator or of a related body corporate.

Note: Prescribed corporations for the purposes of Part 4.5 are Australian banks, and life insurance companies.

Disqualification of insolvent under administration

“581BE. A person must not consent to be appointed, and must not act, as liquidator of a collective investment scheme if he or she is an insolvent under administration.

Remuneration of liquidator

“581BF. (1) The liquidator of a collective investment scheme is entitled to:

- (a) such remuneration as is fixed by resolution of the creditors of the scheme; or
- (b) if no remuneration is so fixed — such remuneration as the Court, on application by the liquidator, fixes.

“(2) If remuneration is fixed under paragraph (1)(a), the Court may, on application by:

- (a) the Commission; or
- (b) an investor in the scheme; or
- (c) the scheme operator; or

- (d) an officer of the scheme operator ; or
 - (e) a creditor of the scheme; or
 - (f) the liquidator of the scheme;
- confirm, increase or reduce it.

“(3) Subsection (2) has effect despite sections 581CB and 581CC.

Vacancy in office of liquidator

“581BG. If the liquidator of a collective investment scheme ceases to act for any reason, the Court may appoint another liquidator.

Removal of liquidator

“581BH. The Court may, on application by:

- (a) the Commission; or
- (b) the scheme operator; or
- (c) a creditor of the scheme;

remove the liquidator of a collective investment scheme.

Notice of appointment of liquidator

“581BI. (1) The liquidator of a collective investment scheme must:

- (a) lodge a notice of the appointment within 7 business day after being appointed; and
- (b) cause notice of the appointment to be published, within 21 business days after the appointment:
 - (i) in a national newspaper; or
 - (ii) in each jurisdiction in which the scheme operator has its registered office or carries on the business of the scheme — in a daily newspaper that circulates generally in that jurisdiction.

“(2) The liquidator of a collective investment scheme must set out, in every public document, and in every eligible negotiable instrument, of the liquidator in connection with the scheme, after the scheme’s name where it first appears, the expression ‘(in liquidation)’.

Effect of contravention of this Division

“581BJ. A contravention of this Division does not affect the validity of anything done or omitted under this Part, except so far as the Court otherwise orders.

“Division 3 — Effect of liquidator’s appointment

Application of Division

“581CA. This Division applies in relation to a collective investment scheme the constitution of which provides that the scheme operator is to hold the scheme property.

Effect of liquidator's appointment

"581CB. The liquidator of a collective investment scheme has, on and from his or her appointment, all the powers and functions of the scheme operator to the exclusion of the scheme operator and the administrator, if any, of the scheme.

Note: For scheme administrators see Part 5.3B.

Only liquidator can deal with scheme property

"581CC. (1) This section applies if:

- (a) the operator of a collective investment scheme that has been terminated purports to enter into; or
- (b) a person purports to enter into, on behalf of the operator of such a scheme;

a transaction or dealing affecting property of the scheme.

"(2) The transaction or dealing is void unless:

- (a) the liquidator entered into it on the operator's behalf; or
- (b) the liquidator consented to it in writing before it was entered into; or
- (c) it was entered into under an order of the Court.

"(3) Subsection (2) does not apply to a payment made:

- (a) by an Australian bank out of an account kept with the bank by the scheme operator in relation to the scheme; and
- (b) in good faith and in the ordinary course of the bank's banking business; and
- (c) after the scheme was terminated and on or before the day on which:
 - (i) the liquidator gives to the bank written notice that the scheme is terminated; or
 - (ii) the liquidator complies with paragraph 581BI(1)(b);whichever happens first.

"(4) Subsection (2) has effect subject to an order that the Court makes after the purported transaction or dealing.

"(5) If, because of subsection (2), the transaction or dealing is void, or would be void apart from subsection (4), an officer of the scheme operator who was in any way, by act or omission, directly or indirectly, knowingly concerned in, or party to, the transaction or dealing contravenes this subsection.

Defence: The defendant did not know and could not reasonably have known that the scheme was in liquidation.

Fault: Except as provided in the defence, the defendant's state of mind, intentions and beliefs and the degree of care, if any, that the defendant exercised, are excluded.

Order for compensation if officer involved in void transaction

"581CD. (1) If:

- (a) a court finds a person guilty of an offence constituted by a contravention of subsection 581CC(5), including such an offence that is to be taken to have been committed because of section 5 of the *Crimes Act 1914* or that section as it applies as a law of this jurisdiction; and
- (b) the court is satisfied that the scheme operator or another person has suffered loss or damage in relation to the scheme because of the act or omission constituting the offence;

the court may, whether or not it imposes a penalty, order the first-mentioned person to pay compensation to the liquidator of such amount as the order specifies.

"(2) An order under subsection (1) may be enforced as if it were a judgment of the court.

"(3) The power of a court under section 1318 to relieve a person from liability as mentioned in that section extends to relieving a person from liability to be ordered under this section to pay compensation.

Note: Section 73A defines when a court is to be taken to find a person guilty of an offence.

Protection of persons dealing with liquidator

"581CE. (1) Sections 164 and 166 apply in relation to a collective investment scheme that has been terminated as if:

- (a) a reference in those sections to the company, or to an officer of the company, were a reference to the liquidator; and
- (b) subsection 164(3) were omitted and the following subsection substituted:

'(3) The assumptions that a person is, because of subsection (1) or (2), entitled to make in relation to dealings with the liquidator of a collective investment scheme in relation to an acquisition or purported acquisition from the liquidator of title to property of the scheme are:

- (a) an assumption that the liquidator is acting within his or her functions and powers as liquidator; and
 - (b) in particular, an assumption that the liquidator is complying with the Corporations Law so far as it relates to the scheme; and
 - (c) an assumption that there are no defects or irregularities affecting the appointment of the liquidator, including as to the liquidator's qualifications.'; and
- (c) the references in section 166 to 'person referred to in paragraph 164(3)(b), (c) or (e)' and to 'officer, agent or employee of the company referred to in paragraph 164(3)(d) or (f)' were references to the liquidator of the scheme.

“(2) The effect that sections 164 and 166 have because of subsection (1) of this section is additional to, and does not prejudice, the effect that they otherwise have in relation to a collective investment scheme.

“Division 4 — Winding up collective investment schemes

Application of Division

“581DA. This Division applies in relation to a collective investment scheme the constitution of which provides that the scheme operator is to hold the scheme property.

Schemes not to continue after termination

“581DB. (1) The operator of a collective investment scheme that has been terminated must not issue, or accept subscriptions for the issue of, interests in the scheme without the Court’s leave.

“(2) The operator of a collective investment scheme that has been terminated must not carry on any of the business of the scheme except so far as the liquidator permits for the better winding up of the scheme.

Limit on liability of investors in trust based schemes

“581DC. If a person who is an investor in the scheme has a liability to the creditors of the operator in his or her capacity as investor, the amount of the person’s liability to the creditors is limited, so far as the operator’s debts relate to the scheme, to the amount that the person has subscribed or has undertaken to subscribe, whichever is greater, in payment for interests in the scheme.

Attachment, sequestration etc. void

“581DD. Any attachment, sequestration, levy of distress or execution made or purported to be made over property of a scheme that has been terminated is void.

Effect of liquidation on transfers etc.

“581DE. If a collective investment scheme has been terminated:

- (a) a transfer of interests in the scheme otherwise than under a will or other testamentary instrument; and
- (b) an alteration in the status of an investor in the scheme as investor;

is void except so far as the liquidator otherwise orders.

Terminated schemes to be wound up

“581DF. The property of a collective investment scheme that has been terminated is:

- (a) first, to be applied in satisfaction of the liabilities of the scheme equally; and

- (b) secondly, to be distributed among the investors according to the value of their interests in the scheme, or as the scheme's constitution provides.

Directors to help liquidator

"581DG. (1) As soon as practicable after a liquidator is appointed for a collective investment scheme, each officer of the scheme operator must:

- (a) deliver to the liquidator all books in the officer's possession that relate to the scheme, other than books that the officer is entitled, as against the scheme operator and the liquidator, to keep; and
- (b) if the officer knows where other books relating to the scheme are — tell the liquidator where those books are.

"(2) Within 7 days after a liquidator is appointed for a collective investment scheme, or such longer period as the liquidator allows, the directors and the secretary of the scheme operator must give to the liquidator a statement about the scheme's business, property, affairs and financial circumstances.

"(3) An officer of the scheme operator must:

- (a) attend on the liquidator at such times; and
 - (b) give the liquidator such information about the scheme's affairs; and
 - (c) give the liquidator such help in winding up the scheme;
- as the liquidator reasonably requires.

"(4) The liquidator may require an officer of the scheme operator to tell the liquidator:

- (a) the officer's residential address and the address of his or her place of work or business; and
- (b) if the officer changes any of those addresses during the winding up — what the new address is.

"(5) A person must not, without reasonable excuse, fail or refuse to comply with subsection (1) or (2) or with a requirement under subsection (3) or (4).

"(6) In this section:

'officer' includes a person who has been an officer as defined by section 82A of the scheme operator.

Liquidator's rights to operator's books about the scheme

"581DH. (1) A person is not entitled, as against the liquidator of a collective investment scheme:

- (a) to keep possession of books of the scheme operator that relate to the scheme; or
- (b) to claim or enforce a lien on such books;

but such a lien is not otherwise prejudiced.

“(2) Paragraph (1)(a) does not apply in relation to books of which a secured creditor of the scheme is entitled to possession otherwise than because of a lien, but the liquidator is entitled to inspect, and make copies of, such books at any reasonable time.

“(3) The liquidator of a collective investment scheme may give to a person a written notice requiring the person to deliver to the liquidator, as specified in the notice, books so specified that are in the person’s possession.

“(4) A notice under subsection (3) must specify a period of at least 3 business days as the period within which the books must be produced.

“(5) A person must comply with a notice under subsection (3) except so far as the person is entitled, as against the scheme operator and the liquidator, to keep possession of the books.

“(6) A reference in this section to books that relate to a collective investment scheme includes a reference to books that relate to a collective investment scheme even if they also relate to something else.

Reports by liquidator

“581DI. (1) If it appears to the liquidator of a collective investment scheme that any of the following persons:

- (a) the scheme operator;
- (b) a person who is or has been an officer or member of the scheme operator;
- (c) a person who is or has been a custodian of scheme property under an arrangement with the scheme operator;
- (d) a person who has taken part in:
 - (i) the formation, promotion, management or winding up of the scheme operator; or
 - (ii) the establishment or registration of the scheme or in matters concerned with the scheme operator’s licence in relation to the scheme;

may have:

- (e) committed an offence in relation to the scheme; or
- (f) misapplied or kept, or become liable or accountable for, property of the scheme in Australia or elsewhere; or
- (g) been guilty of negligence, default, breach of duty or breach of trust in relation to the scheme;

the liquidator must:

- (h) lodge a report about the matter as soon as practicable; and

- (j) give the Commission such information, and such access to and facilities for inspecting and taking copies of documents, as the Commission requires.

“(2) The liquidator may also lodge further reports specifying any other matter that, in his or her opinion, it is desirable to bring to the Commission’s notice.

“(3) Failure to comply with subsection (1) is not an offence, but if it appears to the Court, on application by an interested person or of its own motion, that the liquidator of a scheme has failed to comply with subsection (1), the Court may, by order, direct the liquidator to lodge the report.

Books to be kept by liquidator

“581DJ. (1) The liquidator of a collective investment scheme must keep proper books in which he or she must cause to be recorded entries or minutes of proceedings at meetings and such other matters as are prescribed.

“(2) A creditor of or investor in the scheme may, unless the Court otherwise orders, inspect the books personally or by an agent.

Qualified privilege for liquidator

“581DK. The liquidator of a collective investment scheme or the operator of a collective investment scheme has qualified privilege in respect of:

- (a) any statement made to the Commission about the scheme; and
- (b) the giving of any document, so far as it contains information about the scheme, to the Commission;

whether in response to a direction by the Commission or not.

Note: For qualified privilege see section 89.

Power of Court to supervise

581DL. The Court may, on application by the Commission, the liquidator or an interested person, make such orders as are just, including orders giving directions, in relation to the winding up of a collective investment scheme including, without limitation, orders that the liquidator make good any loss caused by his or her default, misfeasance or neglect in relation to the liquidation.”⁶

Part 5.8 — Offences

Inducement to be appointed liquidator etc. of a company

6. Provisions about proof of debts will need to be inserted here. They should be modelled on Part 5.6, Division 6, Subdivisions A, B, C and E and the relevant provisions of the Corporations Regulations. Provisions about recovery of preferences should also be included at this point.

98. Section 595 of the Corporations Law is amended by adding at the end the following word and paragraph:

“; or (f) the administrator or liquidator of a collective investment scheme”.

Part 5.9 — Miscellaneous

Division 1 — Examining a person about a corporation

Mandatory examination

99. Section 596A of the Corporations Law is amended by adding at the end the following word and paragraph:

“; and (c) if the examinable affairs concern a collective investment scheme of which the corporation is or has been the operator — the Court is satisfied that the person is an examinable officer of the corporation or was such an officer during the 2 years ending:

- (i) if the scheme is under administration — when the administration commenced; or
- (ii) if the scheme operator has executed a deed of arrangement in relation to the scheme — when the deed was executed; or
- (iii) if the scheme is terminated — when the liquidator was appointed; or
- (iv) in any cases — when the application is made.”.

Discretionary examination

100. Section 596B of the Corporations Law is amended by adding “or a collective investment scheme of which the corporation is or has been scheme operator” after “corporation” (second occurring) in subparagraph (1)(b)(i).

Notice of examination

101. Section 596E of the Corporations Law is amended by inserting after paragraph (a) the following paragraph:

“(aa) if the examination relates to a collective investment scheme of which the corporation is or was scheme operator — as many of the scheme’s creditors as reasonably practicable; and”.

Part 5.9, Division 2 — Orders against a person in relation to a corporation

Orders against persons concerned with corporations

102. Section 598 of the Corporations Law is amended by adding “or, if the corporation is or was the operator of a collective investment scheme, in relation to the scheme” after “corporation” in paragraph (a).

Court may order persons not to manage certain corporations

103. Section 599 of the Corporations Law is amended:

- (a) by inserting "a deed of arrangement or" after "executed" in paragraph (1)(ca); and
- (b) by adding at the end the following subsection:
 - "(6) In this section:
'relevant entity' includes a collective investment scheme."

Part 6.1 — Interpretation

Definitions

104. Section 603 of the Corporations Law is amended by omitting paragraph (d) of the definition of "**marketable security**" and substituting the following paragraph:

- "(d) interests in a collective investment scheme of which the body corporate is scheme operator:"

Part 7.1 — Interpretation

Conduct

105. Section 762 of the Corporations Law is amended:

- (a) by inserting after subsection (6) the following subsection:
 - "(6A) Subsections (3) to (6) inclusive do not have effect in a proceeding, whether civil or criminal, against the operator of a collective investment scheme, being a proceeding on a matter arising under this Law in relation to the scheme."; and
- (b) by adding at the end the following note:
 - "Note: For determining what conduct and states of mind are to be attributed to scheme operators see Part 9.7A."

Part 7.3 — Participants in the securities industry

Division 1 — Dealers and investment advisers

Dealers

106. Section 780 of the Corporations Law is amended by adding at the end the following subsection:

- "(2) Subsection (1) does not require the operator of a collective investment scheme to have a licence merely to deal in securities that are interests in the scheme."

Investment advisers

107. Section 781 of the Corporations Law is amended by adding at the end the following subsection:

“(2) Subsection (1) does not require the operator of a collective investment scheme to have a licence merely to advise a person about securities that are interests in the scheme.”.

Grant of licence to natural person

108. Section 783 of the Corporations Law is amended:

(a) by omitting paragraph (2)(c) and substituting the following paragraph:

“(c) if:

- (i) the regulations prescribe particular educational qualifications and experience in relation to licences of the kind applied for — it is satisfied that the person has those qualifications and that experience; or
- (ii) in other cases — it is satisfied that the person’s educational qualifications and his or her experience are adequate having regard to the nature of the duties of a holder of a licence of the kind applied for; and”;

(b) by omitting “of” from subsection (4) and from paragraph (4)(b) and substituting “for”.

Grant of licence to body corporate

109. Section 784 of the Corporations Law is amended by omitting paragraph (2)(c) and substituting the following paragraph:

“(c) if:

- (i) the regulations prescribe particular educational qualifications and experience in relation to licences of the kind applied for— it is satisfied that each responsible officer of the applicant has those qualifications and that experience; or
- (ii) in other cases — it is satisfied that the educational qualifications of each responsible officer of the body corporate, and his or her experience, are adequate having regard to the nature of the duties of a holder of a licence of the kind applied for; and”.

Part 7.3, Division 3 — Representatives

110. After section 807 of the Corporations Law the following section is inserted:

Representatives of dealers and scheme operators

"807A. A natural person must not do an act as a representative of the operator of a collective investment scheme unless:

- (a) the operator of the scheme has a scheme operators licence; and
- (b) the person holds a proper authority from the operator."

Defence

111. Section 808 of the Corporations Law is amended by omitting "section 807 or 807" and substituting "section 806, 807 or 807A".

112. After section 812 of the Corporations Law the following section is inserted:

Scheme operators

"812A. In sections 810 to 812, inclusive, a reference to a licensee includes a reference to the operator of a collective investment scheme."

Part 7.3, Division 5 — Excluding persons from the securities industry

Power to revoke licence after a hearing

113. Section 826 of the Corporations Law is amended by omitting paragraph (1)(g) and substituting the following paragraph:

"(g) all of the following:

- (i) the licensee is a body corporate;
- (ii) the officers of the body who perform, or will perform, duties in connection with holding the licence (the '**present officers**') are not the same as those whose educational qualifications and experience were considered by the Commission when the application for the licence was made; and
- (iii) the Commission is satisfied that:
 - (A) if the regulations prescribe particular educational qualifications and experience in relation to licences of the kind applied for — each of those officers has those qualifications and that experience; or
 - (B) in other cases — those officers' educational qualifications, and their experience, are adequate having regard to the nature of the duties of a holder of a licence of the kind applied for; and"

Part 7.4 — Conduct of securities business***Division 1 — Regulation of certain activities***

114. After section 841 of the Corporations Law the following section is inserted:

Independent advisers

“841A. (1) A securities adviser must not hold himself or herself out as independent if:

- (a) there is an arrangement between the adviser and a body:
 - (i) in whose securities the adviser may lawfully deal; or
 - (ii) about whose securities the adviser may lawfully advise other persons or publish reports; and
- (b) under the arrangement, the adviser will derive a pecuniary or other benefit from a person other than the adviser’s client on account of the client buying or selling securities.

“(2) A securities adviser who is employed by, or acts as agent for, a body:

- (a) in whose securities the adviser may lawfully deal; or
- (b) about whose securities the adviser may lawfully advise other persons or publish reports;

must not hold himself or herself out as independent. If the adviser is 2 or more individuals who together carry on an investment advice business, they must not so hold themselves out if at least 1 of them is so employed or so acts.

“(3) In addition to subsection (2), a securities adviser that is a body corporate must not hold itself out as independent if a body:

- (a) in whose securities it may lawfully deal; or
- (b) about whose securities it may lawfully advise other persons or publish reports;

is in a position to control it.

“(4) In this section:

‘**arrangement**’ includes contract and understanding, whether written or not and whether enforceable or not.”.

Part 7.4, Division 3 — Recommendations about securities

115. Division 3 of Part 7.4 of the Corporations Law is amended by inserting before section 848 the following section:

Interpretation

“847A. In this Division:

‘**securities adviser**’ includes the operator of a collective investment scheme so far as the operator advises persons about the scheme.”.

116. After section 848 of the Corporations Law the following section is inserted:

Adviser must have reasonable basis for recommendation

"848A. (1) A securities adviser must not make a securities recommendation to a person who may reasonably be expected to rely on it (the 'client') unless:

- (a) the adviser has made reasonable inquiries of the client about, and such other investigations as are reasonable of, the client's investment objectives, financial situation and particular needs; and
- (b) the recommendation is based on the results of those inquiries and investigations.

"(2) Contravention of subsection (1) is not an offence."

What client must be told about adviser's interest in transaction

117. Section 849 of the Corporations Law is amended by omitting subsections (2) and (3) and substituting the following subsections:

"(2) The securities adviser must disclose to the client the following particulars:

- (a) if it is intended, in connection with the recommendation, that the securities adviser or an associate of the securities adviser will arrange for the securities concerned to be bought or sold on behalf of the client — particulars of how much of the money paid to the adviser or associate in connection with the buying or selling will be spent on account of fees or commissions;
- (b) particulars of all the charges payable in relation to a dealing recommended by the adviser, for example, charges for stamp duty and other disbursements, and the nature and amount of each of those charges;
- (c) particulars of any fee or commission, and of any other benefit or advantage, whether pecuniary or not and whether direct or indirect, that the securities adviser or associate has received, or will or may receive, in connection with the recommendation or a dealing by the client in securities as a result of the recommendation; and
- (d) particulars of any other pecuniary or other interest, whether direct or indirect, of the securities adviser or associate, being an interest that may reasonably be expected to be capable of influencing the adviser in making the recommendation.

"(2A) Paragraphs (2)(c) and (d) do not require the disclosure of a fee or commission that the securities adviser has received, or will or may receive, from the client.

“(3) A securities adviser, or an associate of a securities adviser, must not carry out, on behalf of the client, a dealing in securities recommended by the adviser, or a dealing substantially the same as one so recommended, unless the information required by subsection (2) has been given to the client.”.

Defences to alleged breach of subsection 849(2)

118. Section 850 of the Corporations Law is amended:

- (a) by omitting subparagraphs(1)((a)(i) and (2)(i); and
- (b) by omitting “as required by subsection 849(2), particulars of a matter” from paragraphs(1)(a) and (2)(a) and substituting “particulars of a matter mentioned in paragraph 849(2)(c) or (d) that the person must , because of subsection 849(2), disclose”; and
- (c) by omitting subsection (2); and
- (d) by adding at the end the following subsection:

“(3) Arrangements that the operator of a collective investment scheme has in operation are not arrangements of a kind described in paragraph (2)(c) merely because they are measures specified in conditions to which a scheme operators licence is subject.”.

119. Section 851 of the Corporations Law is repealed and the following section substituted:

Recommendation to be in writing

“851. A securities adviser who makes a securities recommendation to a person who may reasonably be expected to rely on it (the ‘**client**’) must:

- (a) do so by giving to the client a written statement of the recommendation; or
- (b) without delay after the recommendation is made, give to the client a written statement of the recommendation.

The statement is to include the following:

- (c) particulars of the inquiries and investigations made as required by subsection 848A(1);
- (d) the information required to be given to the client by section 849.

Defence: For an offence constituted by failure to give the information mentioned in paragraphs 849(2)(c) or (d) — a defence provided for in section 850 applies.”.

Part 7.11 — Conduct in relation to securities

Division 2 — Prohibited conduct

Misleading or deceptive conduct and advertising

120. Section 995 of the Corporations Law is amended:

- (a) by inserting after subsection (2) the following subsections:

“(2A) A person must not publish or use, in or in connection with a dealing in securities that are interests in a collective investment scheme, any advertising or disclosure material that is misleading or deceptive or is likely to mislead or deceive.

“(2B) Subsection (2A) does not limit the generality of subsection (2).”; and

(b) by adding at the end the following subsection:

“(5) In this section:

‘advertising or disclosure material’, in relation to a collective investment scheme, means:

- (a) any writing ordinarily used, or proposed to be used, by the scheme operator in connection with the scheme; or
- (b) a description of the provisions of, or of the benefits to be or likely to be derived from, participating in the scheme, whatever the medium used to publish the description (for example, it might be writing, film, videotape, audio tape or disc).”.

Part 7.11, Division 2A — Insider trading

Securities

121. Section 1002A of the Corporations Law is amended by omitting paragraphs (c) and (d) of the definition of “securities” and substituting the following paragraphs:

- “(c) interests in a collective investment scheme of which the body corporate is the operator;
- (d) units of shares of the body corporate or of interests in a collective investment scheme of which the body corporate is the operator;”.

122. Section 1002H of the Corporations Law is repealed and the following section substituted:

Exception for redemption of interests in collective investment schemes

“1002H. Subsection 1002G(2) does not prevent the operator of a collective investment scheme:

- (a) redeeming an interest in the scheme in accordance with this Law; or
- (b) buying an interest in the scheme from an investor in accordance with this Law.

Note: For redemptions see Division 2 of Part 2.5. For buy-backs see Divisions 3 and 4 of Part 2.5.”.

Chinese wall arrangements by bodies corporate

123. At the end of section 1002M of the Corporations Law the following subsection is added:

“(2) Arrangements that the operator of a collective investment scheme has in operation are not arrangements of a kind described in paragraph (1)(b) merely because they are measures specified in conditions to which a scheme operators licence is subject.”.

Chinese wall arrangements by partnerships, etc.

124. At the end of section 1002N of the Corporations Law the following subsection is added:

“(2) Arrangements that the operator of a collective investment scheme has in operation are not arrangements of a kind described in paragraph (1)(b) merely because they are measures specified in conditions to which a scheme operators licence is subject.”.

Part 7.11, Division 4, Subdivision B — Liability in respect of prospectuses

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

125. Section 1006 of the Corporations Law is amended by omitting paragraph (3)(b) and substituting the following paragraph:

“(b) a trustee or custodian of property of a collective investment scheme;”.

No liability for mistake etc. if reasonable precautions taken

126. After subsection 1011(1) of the Corporations Law the following subsection is inserted:

“(1A) In an action under section 1005 against the operator of a collective investment scheme, the operator is not to be taken to have taken reasonable precautions and exercised due diligence as mentioned in subsection (1) merely because it took measures specified in conditions to which a scheme operators licence is subject.”.

Part 7.11, Division 4, Subdivision C — Liability in respect of unlawful market activity

Liability for insider trading

127. Section 1013 of the Corporations Law is amended by omitting subsection (8) and substituting the following subsection:

“(8) Any amount recovered in an action brought under subsection (2) or (5) by or in the name of the operator of a collective investment scheme in relation to interests in the scheme must be held by the operator for the

persons who were investors when the relevant subscription, sale, purchase or agreement took place and is to be held on their behalf in the respective proportions that, at that time, the value of their interests bore to the total of the values of all those interests.”

Part 7.12 — Offering securities for subscription or purchase

Division 2 — Prospectuses

Registrable prospectuses

128. Section 1017A of the Corporations Law is amended:

- (a) by omitting paragraph (b) of the definition of “approved unlisted corporation” in subsection (1), and
- (b) by omitting paragraph (e) of the definition of “exempt recipient” in subsection (1);⁷ and
- (c) by omitting subsection (4) and substituting the following section:

“(4) A prospectus in relation to interests in a collective investment scheme is exempt from registration under section 1020A.”.

Form of application for securities to be attached to prospectus

129. Section 1020 of the Corporations Law is amended by adding at the end the following subsection:

“(2) If the securities are interests in a collective investment scheme, the form of application must include:

- (a) a prominent statement that all cheques and payment orders in respect of applications for interests must be drawn in favour of the scheme operator for payment into an account that is clearly identified as property of the scheme; and
- (b) particulars of the procedures to be followed for redeeming interests, and for the operator’s buying interests from investors.”.

Specific provisions applicable to prospectuses

130. Section 1021 of the Corporations Law is amended by inserting after subsection (6A) the following subsections:

“(6B) A prospectus in relation to interests in a collective investment scheme must also set out the following:

- (a) **investments**: particulars of all the kinds of investments in which, and the uses to which, the scheme operator may, under the scheme’s constitution, apply the scheme property;
- (b) **fees and charges**: how the fees and charges of the operator that will be paid from scheme property are to be worked out;

7. This can be covered under para (f) of the definition

- (c) ***borrowings***: if subsection 260AJ(2) applies in relation to the scheme:
- (i) particulars of the limits specified in the constitution of the scheme on the operator's borrowings in relation to the scheme; and
 - (ii) the amount outstanding on all the operator's borrowings in relation to the scheme as at the date of the prospectus;
- (d) ***links with other entities***: if the prospectus suggests that another entity has assumed or will assume a liability in relation to the scheme (for example, by way of guarantee or indemnity) — the circumstances in which the liability will arise;
- (e) ***MER (management expense ratio)***: the MER for the scheme for the financial year immediately before the date of the prospectus and for each of the 4 financial years before that or, if the scheme is less than 5 years old, for each of the financial years during which the scheme has been in existence;
- (f) ***redemption and buy-back procedure***: particulars of the procedures to be followed for redeeming interests, and for the operator's buying interests from investors;
- (g) ***redemption and buy-back obligations***: whether the scheme operator was, during the financial year immediately before the date of the prospectus, under an obligation to redeem investors' interests out of scheme property or buy investors' interests from them;
- (h) ***redemption history***: in relation to redemption opportunities provided to investors during the 2 financial years immediately before the date of the prospectus:
- (i) how many opportunities were provided; and
 - (ii) for each opportunity for which redemption applications were not met in full — how much of the application was met; and
- (j) ***informal dispute resolution***: particulars of the arrangements under section 260AM for the scheme;
- (k) ***other matters***: particulars of such other matters as are prescribed.

Note: Section 260AJ prohibits schemes from borrowing more than 10% of the value of the property of the scheme. Subsection 260AJ(2) provides an exception for schemes whose name includes the word 'geared' or some similar word. Section 260AM requires scheme operators to maintain informal dispute resolution arrangements. "

131. After section 1021 of the Corporations Law the following section is inserted:

Prospectuses for collective investments — covers

"1021A. The front of the cover of a prospectus in relation to interests in a collective investment scheme, or the front page of such a prospectus, must display, as prescribed:

- (a) the name, registration number and address of the registered office of the operator of the scheme; and
- (b) the name and registration number of the scheme.”.

General provisions applicable to all prospectuses other than those to which section 1022AA or 1022AB apply

132. Section 1022 of the Corporations Law is amended:

- (a) by omitting subsection (1) and substituting the following subsections:
 - “(1) In addition to the information required by section 1021 to be included in a prospectus in relation to securities of a corporation (except a prospectus to which section 1022AA or 1022AB, or subsection (1A) of this section, applies), such a prospectus must contain all such information as investors and their professional advisers would reasonably require, and reasonably expect to find in the prospectus, for the purpose of making an informed assessment of:
 - (a) the assets and liabilities, financial position, profits and losses, and prospects of the corporation; and
 - (b) the rights attaching to the securities.
 - “(1A) In addition to the information required by sections 1021 and 1021A to be included in a prospectus in relation to interests in a collective investment scheme, except a prospectus to which section 1022AA or 1022AB applies, such a prospectus must contain all such information as investors in collective investment schemes and their professional advisers would reasonably require, and reasonably expect to find in the prospectus, for the purpose of making an informed assessment of:
 - (a) the assets and liabilities, financial position, profits and losses, and prospects of the scheme; and
 - (b) the rights attaching to the interests; and
 - (c) the merits of participating in the scheme and the nature and extent of the risks involved in participating.”; and
- (b) by inserting “or (1A)” in subsections (2) and (3) after “subsection (1)”;
- (c) by inserting after subsection (3) the following subsection:
 - “(3A) In determining what information is required to be included in a prospectus because of subsections (1A) and (2), regard must be had to:
 - (a) the nature of:
 - (i) the scheme operator and of any custodian of the scheme property; and
 - (ii) the interests in the scheme; and
 - (iii) the relevant undertaking; and
 - (b) the kinds of persons likely to consider subscribing for or buying the interests; and

- (c) the fact that certain matters may reasonably be expected to be known to professional advisers of any kind whom those persons may reasonably be expected to consult; and
- (d) whether the persons to whom the offers or invitations are to be made or issued hold interests in the scheme and if so, to what extent, if any, relevant information has previously been given to them by the scheme operator under any law or requirement of the business rules or listing rules of a securities exchange, or otherwise; and
- (e) any information known to investors or their professional advisers because of an Australian law.”.

General provisions applicable to certain primary prospectuses for securities of disclosing entities

133. Section 1022AA of the Corporations Law is amended

- (a) by omitting paragraph (1)(b) and substituting the following paragraph:

“(b) if the securities are interests in collective investment schemes, or units in such interests, and the corporation is the scheme operator — the scheme (**‘the disclosing entity’**) was a qualifying disclosing entity at all times during the period (**‘the qualifying period’**) of 13 months ending immediately before the issue of the prospectus;” and

- (b) by omitting paragraph (2)(a) and substituting the following paragraphs:

“(a) if it relates to interests in a collective investment scheme — subject to subsections (3) and (4), contain all such information as investors in collective investment schemes and their professional advisers would reasonably require, and reasonably expect to find in the prospectus, for the purpose of making an informed assessment of:

- (i) the offer or invitation contained in the prospectus; and
- (ii) the effect of that offer or invitation on the disclosing entity; and
- (iii) the merits of participating in the scheme and the nature and extent of the risks involved in the participation; and

- (aa) in other cases — subject to subsections (3) and (4), contain all such information as investors and their professional advisers would reasonably require, and reasonably expect to find in the prospectus, for the purpose of making an informed assessment of:

- (i) the offer or invitation contained in the prospectus; and
- (ii) the effect of that offer or invitation on the disclosing entity; and
- (iii) the rights attaching to the securities; and” and
- (c) by omitting from subsections (3) and (4) “paragraph (2)(a)” and substituting “paragraphs (2)(a) and (aa)”;
- (d) by omitting paragraph (4)(d) and substituting the following paragraph:
 - “(d) whether the persons to whom the offers or invitations are to be made or issued are:
 - (i) if the prospectus relates to interests in a collective investment scheme — investors in the scheme; or
 - (ii) in other cases — holders of shares in the corporation;
 and if they are, to what extent, if any, relevant information has previously been given to them by the corporation under any law, any requirement of the business rules or listing rules of a securities exchange, or otherwise; and”.

General provisions applicable to certain secondary prospectuses for securities of disclosing entities

134. Section 1022AB of the Corporations Law is amended by omitting paragraph (1)(b) and substituting the following paragraph:

- “(b) if the securities are interests in collective investment schemes, or units in such interests, and the corporation is the scheme operator — the seller knows, or has reasonable grounds to believe, that the scheme (**‘the disclosing entity’**) was a qualifying disclosing entity at all times during the period of 13 months ending immediately before the issue of the prospectus;”.

Obligation to notify person who lodged prospectus of false or misleading statements, changes etc.

135. Section 1023A of the Corporations Law is amended by omitting “section 1022 or 1022AA” from paragraphs (c) and (d) of the definition of “notifiable matter” in subsection (1) and substituting “section 1022, 1022AA or 1022AB”.

Supplementary prospectuses

136. Section 1024 of the Corporations Law is amended:

- (a) by omitting “section 1022 or 1022AA” from subparagraphs (1)(b)(i) and (ii) and substituting “section 1022, 1022AA or 1022AB”;
- (b) by inserting “or (1A)” in paragraph (a) of the definition of “significant” in subsection (3) after “subsection 1022(1)”.

Time limit on allotment, issue or sale of securities on the basis of a prospectus

137. Section 1040 of the Corporations Law is amended by omitting "12 months" from subparagraph (6)(c)(i) and substituting "13 months".

Part 7.12, Division 5 — Prescribed interests**Part 7.12, Division 5A — Special provisions relating to unlisted property trusts**

Repeal of Divisions 5 and 5A of Part 7.12

138. Divisions 5 and 5A of Part 7.12 of the Corporations Law are repealed.

Part 7.12, new Division 6A

139. After Division 6 of Part 7.12 of the Corporations Law the following Division is inserted:

"Division 6A — Advertisements for collective investment schemes

Advertisements for interests in collective investment schemes

"1082A. (1) The operator of a collective investment scheme contravenes this section if an advertisement for the scheme is published that does not disclose, clearly and prominently:

- (a) the name, registration number and address of the registered office of the operator; and
- (b) the name and registration number of the scheme.

Defence: At the time when the contravention occurred:

- (c) the defendant was taking all reasonable measures to prevent contraventions of the relevant kind; and
- (d) none of the executive officers of the defendant had reason to suspect that the contravention would occur.

Fault: Except as provided in the defence, the defendant's state of mind, intentions and beliefs and the degree of care, if any, that the defendant exercised, are excluded.

"(2) In this section:

'advertisement', in relation to a collective investment scheme, means a description of the provisions of, or of the benefits to be or likely to be derived from, participating in the scheme, whatever the medium used to publish the description (for example, writing, film, videotape, audio tape or disc)."

Part 7.12A — Continuous disclosure**Division 1 — Preliminary**

How this Part applies to an undertaking that is a disclosing entity

140. Section 1084B of the Corporations Law is amended:

- (a) by omitting "that is the entity to which prescribed interests relate" and substituting "that is a collective investment scheme"; and
- (b) by omitting "management company", wherever occurring, and substituting "scheme operator".

Part 7.12A, Division 4 — Civil liability

Defences

141. At the end of section 1084G of the Corporations Law the following subsection is added:

"(2) The fact that particular measures were specified in conditions to which a scheme operators licence is subject does not mean that the measures amounted to a system that it was reasonable to expect the disclosing entity to have had."

Part 7.12A, Division 5 — Exemptions from enhanced disclosure provisions

Enhanced disclosure provisions

142. Section 1084H of the Corporations Law is amended by omitting paragraphs (1)(d) and (e).

Part 7.13 — Title to, and transfer of, securities**Division 1 — Title to securities**

Loss or destruction of certificates

143. Section 1089 of the Corporations Law is amended by omitting "prescribed interests" from subsection (1) and substituting "interests in a collective investment scheme".

Part 7.13, Division 2 — Transfer of securities

Definition

144. Section 1090 of the Corporations Law is amended by omitting "prescribed interests" and substituting "interests in a collective investment scheme".

145. After section 1091A of the Corporations Law the following section is inserted:

Rights of trustee of estate of bankrupt investor in collective investment scheme

“1091B. (1) If:

- (a) because of the *Bankruptcy Act 1966*, an interest in a collective investment scheme, being part of the property of a bankrupt, vests in the trustee of the bankrupt's estate; and
- (b) the bankrupt is registered in the register of investors for the scheme kept under Part 2.6 as the holder of that interest;

this section applies whether or not the trustee has been registered in that register as the holder of the interest.

“(2) On producing such information as the scheme operator properly requires, the trustee is entitled to:

- (a) the same income payments and other benefits; and
- (b) the same rights, for example, but without limitation, rights in relation to:
 - (i) meetings of investors in the scheme; and
 - (ii) documents, including notices of such meetings and of buy-back and redemption offers; and
 - (iii) voting; and
 - (iv) inspection of records that relate to the scheme;

as the bankrupt would be entitled to if he or she were not a bankrupt.

“(3) The trustee has the same rights:

- (a) to transfer the interest; and
- (b) to require a person to do an act or give a consent in connection with completing or registering a transfer of the interest;

as the bankrupt would have if he or she were not a bankrupt.

“(4) If the trustee transfers the interest, the transfer is as valid as if the trustee had been registered in the register of investors kept under Part 2.6 as the holder of the interest when the trustee executed the instrument of transfer.

“(5) A person or body whose consent or approval is required for the transfer of interests in the scheme must not unreasonably withhold consent or approval for the transfer of the interest by the trustee.

“(6) A person who contravenes subsection (5) is not guilty of an offence.

“(7) A provision of the scheme’s constitution is void as against the trustee so far as, but for this section, it would affect rights attached to the interest:

- (a) because the bankrupt is a bankrupt; or
- (b) because of some event that led to the bankrupt becoming, or that indicated that the bankrupt was about to become, or might be about to become, a bankrupt; or
- (c) for reasons including a reason referred to in paragraph (a) or (b).

“(9) Nothing in this section limits the generality of anything else in it.

“(10) This section has effect despite anything in the scheme’s constitution.”.

Part 9.2 — Registration of auditors and liquidators

Division 2 — Registration

Registration of auditors

146. Section 1280 of the Corporations Law is amended by inserting “an order under section 230A” after “a section 230 order,” in subsection (3).

Auditors and other persons to enjoy qualified privilege in certain circumstances

147. Section 1289 of the Corporations Law is amended:

- (a) by inserting “, 323H or 323J” after “section 304” in paragraph (1)(b); and
- (b) by omitting “under subsection 332(9) or (10) from paragraph (1)(c) and substituting “subsection 332(9) or (10) or section 331G”; and
- (c) by inserting after subsection (1) the following subsection:
 - “(1A) The auditor of the operator of a collective investment scheme and the auditor of a collective investment scheme each have qualified privilege in respect of:
 - (a) any statement made to the Commission about the scheme; and
 - (b) the giving of any document, so far as it contains information about the scheme, to the Commission; whether in response to a direction by the Commission or not.”; and
- (d) by adding at the end the following note:

“Note: For qualified privilege see section 89.”.

Part 9.4— Offences**Division 1 — Specific offences**

False or misleading statements

148. Section 1308 of the Corporations Law is amended by omitting “a securities licence or futures licence” from subsection (8) and substituting “a securities licence, a futures licence, a scheme operators licence or the registration of a collective investment scheme”.

False information etc.

149. Section 1309 of the Corporations Law is amended by inserting after each of paragraphs 1309(1)(c) and (2)(c):

“or (ca) if the corporation is the operator of a collective investment scheme, or a related entity to such a corporation — investors in the scheme;”.

Part 9.4A — Review by Administrative Appeals Tribunal of certain decisions

Excluded decisions

150. Section 1317C of the Corporations Law is amended by adding at the end the following word and paragraph:

“; or (h) a decision by the Commission to specify compliance measures in a notice under subsection 158D(3)”.

151. Part 9.4A of the Corporations Law is amended by adding at the end the following section:

Statement to accompany notification of decisions

“1317CA. (1) A written notice of a decision or determination under this Law served on or given to a person whose interests are affected by the decision is to include, if an application may be made to the Administrative Appeals Tribunal for review of the decision or determination, a statement to the effect that, subject to the *Administrative Appeals Tribunal Act 1975*, application may be made to the Administrative Appeals Tribunal for review of the decision or determination by or on behalf of the person whose interests are affected by the decision.

“(2) Non-compliance with subsection (1) does not affect the validity of the decision or determination.”.

Part 9.4B — Civil and criminal consequences of contravening civil penalty provisions

Division 1 — Preliminary

Civil penalty provisions

152. Section 1317DA of the Corporations Law is amended by inserting after “Subsection 318(1)” the following:

“Subsection 232AA(1);
 Subsection 232AA(2)
 Subsection 232AA(3);
 Subsection 232AA(4);
 Subsection 232AA(6);
 Section 243ZEA;
 Section 323KB;”.

Part 9.4B, Division 5 — Compensation for loss suffered by corporation

Heading to Division 5 of Part 9.4B

153. The heading to Division 5 of Part 9.4B is amended by adding at the end “*or collective investment scheme investors*”.

On application for civil penalty order, Court may order compensation

154. Section 1317HA of the Corporations Law is amended:

(a) by inserting after subsection (1) the following subsection:

“(1A) If, on an application for a penalty order against a person in relation to a contravention in relation to a collective investment scheme, the Court finds that:

- (a) the person committed the contravention; and
- (b) the scheme has suffered loss or damage as a result of the act or omission that constituted the contravention;

the Court may, whether or not it makes an order under subsection 1317EZA(3), order the person to pay the scheme operator the amount of the loss or damage.”; and

(b) by inserting after subsection (2) the following subsection:

“(2A) The operator of the collective investment scheme, or an investor in the scheme, may intervene in an application for a civil penalty order against a person in relation to a contravention in relation to the scheme, unless the application was made under Division 4.”; and

(b) by adding at the end the following subsections:

“(4) A corporation that is the operator of a collective investment scheme that, or a investor who, so intervenes is entitled to be heard:

- (a) only if the Court is satisfied that the person committed the contravention in relation to the scheme; and
- (b) only on the question whether the Court should order the person to pay compensation to the operator because of the contravention.

“(5) Amounts payable under subsection (1A) are property of the relevant collective investment scheme.”.

Criminal court may order compensation

155. Section 1317HB of the Corporations law is amended by adding at the end the following subsections:

“(3) If:

(a) a court:

- (i) finds a person guilty of an offence constituted by a contravention of a civil penalty provision in relation to a collective investment scheme; or
- (ii) declares under Division 4 that a person has, by an act or omission, contravened a civil penalty provision in relation to a collective investment scheme; and

(b) the court is satisfied that the scheme has suffered loss or damage as a result of the contravention, act or omission;

the Court may, whether or not it imposes a penalty or makes an order under subsection 1317EA(3), order the person to pay the scheme operator the amount of the loss or damage.

“(4) Amounts payable under subsection (3) are property of the relevant collective investment scheme.”.

Recovery of profits, and compensation for loss, resulting from contravention

156. Section 1317HD of the Corporations Law is amended:

(a) by inserting after subsection (1) the following subsection:

“(1A) If a person contravenes a civil penalty provision in relation to a collective investment scheme, the scheme operator or an investor in the scheme may, by proceedings in a court of competent jurisdiction, recover from the person, as a debt due to the operator:

- (a) if that or some other person has made a profit because of the contravention — an amount equal to the amount of the profit; or

- (b) if the scheme has suffered loss or damage as a result of the contravention — an amount equal to the amount of the loss or damage;
- whether or not:
- (c) the first-mentioned person has been convicted of an offence in relation to the contravention; or
- (d) a civil penalty order has been made against the first mentioned person in relation to the contravention.”; and
- (b) by adding at the end the following subsection:
 “(3) Amounts payable under subsection (1A) are property of the relevant collective investment scheme.”.

Part 9.6 — Proceedings

Irregularities

157. Section 1322 of the Corporations Law is amended by omitting “or at a joint meeting of creditors and members of a corporation” from subparagraph 1322(1)(b)(i) and substituting “, at a joint meeting of creditors and members of a corporation or at a meeting of creditors of or investors in a collective investment scheme”.

new Part 9.7A

158. After Part 9.7 of the Corporations Law the following Part is inserted:

**“PART 9.7A — ATTRIBUTING ACTS, STATES OF MIND ETC. TO
 COLLECTIVE INVESTMENT SCHEME OPERATORS**

Application

“1345AA. This Part applies only in a proceeding, whether civil or criminal, on a matter arising under a national scheme law in relation to a collective investment scheme.

Interpretation

“1345AB. In this Division:
 ‘**relevant person**’, in relation to a collective investment scheme, means any of the following:

- (a) a director of the operator of the scheme who is also its employee;
- (b) an officer of the operator of the scheme acting as its agent;
- (c) an employee of the operator of the scheme;
- (d) an agent of the operator of the scheme.

What acts and states of mind etc. are to be taken to be acts and states of mind etc. of scheme operator

"1345AC. (1) If a relevant person does an act that is within the person's actual or apparent authority from the operator of a collective investment scheme, the operator is to be taken also to have done the act unless it is established that:

- (a) in doing the act, the person acted only for his or her own benefit and not for the benefit of the operator; and
- (b) the operator did not in fact benefit from the act.

"(2) If a relevant person has a particular state of mind, intention or belief in relation to an act done by the person, then, if the person did the act with actual or apparent authority from the operator of a collective investment scheme, the operator is to be taken to have the state of mind, intention or belief in relation to the act.

"(3) If a relevant person:

- (a) authorises or purports to authorise, with actual or apparent authority from the operator of a collective investment scheme, another relevant person to do an act; and
- (b) has a particular state of mind, intention or belief in relation to the act; the operator is to be taken also to have the state of mind, intention or belief in relation to the act.

Acts not attributed if reasonable measures to prevent it

"1345AD. (1) If it is established as provided in subsection 1345C(1) that the operator of a collective investment scheme did an act, then, if it is established that the operator had taken all reasonable measures to prevent its officers, including its directors and employees, and its agents from doing the act, the operator is not to be taken to have done the act.

"(2) Without limiting subsection (1), the court is not to find that the measures taken were reasonable:

- (a) if the person who did the act believed on reasonable grounds that, if he or she reported the matter to the board of directors or in accordance with the system, if any, for reporting contraventions or possible contraventions of the relevant kind:
 - (i) the operator would not have taken effective measures to prevent the act being done; or
 - (ii) the person would have been prejudiced, in relation to his or her employment or otherwise; or
- (b) merely because they are measures specified in conditions to which a scheme operators licence is subject.

When operator to be taken to know facts

"1345AE. If a relevant person is aware of a fact or matter in relation to a collective investment scheme then, whether or not the person became aware of the fact or matter in the course of the person's employment by, or as agent of, the operator of the scheme, the operator is to be taken to be aware of the fact or matter.

Acts of board or of general meeting not affected

"1345AF. This Part does not affect the liability of an operator for anything done by or in pursuance of a resolution of its board of directors or of its members."

Part 9.9 — Miscellaneous

Non-application of rule against perpetuities to certain schemes

159. Section 1346 of the Corporations Law is amended by omitting subsection (1) and substituting the following subsection:

"(1) The rules of law relating to perpetuities do not apply, and are to be taken never to have applied, to:

- (a) the trusts of any fund or scheme for the benefit of any employee of a corporation, whether the fund or scheme was established before, or is established after, the commencement of this section; or
- (b) a collective investment scheme; or
- (c) a deed that was, immediately before the commencement of the *Collective Investment Schemes Act 1997*, an approved deed for the purposes of Division 5 of Part 7.12."

new Part 9.9A

160. After Part 9.9 of the Corporations Law the following Part is inserted:

**"PART 9.9A — EXEMPTIONS FOR COLLECTIVE INVESTMENT
SCHEMES**

Power to exempt

"1350A. (1) The Commission may, by instrument in writing, exempt the operator of a collective investment scheme from compliance with a specified provision of this Law so far as it relates to collective investment schemes.

“(2) An exemption may relate to any 1 or more of the following:

- (a) a particular act or requirement or to acts or requirements included in a specified class of acts or requirements;
- (b) a particular scheme or to schemes included in a specified class of schemes.

Exemptions may be continuing

“1350B. (1) An exemption may, except to the extent that a provision of this Law expressly provides to the contrary, be a continuing exemption, that is, an exemption that is not limited to a single act, circumstance or requirement.

“(2) If a period is specified in a continuing exemption as the period of the exemption, the exemption, unless sooner revoked, ceases to have effect at the end of the period.

Exemptions may be conditional

“1350C. (1) An exemption in relation to a provision of this Law may be subject to conditions imposed for the purpose of the provision.

“(2) The conditions must be communicated to the person to whom the exemption is given before or at the time when the exemption is given.

“(3) If:

- (a) a person would, but for an exemption, have contravened a provision of this Law; and
- (b) a condition to which the exemption is subject is not complied with; the person contravenes this subsection and, unless the condition is to be complied with after the relevant act is done or after the time for doing the relevant act, the exemption is of no effect in relation to the contravention.

“(4) In a proceeding against the operator of a collective investment scheme, or against an officer of the operator of a collective investment scheme, under this Law, the fact that a condition of an exemption had not been complied with is to be disregarded if it is established that the defendant:

- (a) is not the person to whom the exemption was given; and
- (b) did not know, and could not reasonably have known:
 - (i) that the exemption was subject to the condition; or
 - (ii) that the condition had not been complied with.

Exemptions may be revoked or varied

“1350D. (1) An exemption may be revoked or varied but only by:

- (a) a resolution of the Commission; or
- (b) a member of the Commission; or
- (c) a Regional Commissioner authorised by a resolution of the Commission to revoke or vary exemptions of the relevant kind.

“(2) A revocation or variation is not effective unless it is in writing and is communicated to the person to whom the exemption was given.

“(3) In a proceeding against the operator of a collective investment scheme, or against an officer of the operator of a collective investment scheme, under this Law, the fact that a condition of an exemption had been varied or that the exemption had been revoked is to be disregarded if it is established that the defendant:

- (a) is not the person to whom the exemption was given; and
- (b) did not know, and could not reasonably be expected to have known, that the exemption had been varied or revoked, as the case requires.”.

Part 9.11 — Commencement and application of certain changes to this Law
new Division 7

161. After Division 6 of Part 9.11 of the Corporations Law the following Division is inserted:

“Division 7 — Changes from the Collective Investment Schemes Act 199?”

Interpretation

“1394. In this Division:

‘existing prescribed interest scheme’ means a collective investment scheme that provides for the issue of securities that are prescribed interests in relation to which there is, on the general commencement day, a deed that is an approved deed for the purposes of Division 5 of Part 7.12;

‘general commencement day’ means the day fixed by or under subsection 2(2).

Commencement of amendments made by the Collective Investment Schemes Act in relation to existing prescribed interests schemes

“1395. Except as provided by this Division, the amendments of this Law made by the *Collective Investment Schemes Act 199?* apply in relation to a prescribed interest scheme from the earlier of the following:

- (a) the end of 2 years after the general commencement day;
- (b) if, before the end of 2 years after the general commencement day, the scheme is registered and a scheme operators licence issued in respect of the scheme — the day of registration.

“(2) The Commission may, on application made before the end of the 2 years, extend the 2 years, and may do so conditionally.

Related party provisions — commencement

"1396. (1) Part 3.2A as amended by the *Collective Investment Schemes Act 199?* applies in relation to an existing prescribed interest scheme from *date to be inserted*.

"(2) The trustee or representative and the management company may jointly elect in writing that the Part as so amended apply in relation to the undertaking to which the prescribed interests relate from some earlier day.

"(3) The election is irrevocable.

"(4) In its application as mentioned in subsection (1) or (2), references in Part 3.2A to the operator of a collective investment scheme are to be read as references to the management company and the trustee or representative for the existing prescribed interests scheme, but an act that is to be or may be done by the operator under or for the purposes of that Part may be done by either the management company or the trustee or representative.

Redemption and buy-back — commencement

"1397. (1) Part 2.5 199? in relation to an existing prescribed interest scheme from *date to be inserted*.

"(2) In its application as mentioned in subsection (1) or (2), references in Part 2.5 to the operator of a collective investment scheme are to be read as references to the management company and the trustee or representative for the existing prescribed interests scheme, but an act that is to be or may be done by the operator under or for the purposes of that Part may be done by either the management company or the trustee or representative.

Early application of certain provisions to existing prescribed interest schemes

"1398. (1) The following provisions, namely, Division 6A of Part 1.2, section 183C, section 260AO, section 260AP, section 260AQ, Divisions 2 and 3 of Part 3.4A, section 315, Division 11 of Part 3.6, Divisions 2A and 3 of Part 3.7, Division 1 of Part 7.3, Parts 7.4, 7.11, 7.12 and 7.12A, section 1091B, section 1322 and section 1346, as amended by the *Collective Investment Schemes Act 199?*, apply in relation to an existing prescribed interest scheme from the general commencement day.

"(2) In its application as mentioned in subsection (1) or (2), references in Part 3.2A to the operator of a collective investment scheme are to be read as references to the management company and the trustee or representative for the existing prescribed interests scheme, but an act that is to be or may be done by the operator under or for the purposes of that Part may be done by either the management company or the trustee or representative.

“(3) Section 183C (*investors may remove operator*), in its application as mentioned in subsection (1), is to be read as providing for the removal of either or both of the management company and the trustee or representative for the purposes of the deed that is the approved deed for the purposes of Division 5 of Part 7.12 and its replacement by another person. If the trustee or authorised representative is removed, any replacement trustee or representative must not take up office until approved by the Commission.

Note: Part 1.2, Division 6A defines collective investment schemes; section 183C provides for scheme investors to remove the scheme operator; section 260AO allows the Court to make an order for compliance with a collective investment scheme's constitution or with this Law; section 260AP gives a right to claim compensation for loss caused by a contravention of a collective investment scheme's constitution or this Law; section 260AQ provides a remedy for oppression; Part 3.4A, Divisions 2 and 3 provide for investors' meetings, reports to the Commission and whistleblower protection; section 315 provides that members and investors are entitled to financial statements and accounts; Part 3.6, Division 11 provides for accounts and audits for collective investment schemes the interests in which are ED securities; Part 3.7, Divisions 2A and 3 provide for duties and powers of auditors of collective investment schemes; Part 7.3, Division 1 provides for licensing of dealers and investment advisers; Part 7.4, 7.11 deals with prohibited conduct in relation to securities; Parts 7.12 and 7.12A set out the disclosure rules, including the rules for prospectuses and for enhanced disclosure; section 1091B provides for the rights of the trustee in bankruptcy; section 1322 provide allows the Court to excuse irregularities in meetings; section 1346 excludes the rule against perpetuities.

Registration and licensing — existing prescribed interest schemes

“1399. (1) An application under Part 2.2A in relation to an existing prescribed interest scheme must be made with the consent of all the parties to the deed that is the approved deed under Division 5 of Part 7.12.

“(2) However, after the end of 18 months after the general commencement day, an application may be made by the management company, without anyone's consent.

“(3) If the application, by whomever made, is granted, the trustee or representative for the purposes of the approved deed must, on written demand, do whatever is necessary and it is capable of doing:

- (a) to give the scheme property held by the trustee or representative; or
 - (b) to ensure that a person who holds scheme property gives it;
- to the scheme operator or as it directs in writing.

“(4) Despite any other provision in this Law or in the scheme's constitution, the costs incurred in relation to giving effect to subsection (2), including the reasonable costs of the trustee, are payable by the operator and may be recovered from the scheme property.

Court may resolve difficulties

“1400. The Court may, on application by the Commission or by a interested party, give directions in connection with the application of the Corporations Law as amended by the *Collective Investment Schemes Act 1997* to existing prescribed interest schemes as are just.”

Schedule 3

Schedule 3

162. Schedule 3 of the Corporations Law is amended:

(a) by inserting before "Section 170" the following:

"Section 113A:

Penalty: ?.

Section 113C:

Penalty: ?.

Section 158K:

Penalty: ?.

Section 158L:

Penalty: ?.

Section 158T:

Penalty: ?."; and

(b) by inserting before "Section 190" the following:

"Section 183B:

Penalty: ?.

Subsection 183E(8):

Penalty: ?.

Subsection 183F(2):

Penalty: ?.

Subsection 183F(4):

Penalty: ?.

Subsection 183H(1):

Penalty: ?.

Section 183K:

Penalty: ?."; and

(c) by inserting before "Section 219" the following:

"Section 216AB:

Penalty: ?.

Section 216AD:

Penalty: ?.

Section 216AI:

Penalty: ?.

Section 216AK:

Penalty: ?.

Section 216AL:

Penalty: ?.

Section 216AQ:

Penalty: ?.

Section 216AR:

Penalty: ?.

Section 216AT:

Penalty: ?.

- Section 216AU:**
Penalty: ?.
- Section 216BA:**
Penalty: ?.
- Section 216BB:**
Penalty: ?.
- Section 216BC:**
Penalty: ?.
- Section 216BD:**
Penalty: ?."; and
- (d) by inserting before "Section 224" the following:
"Section 219A:
Penalty: ?."; and
- (e) by inserting before "Section 234ZF" the following:
"Section 241B:
Penalty: ?.
- Subsection 243HA(1):**
Penalty: ?.
- Subsection 243ZDD(2):**
Penalty: ?.
- Section 243ZDF:**
Penalty: ?.
- Section 243ZEA:**
Penalty: ?."; and
- (f) by inserting before "Section 289" the following:
"Section 260AB:
Penalty: ?.
- Section 260AC:**
Penalty: ?.
- Section 260AD:**
Penalty: ?.
- Section 260AE:**
Penalty: ?.
- Section 260AF:**
Penalty: ?.
- Section 260AG:**
Penalty: ?.
- Section 260AH:**
Penalty: ?.
- Section 260AI:**
Penalty: ?.
- Section 260AJ:**
Penalty: ?.
- Section 260AK:**
Penalty: ?.

-
- Section 260AL:**
Penalty: ?.
- Section 260AN:**
Penalty: ?.
- Subsection 260AQ(6):**
Penalty: ?.
- Section 260BC:**
Penalty: ?.
- Section 260BD:**
Penalty: ?.
- Section 260BJ:**
Penalty: ?.
- Section 260BK:**
Penalty: ?.
- Section 260CA:**
Penalty: ?.”; and
- (g) by inserting before “**Section 471A**” the following:
“**Section 458CC:**
Penalty: ?.
- Subsection 458CD(5):**
Penalty: ?.
- Subsection 458DB(4):**
Penalty: ?.
- Subsection 458DC(5):**
Penalty: ?.
- Section 458PB:**
Penalty: ?.
- Section 458PC:**
Penalty: ?.
- Section 458PD:**
Penalty: ?.
- Section 458RE:**
Penalty: ?.”; and
- (h) by omitting “**Subsection 486A(8)**” and substituting “**Subsection 486AB(6)**”; and
- (j) by inserting before “**Subsection 590(1)**” the following:
“**Subsection 581BB(2):**
Penalty: ?.
- Section 581BD:**
Penalty: ?.
- Section 581BE:**
Penalty: ?.
- Subsection 581BI(2):**
Penalty: ?.
- Subsection 581CC(5):**
Penalty: ?.

Section 581DB:

Penalty: ?.

Subsection 581DG(5):

Penalty: ?.

Subsection 581DH(5):

Penalty: ?."; and

- (k) by inserting before "Section 809" the following:

"Section 807A:

Penalty: ?."; and

- (m) by inserting before "Section 843" the following:

"Section 841A:

Penalty: ?."; and

- (n) by inserting before "Subsection 866(3)" the following:

"Section 851:

Penalty: ?."; and

- (p) by inserting before "Section 1112" the following:

"Section 1082A:

Penalty: ?."; and

- (q) by adding at the end the following:

"Subsection 1350C(3):

Penalty: ?."

PART 3 — AMENDMENTS OF THE ASC ACT

Part 1 — Preliminary

Division 1 — Objects

Objects

163. Section 1 of the ASC Act is amended by adding after paragraph (2)(b) the following paragraph:

- "(ba) to maintain the confidence of investors in, and the efficiency of, collective investment schemes, in particular, by acting to minimise, so far as practicable, the risk of contravention of national scheme laws in relation to collective investment schemes;"

Part 1, Division 4 — Interpretation

Interpretation

164. Section 5 of the ASC Act is amended by adding at the end of the definition of "eligible person" in subsection (1), after paragraph (b), "and in

relation to a collective investment scheme, also includes a person who is or has been an auditor of the scheme or is acting or has acted in any other capacity for the scheme operator in relation to the scheme”.

Part 3 — Investigations and information-gathering

new Division 1A

165. Part 3 of the ASC Act is amended by inserting before Division 1 the following Division:

“Division 1A — Surveillance audits for collective investment schemes

When certain powers may be exercised

“12A. A power conferred by this Division may be exercised for the purposes of checking compliance by the operator of a collective investment scheme with a national scheme law of this jurisdiction in relation to the scheme.

Staff members to be specially authorised

“12B. A power under this Division is not to be exercised by a staff member unless authorised in writing by the Commission to conduct surveillance audits under this Division.”.

Commission may enter places and search for and examine books

“12C. (1) A member or staff member:

- (a) may use reasonable force to enter, and to conduct a search in, a place:
 - (i) occupied or used, in the course of a business, by the operator of a collective investment scheme or by an eligible person in relation to a collective investment scheme; or
 - (ii) where the undertaking or part of the undertaking of a collective investment scheme is carried on; or
 - (iii) specified in the application for registration of a collective investment scheme as required by paragraph 158A(3)(f) of the Corporations Law; and
- (b) is entitled to full and free access to and within such a place to conduct a search;

for books that contain, or that that or some other member or staff member believes on reasonable grounds contain, information relevant to compliance by the operator of a collective investment scheme with a national scheme law of this jurisdiction in relation to the scheme.

“(2) A member or staff member may do whatever is reasonably necessary to conduct such a search.

“(3) A member or staff member may examine any book found during such a search to find out whether it is a book that contains such information and, if it is, to check compliance by the operator with a national scheme law of this jurisdiction in relation to the scheme.

“(4) The member or staff member may only enter or remain on the place after 8 am and before 6 pm on a business day or with the occupier’s consent.

“(5) A consent is not effective for the purpose of subsection (4) unless, before it was given, a member or staff member told the occupier that the occupier does not have to consent.

Taking possession of and removing books found during audit surveillance

“12D. (1) A member or staff member is not to take possession of, or remove from a place, any books found during a search under this Division except by consent of the occupier of the place or in accordance with Division 3. However, a member or staff member may secure the books at the place until action under Division 3 is taken, but in any case for no longer than 24 hours.

“(2) A consent is not effective for the purpose of subsection (1) unless, before it was given, a member or staff member told the occupier that the occupier does not have to consent.

Note: Division 3 provides for investigations.

Securing books etc.

“12E. If a member or staff member may, under subsection 12C(1), secure books at a place, that or some other member or staff member may do whatever is necessary to secure the books and to prevent interference with them.

Surveillance audits — duty to help Commission

“12F. (1) If a member or staff member has entered a place in the course of a search for, or examination of, books under this Division, each of the following:

- (a) the occupier of a place where the books are;
- (b) the owner of the books;
- (c) a person in possession of the books;
- (d) a person authorised to have possession of the books;

must, on being asked by that or some other member or staff member, or by a person authorised in writing by the Commission for the purpose of such a search or examination, give such help, and provide such facilities, as it is reasonable for the person to give or provide to enable a member or staff member, or the authorised person, to search for and examine books or to have them examined.

“(2) The occupier may recover from the Commission the amount of the cost to the occupier of a member or staff member’s using a device to make a copy of a document, but not exceeding the amount worked out as prescribed.

Note: Examples of what a person might be asked under subsection (1) to do include

- indicate the location of the books;
- make them available for examination;
- open a room or package in which they are;
- bring them to a particular place for examination;
- make a copy, or allow a member or staff member to use a device at the place to make a copy, of them.”.

Part 3, Division 1 — Investigations

General powers of investigation

166. Section 13 of the ASC Act is adding by inserting “or the affairs of a collective investment scheme” at the end of subparagraph (1)(b)(i).

Investigation after report of receiver, administrator or liquidator

167. Section 15 of the ASC Act is amended by omitting all words up to “of that Law” and substituting “If a report has been lodged under section 422, 438D, 458DD, 533 or 581DI of the Corporations Law, or under a previous law corresponding to any of those sections,”.

Part 3, Division 2 — Examination of persons

168. Section 25 of the ASC Act is repealed and the following section substituted:

Giving to other persons copies of record

“25. (1) The Commission may give:

- (a) a copy of any books that the Commission holds in relation to a matter in respect of which it has a power or function under a national scheme law; or
- (b) a copy of a written record of an examination, and of any related documents;

to a person’s lawyer if the Commission is satisfied that the person is carrying on, or is contemplating in good faith, a proceeding in relation to the matter or to a matter the subject of the examination or investigation.

“(2) The Commission may give the copy despite any obligation not to disclose the record or the information in the record.

“(3) The Commission may give the copies subject to conditions. If the conditions are not complied with, the person commits an offence.

Penalty: ?.

“(4) If the Commission gives a copy to a person under subsection (1), the person, and any other person who has possession or control of the copy, must not, except in connection with preparing, beginning or carrying on a proceeding:

- (a) use the copy, or a further copy of the copy; or
- (b) publish or communicate to a person the copy or a further copy of the copy;

knowing it to be such a copy.

Penalty: ?.”.

Part 3, Division 3 — Inspection of books

When certain powers may be exercised

169. Section 28 of the ASC Act is amended by inserting after “ensuring” in paragraph (b) “or checking”.

Notice to produce books about affairs of body corporate or collective investment scheme

170. Section 30 of the ASC Act is amended by adding at the end the following subsection:

“(2) The Commission may give to:

- (a) a body corporate that is or has been the operator of a collective investment scheme; or
- (b) an eligible person in relation to a collective investment scheme;

a written notice requiring the production to a specified member or staff member, at a specified time and place, of specified books relating to the affairs of the scheme.”.

Notice to produce books about securities

171. Section 31 of the ASC Act is amended:

- (a) by inserting after paragraph (1)(d) the following paragraph:
 - “(da) a company that is or has been the operator of a collective investment scheme;”;
- (b) by omitting from paragraph (1)(e) “or (d)” and substituting “, (d) or (da)”; and
- (c) by inserting after subsection (1) the following subsections:

“(1A) The Commission may give to a company that is or has been the operator of a collective investment scheme a written notice requiring the production to a specified member or staff member, at a specified time and place, of specified books relating to the affairs of the scheme.

“(1B) Subsections (1) and (1A) do not affect each other’s operation.”.

Notice to produce documents in persons' possession

172. Section 33 of the ASC Act is amended by inserting after paragraph. (a) the following paragraph:

“(aa) affairs of a collective investment scheme; or”.

173. After section 33 of the ASC Law the following sections are inserted:

Notice to produce documents etc. obtained or secured during surveillance audits

“33A. If books or documents are obtained by a member or staff member under Division 1A, or have been secured by a member or staff member under that Division, a notice under section 30, 31, 32 or 33 may be given in relation to the books and documents by being given to the person last in possession of the books or documents. The notice must, however, state that the books or documents are in the possession of the Commission, or have been secured, as the case requires.

Books and documents overseas

“33B. If books that relate to:

- (a) affairs of a body corporate or of a collective investment scheme; or
- (b) a matter referred to in any of paragraphs 31(1)(g) to (m), inclusive, and 32(1)(j) to (p), inclusive;

are in a foreign country, the Commission may give to a person a written notice requiring the person to give such consents and directions, or do such other things, as the person may do or give so that the Commission has the unconditional authority, enforceable in the foreign country, to take possession of or examine the books or copies of them.”.

174. After section 36 of the ASC Law the following sections are inserted:

Telephone, fax etc. warrants

“36A. (1) If it is impracticable to apply for a warrant as mentioned in section 35 in person, the application may be made by facsimile, telephone or other appropriate means. In such a case:

- (a) the judicial officer is not to issue the warrant unless he or she is satisfied that it is impracticable for the applicant to apply in person for the warrant; and
- (b) the judicial officer is to prepare and sign the warrant and tell the applicant its terms; and
- (c) the applicant is to prepare an instrument in the same terms as the warrant and write on it:
 - (i) the time at which and the day on which the warrant was signed; and
 - (ii) the name of the judicial officer who signed the warrant; and

- (d) the applicant is to give to the judicial officer who signed the warrant, not later than 24 hours after it was signed, the information on oath mentioned in paragraph 35(1)(c) and the instrument mentioned in paragraph (c).

“(2) Without limiting the matters that are relevant to determining whether it is impracticable to apply for the warrant in person, the following are relevant:

- (a) the period within which what is to be authorised by the warrant must be done;
- (b) the time that would be taken if an application were to be made in person.

“(3) While the warrant remains in force, the instrument may be used instead of the warrant.

“(4) In any proceeding a court is not to find that anything was done in accordance with a warrant issued as mentioned in this section unless the warrant, signed as mentioned in paragraph (1)(b), is admitted in evidence in the proceeding.

Execution of warrants

“36B. (1) A warrant under this Division is not discharged merely because a person, including the person responsible for executing the warrant, leaves a place where it is being executed:

- (a) for not more than one hour between 8 am and 6 pm; or
- (b) between 6 pm and 8 am; or
- (c) with the written consent of the occupier of the place.

“(2) If:

- (a) a court orders the execution of a warrant to be stopped; and
- (b) the order is later reversed or revoked on appeal; and
- (c) the warrant is still in force;

the execution of the warrant may be completed.”.

Part 3, Division 4 — Requirements to disclose information about securities or futures contracts

When certain powers may be exercised

175. Section 40 of the ASC Act is amended by inserting after “ensuring” in paragraph (b) “or checking”.

Part 3, Division 5 — Proceedings after an investigation

Commission may cause civil proceeding to be begun

176. Section 50 of the ASC Act is amended by adding at the end the following subsection:

“(2) Subsection (1) extends to allow the Commission to begin and carry on a proceeding in a person’s name as a representative proceeding within the meaning of Part IVA of the *Federal Court of Australia Act 1976*.”.

Part 3, Division 7 — Offences

177. After section 67 of the ASC Law the following section is inserted:

Interfering with books that have been secured

“67A. A person must not, without the authority of the Commission, alter or interfere with any books that the person knows have been secured in accordance with section 12D.

Penalty: ?.”.

Part 3, Division 10 — Miscellaneous

178. After section 83A of the ASC Law the following section is inserted:

Enforceable undertakings

“83B. (1) The Commission may accept a written undertaking given by a person for the purposes of this section in connection with a matter in relation to which the Commission has a power or function under a national scheme law.

“(2) An undertaking is of no effect so far as it is inconsistent with a national scheme law.

“(3) The person may withdraw or vary the undertaking at any time, but only with the consent of the Commission.

“(4) The Court may, on the application of the Commission and if satisfied that the person has contravened a provision of the undertaking, make 1 or more of the following orders:

- (a) an order directing the person to comply with that provision;
- (b) an order directing the person to pay to the Commonwealth an amount up to the amount of any financial benefit that the person has obtained directly or indirectly and that is reasonably attributable to the contravention;

- (c) any order directing the person to compensate some other specified person who the Court finds has suffered loss or damage as a result of the contravention;
- (d) such other order as is just."

179. After section 87 of the ASC Law the following sections are inserted:

Bringing devices, including computers, to places for searching or examining

"87A. If:

- (a) a member or staff member has power to search for, to inspect or to examine, books at a place; and
- (b) that or some other member or staff member believes that it is necessary to bring a device, including a computer, to the place and use it for the search and examination;

that or some other member or staff member may bring the device to the place and use it for the search or examination.

Testing computers etc. used to produce documents

"87B. (1) If a person uses, or provides access to, a computer for the purpose of complying with a requirement to produce books, a member or staff member may direct the person to allow the computer to be tested to find out whether the computer accurately produces the contents of, or the information in, documents.

"(2) The direction is not to require the computer to be tested except at a place where it is usually located and at a reasonable time.

Use of computers in searches and examinations

"87C. (1) If a member or staff member has power to search for, or to examine, books at a place, that or some other member or staff member, or a person authorised in writing by the Commission for the purpose, may operate a computer that is already at the place if that or some other member or staff member believes on reasonable grounds that:

- (a) it is necessary for the member, staff member or person to operate the computer to achieve any of the following purposes:
 - (i) to search for the book;
 - (ii) to examine the document;
 - (iii) to put a document into readable form;
 - (iv) to copy a document to some other document to examine it or put it into readable form; and
- (b) the computer is suitable for that use; and
- (c) the computer can be used in that way without damaging the computer or the books.

“(2) A member or staff member so using a computer may use it to get access to any document that the computer can lawfully get access to, including a document held at another place.

“(3) The member or staff member does not have to ask permission before using the computer.

Compensation for loss or damage caused by Commission using computers

“87D. (1) If:

(a) a member, staff member or person operates a computer as mentioned in section 87C; and

(b) before using the computer, a member or staff member did not ask:

(i) the owner of the computer; or

(ii) a person apparently in charge of the business in which the computer is being used;

to operate the computer or to cause it to be operated for that purpose; and

(c) the owner of the computer, or a person who uses the computer in his or her business, suffers loss or damage because of the member, staff member or person's operating the computer;

the owner of the computer or a person who uses the computer in his or her business may recover from the Commission the amount of the loss or damage, whether or not the loss or damage was caused by the member, staff member or person's neglect or fault.

“(2) Subsection (1) does not apply if neither the owner of the computer nor the person apparently in charge of the business was present, or readily available to be asked, when the computer was to be used.

“(3) If:

(a) a member, staff member or person operates a computer at a place as mentioned in section 87C; and

(b) before using the computer:

(i) a member or staff member asked a person mentioned in paragraph (1)(b) to operate the computer or to cause it to be operated for that purpose; and

(ii) the person asked failed or refused to comply; and

(iii) the failure or refusal was reasonable; and

(c) the owner of the computer, or a person who uses the computer in his or her business, suffers loss or damage because of the member, staff member or person's operating the computer;

the owner of the computer or a person who uses the computer in his or her business may recover from the Commission the amount of the loss or damage, whether or not the loss or damage was caused by the member, staff member or person's neglect or fault.

“(4) If the loss or damage was partly caused by the claimant’s neglect or fault, the amount of the loss or damage recoverable under subsection (1) or (2) is to be reduced to such extent as is just having regard to the person’s share in the responsibility for the loss or damage.”.

Part 8 — Finance

Division 1 — General

Application of Division 3 of Part XI of the Audit Act

180. Section 138 of the ASC Act is amended by adding at the end of subsection (2) the following word and paragraph:

“; and (d) particulars of each exemption granted during that year under Part 9.9A of the Corporations Law”.

Transitional

Transitional

181. (1) Part 3 of the ASC Act as in force after the commencement of this Part of this Act applies to an existing prescribed interest scheme as if:

- (a) references to a collective investment scheme were references to arrangements for the issue of securities that are prescribed interests; and
- (b) reference to the operator of a collective investment scheme were references to the management company or the trustee of representative for the purposes of the deed approved for the purposes of Division 5 of Part 7.12.

(2) In this section:

“**existing prescribed interest scheme**” means a scheme that provides for the issue of securities that are prescribed interests in relation to which there is, on the day fixed for the purposes of subsection 2(2), a deed that is an approved deed for the purposes of Division 5 of Part 7.12 of the Corporations Law.

PART 4 — AMENDMENT OF THE CORPORATIONS ACT 1989

The Corporations Regulations

182. After paragraph 22(k) of the Corporations Act the following paragraph is inserted:

“(ka) excluding or modifying the operation of a provision of the Law in relation to a specified collective investment scheme or a class of collective investment schemes; and”.
