

1992

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HOUSE OF REPRESENTATIVES

CORPORATE LAW REFORM BILL 1992

EXPLANATORY MEMORANDUM

(Circulated by Authority of the Attorney-General,  
the Honourable Michael Duffy, MP)

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## CORPORATE LAW REFORM BILL 1992

### OUTLINE

1. The Corporate Law Reform Bill 1992 contains amendments to the Corporations Law relating to:

- Directors' duties;
- Related party transactions;
- Corporate insolvency;
- Stock exchange settlement procedures; and
- Miscellaneous other provisions.

2. The Bill addresses three major law reform reports:

- The report by the Senate Standing Committee on Constitutional and Legal Affairs entitled 'The Social and Fiduciary Duties and Obligations of Company Directors';
- The corporate law aspects of the report by the Australian Law Reform Commission on its 'General Insolvency Inquiry' (Report No.45) - the personal bankruptcy aspects of that report are being addressed in a separate legislative exercise; and
- The Report by the Companies and Securities Advisory Committee on 'Corporate Financial Transactions'.

3. The recommendations in these reports which are being implemented by this Bill, and the other reforms which the Bill effects, are described in detail below under the heading 'Summary of Main Features of Bill'. The broad impact will be as follows.

4. The Bill picks up recommendations by the Senate Committee concerning the duty of care of company directors, the decriminalisation of directors' duties in appropriate circumstances, the introduction of civil penalties for breaches of the Corporations Law, and the extension of the system of penalty notices, thus providing for the efficient disposition of matters involving minor infringements of the Law.

5. The Bill implements a wide range of recommendations from the Australian Law Reform Commission report. Perhaps the most significant of these is the introduction of a new procedure for the administration of insolvent companies, which is intended to facilitate the rehabilitation of such companies wherever possible. Other important reforms will make insolvency practitioners more accountable to creditors and members of insolvent companies, while at the same time facilitating their work by making it easier to claw back monies paid out by a company just prior to its insolvency, especially where such monies are paid to persons related to those controlling the company.

6. The Bill also deals with related party transactions, such as loans to directors and intra-group loans. When it was exposed in February 1992, the Bill reproduced provisions drafted by the Companies and Securities Advisory Committee on these issues. Following submissions that these provisions were too detailed and complex, they have been comprehensively redrafted. The underlying principle remains the same - that financial benefits given to persons who are in a position to significantly influence the decision to give the benefit should be subject to shareholder approval unless they are on commercial terms. The Bill also requires directors to refrain from participating in, or voting at, board meetings which are considering matters in which the directors have a personal interest.

7. The Bill also effects changes to facilitate electronic settlement of transactions on the Australian Stock Exchange, thereby making the Stock Exchange more competitive with its international counterparts. These reforms build upon the securities settlement reforms contained in the Corporations Legislation Amendment Act (No.2) 1991.

8. Other, miscellaneous reforms include a new requirement for the Australian Accounting Standards Board to consult with its New Zealand counterpart in developing accounting standards, so as to ensure trans-Tasman harmonisation of such standards wherever practicable.

9. The Bill was released as an exposure draft in February 1992. Over 200 submissions were received on the exposure draft. In the light of those submissions, a number of amendments have been made to the Bill. By far the majority of these are minor technical and drafting matters. There have, however, been some important amendments and these are outlined below under the heading 'Main Changes to Exposure Draft'.

#### FINANCIAL IMPACT STATEMENT

10. The Bill is not expected to have any significant financial impact on Government.

11. Parts of the Bill, and in particular Parts 3 and 4, will impose some additional obligations on persons associated with companies.

12. Part 3 requires shareholder approval of some related party transactions which are not currently required to be submitted to shareholders. It is difficult to assess whether there will be an overall increase in the need to put related party transactions before shareholders, since there are already such requirements, both in the Corporations Law and in the Australian Stock Exchange Listings Rules, and the new provisions, while more extensive than the current

requirements in some important respects, have in other respects a narrower coverage. Further, Part 3 has been structured so that such proposals will only need to be submitted to shareholders at the time of a company's annual general meeting, so that no special general meeting should be necessary in the usual case.

13. Further, exceptions provided within Part 3 allow legitimate commercial transactions to continue with little or no additional regulation and, in important areas, less regulation than is imposed by the current law.

14. The reforms to be effected in implementing recommendations of the Harmer Report (Part 4) are many and varied. Their overall aim, however, is to make Australia's corporate insolvency laws operate more efficiently and effectively than they have done in recent years. In some cases, additional costs will be involved (eg. through the new requirement that 'managing controllers' lodge an early report about the affairs of the company they have come to control). In these cases, however, the additional cost is outweighed by the potential benefits available (in the case of the above example, in the form of additional accountability to shareholders and creditors).

15. Of particular importance in Part 4 is the new voluntary administration scheme to be set out in new Part 5.3A. The aim of that scheme is to save companies and businesses which are experiencing solvency difficulties, rather than destroy them in the way the current law all too often does. If the new Part is successful in even a small minority of cases, the benefits available, both to the company under administration and to its creditors, will be very significant.

16. The reforms to Stock Exchange Settlement Procedures to be introduced by Part 5 will make the Australian Stock Exchange more competitive internationally and, by speeding up securities settlements, will reduce risk for investors. This will benefit Australian business significantly.

17. The other reforms to be effected by the Bill are expected to have little impact on business.

## ABBREVIATIONS

The following abbreviations are used in this explanatory memorandum:

ACL	- Australian Company Law Cases
ACSR	- Australian Corporations and Securities Reports
AGM	- Annual general meeting
AGPS	- Australian Government Publishing Service
ASC	- Australian Securities Commission
ASX	- Australian Stock Exchange
the Bill	- Corporate Law Reform Bill 1992

## SUMMARY OF MAIN FEATURES OF BILL

### DIRECTORS' DUTIES

18. Part 2 of the Bill implements a number of amendments to the Corporations Law foreshadowed by the Government in its response to the report by the Senate Standing Committee on Legal and Constitutional Affairs on its inquiry into the 'Social and Fiduciary Duties and Obligations of Company Directors'. Specifically, Part 2 will implement the Government's decisions to amend the Corporations Law to:

- reinforce that the duty of care and diligence required of company officers by Corporations Law subsection 232(4) is an objective duty, requiring a company officer to exercise the degree of care and diligence that a reasonable person would exercise;
- require the directors of a public company to include in the company's annual report to its members a statement indicating the number of board meetings convened that year and the number of meetings attended by each person who was a director of the company at any time during the reporting period;
- define a number of provisions of the Corporations Law as 'civil penalty provisions';
- enable the Court to make a 'civil penalty order' in relation to a contravention of a civil penalty provision;
- retain criminal sanctions in relation to a contravention of a civil penalty provision committed with a dishonest intent;
- enable the court to order a person who contravenes a civil penalty provision to compensate the company; and
- extend the availability of penalty notices to all offences not involving imprisonment and having a maximum fine not exceeding a fine of \$500.

## RELATED PARTY TRANSACTIONS

19. Part 3 of the Bill deals with related party transactions, such as loans to directors, intra-group loans and executive remuneration. The main elements of the provisions are as follows:

- all financial benefits given by a public company to a related party require shareholder approval, unless they fall within a number of excepted types of transactions;
- ‘financial benefit’ is very broadly defined, to catch any situation where the companies resources are transferred, even if the related party purports to offer consideration;
- ‘related party’ is defined to include all persons in a position to exercise control over the company - this includes holding companies as well as directors and their immediate relatives;
- the exceptions are as follows:
  - benefits given before the Part commences on 1 February 1994;
  - reasonable remuneration;
  - advances up to \$2,000;
  - benefits passing between a wholly-owned subsidiary and its holding company;
  - benefits given on arms’ length terms;
  - benefits given pursuant to a court order; and
  - benefits given to related parties because they are members, provided there is no discrimination in favour of related parties over other members;
- where shareholder approval is required, shareholders must be provided with full information, the ASC must be provided with an opportunity to comment on the information put before shareholders, any comments made by the ASC must be put before shareholders, and interested parties cannot vote; and
- directors who have an interest in a matter involving the company must not vote at, or attend a board meeting which considers the matter, unless the other directors resolve that these disqualifications need not apply.

## CORPORATE INSOLVENCY

20. Part 4 of the Bill inserts a number of new or replacement sets of provisions into the Corporations Law, and amends a number of other provisions, in relation to corporate insolvency. These reforms implement recommendations by the Australian Law Reform Commission in the report on its 'General Insolvency Inquiry' (known as 'the Harmer Report')

### Voluntary administration of insolvent companies

21. Proposed Part 5.3A implements the Harmer Report's recommendations in relation to the establishment of a new scheme for the voluntary administration of insolvent companies. The Harmer Report recommended a new procedure (based loosely on a United States approach) under which a company in financial difficulties could appoint an administrator.

22. The procedure under proposed Part 5.3A involves the following key elements:

- allowing directors to appoint an independent administrator;
- allowing the administrator up to 35 days to develop a proposed scheme of arrangement for consideration by the company and its creditors;
- giving force to the arrangement if the creditors and the company support it;
- giving protection to the rights of creditors by:
  - enabling a committee of creditors to require information from the administrator;
  - enabling creditors to vote to replace an administrator;
  - allowing a creditor secured over the whole or substantially the whole of the company's assets a short period during which the creditor may elect to enforce the security, notwithstanding the appointment of an administrator; and
  - requiring the court to ensure the adequate protection of any creditors in certain situations;
  - providing that a secured creditor who opposes a scheme of arrangement is not bound by it; and
  - allowing an unsecured creditor who considers that a scheme is oppressive to challenge the scheme in court;
- where the administrator or the meeting of creditors concludes that the company should be wound up, providing for a smooth and efficient transition to a winding up process.

### Winding up of insolvent companies

23. Proposed Parts 5.4 to 5.4B implement recommendations of the Harmer Report relating generally to winding up. They will clarify the law and increase the efficiency of the winding up process.

24. Reforms to the winding up process, contained in the proposed new provisions, include the following:

- procedures for statutory demands (a preliminary step in the winding up process) will be simplified, time limits will be imposed on the life of a demand and the court will be given the discretion to disregard technical irregularities in statutory demands. This will greatly facilitate the winding up process, resulting in time savings to the courts and reduced costs for the parties, by preventing the use of the winding up hearing for the dispute of minor matters; and
- a liquidator will be able to apply to the Court for the arrest of company officers in prescribed circumstances, or for the seizure of company books or other property, and the Court will be enabled to prohibit company officers transferring money or property out of the jurisdiction.

### Receivers

25. Part 4 of the Bill implements the Hammer Report's recommendations that:

- most of the receivership provisions in the Corporations Law be extended to apply to mortgagees and their agents (the provisions in question relate largely to reporting to shareholders and the ASC). This means that there will be more information available where entry into possession is used in preference to the appointment of a receiver, and
- receivers, chargees in possession and their agents will have a duty to take reasonable care in exercise of their powers in relation to the sale of company assets.

### Director liability and disqualification

26. Proposed Parts 5.7B and 9.4AA implement recommendations of the Harmer Report to the effect that:

- directors have a duty to prevent a company trading when it is unable to pay its debts;
- a liquidator will be able to sue a director who breached this duty, with the proceeds to be applied for the benefit of all unsecured creditors, rather than just the first creditor who takes action;

- criminal liability will be retained where there is dishonesty; and
- disqualified directors who continue to act where a company is insolvent will have unlimited personal liability.

#### Avoidance of antecedent transactions

27. Proposed Part 5.7B contains revised and simplified provisions regulating antecedent transactions in relation to companies, as recommended by the Harmer Report.

28. In particular, the provisions are aimed at:

- the strengthening of the antecedent transactions provisions concerning ‘related persons’, so that assets disposed of by the company to favoured creditors shortly before the winding up will be more readily available for equal distribution amongst the general body of unsecured creditors; and
- setting out comprehensively the basis for the review of antecedent transactions in the context of companies. At present the provisions applied to companies are located in the Bankruptcy Act and applied by reference.

29. The provisions make the Corporations Law more comprehensive and more readily understood on these issues.

#### Priority among creditors

30. Part 4 also implements some of the Hammer Report’s recommendations in relation to priority among unsecured creditors, including the recommendation that the priority accorded to costs of an ASC investigation should be abolished. The ASC will still be able to claim such costs as a debt owing to it by the company but this will not rank any higher than other unsecured debts.

31. These provisions clarify the existing law and make the division of assets among unsecured creditors more equitable. Superannuation entitlements are also to be specifically given the same special priority as unpaid wages. This is to resolve uncertainty in the existing law under which only award-based superannuation contributions appear to have such priority.

#### Claims in insolvency

32. The Bill implements a number of recommendations of the Harmer Report in relation to claims, including the recommendation that claims for unliquidated damages arising from tort should be admissible.

33. The Bill does not implement the Report’s recommendation in relation to the recommendation that fines imposed with respect to offences committed before the commencement of the winding up should be admissible. This is thought to be potentially

inequitable~ in that in ‘punishes’ creditors for the wrong acts of the company.

### Available assets

34. The Bill implements the Harmer Report’s recommendations in relation to available assets:

- making void restrictive provisions in the memorandum and articles of a company which prevent a trustee in bankruptcy from getting the full advantage of ownership of the bankrupt’s shares;
- that companies be made liable for the debts of related companies where it is ‘just to do so’.

35. The recommendation concerning the liability for the debts of related companies is a major reform, directed at preventing companies avoiding liability for debts by quarantining the debts in subsidiaries. The Bill provides that a company will only be liable for the debts of a related company where it has knowledge of, and control over, the trading of that company, and has allowed it to trade while insolvent.

### STOCK EXCHANGE SETTLEMENT PROCEDURES

36. Part 5 of the Bill will make amendments necessary to enable the Australian Stock Exchange to introduce a new Clearing House Electronic Subregister System (CHES). This system will facilitate the transfer of securities electronically without a physical document transfer and will also enable the simultaneous exchange of valid securities for cleared funds (a delivery versus payment system). CHES will effectively support a short fixed period settlement discipline for equities settlement obligations between member brokers of the Australian Stock Exchange and other parties who are participants in the clearing house. A special feature of CHES will be the concept of the clearing house subregister which will be a dematerialised and integral part of the register of members of a company. The rationale for the CHES system is that it will assist Australia in maintaining competitive equities market in the face of competition from foreign markets. It will also reduce settlement risks for securities transactions because it will shorten the settlement cycle and will lead to greater efficiencies associated with the transfer of securities thus resulting in tangible net cost savings.

### MISCELLANEOUS

37. The provisions in Part 6 of the Bill will:

- amend the Corporations Law to:
  - simplify procedural requirements in notifying the ASC of the address of a company’s registered office (section 100);

- replace the existing requirement in section 187(4) for production of an original stamped contract for an allotment of shares with a requirement to lodge a certificate of compliance with stamp duty obligations; and
- allow the Minister to delegate to an officer in the Department prescribed powers and functions under the Corporations Law (new section 1345A); and
- amend the Australian Securities Commission Act 1989 to:
  - require the Australian Accounting Standards Board to consult its New Zealand counterpart in formulating accounting standards (section 226); and
  - protect the Minister from liability for damages arising from any action taken in good faith under a national scheme law (section 246);

#### TRANSITIONAL

38. The Bill concludes with Part 7, which deals with transitional matters.

## MAIN CHANGES TO EXPOSURE DRAFT

### Directors' Duties

39. The following amendments have been made to Part D of the draft exposure Bill:
- the directors' duty of care provision (proposed subsection 232(4)) has been amended to make it clear that the degree of care and diligence which must be exercised by an officer of a corporation in the discharge of his or her duties is that which a reasonable person in a like position in a corporation would exercise in the corporation's circumstances:
    - the addition of the phrase 'in a like position' will enable the court to look both at any special expertise held by individual directors and the distribution of functions within the corporation;
    - the revised subsection will maintain the endorsement of a more objective test, as recommended by the Senate Standing Committee on Legal and Constitutional Affairs and as articulated in recent Australian cases, while at the same time ensuring that our courts have complete freedom to take into account all relevant considerations in applying that test.
  - the provisions which set out a list of factors to be taken into account by a court in determining whether a director had complied with the duty of care provisions (proposed subsection 232(4AA) in the draft exposure Bill) have been deleted, having regard to the number of submissions which suggested that the guidance intended to be provided by those provisions was not necessary and could be counterproductive;
  - the civil penalty provisions (new Part 9.4B) have been amended to:
    - put the ASC to a binding election between commencing a civil penalty action or a prosecution, so as to ensure that a director cannot face two proceedings involving a possible penalty;
    - give the court the power to order that the pecuniary penalty be payable to the corporation where it would be just to do so; and
    - confine the court's power to impose a pecuniary penalty to cases involving a serious breach of duty and, for non-serious breaches, allow the court to make a declaration that a person has contravened a civil penalty provision.

### Related Party Transactions

40. Part 3 of the Bill replaces Part G in the exposure draft Bill. Part RP proposes the

insertion of a new section 232A and Part 3.2A into the Corporations Law. Part RP, like its predecessors deals with:

- a. company loans, assets transfers and similar transactions concerning those able to exercise control or significant influence over the company;
- b. disclosure of conflicts of interests by directors; and
- c. disclosure of benefits given to directors.

41. As with Part G, the overall object of the new Part 3.2A is to protect a public company's resources and the interests of its members by requiring that financial benefits to related parties that could diminish or endanger those resources, or that could adversely affect those interests, be disclosed, and approved by a general meeting, before they are given.

42. A number of techniques have been applied in the development of the new provisions. Where appropriate, reliance has been placed on statements of general principle, supported by examples, rather than long and detailed 'black-letter' prescriptions. The number of cross-references and definitions have been reduced as far as possible, so that each provision is as far a practicable self-contained and easy to read.

43. Part 3.2A proposes a prohibition on the giving of a 'financial benefit' by a public company and its 'child entities' to a 'related party' of the public company.

44. The expression 'financial benefit' is defined in general terms so that the economic and commercial substance and effect of the transaction is to prevail over its legal form. A 'child entity' of the public company is any entity, such as a subsidiary, trust or partnership, over which the public company may exercise control. The term 'related party' is defined to include the public company's directors and immediate family plus any other entity in a position to exercise control over the public company.

45. The new Part 3.2A then focuses on the central policy question to which Part G was directed. It does so by providing that financial benefits given to a related party on arms length terms will not be affected by the prohibition. Furthermore, as with Part O, any transactions will be permitted if they are disclosed to and approved by an informed meeting of disinterested shareholders. The disclosure requirements have been simplified through the use a 'prospectus' test (ie all information reasonably required to decide whether the giving of the financial benefit was in the company's interests) rather than the prescriptive test originally proposed by Part G.

46. A number of additional specific exceptions, that might not ordinarily fall within the arms length exception, are also made subject to the prohibition. These relate to the payment of reasonable remuneration to related parties who are employees, the giving of benefits to related parties in their capacity as a member of the related party (eg the payment of dividends or other 'shareholder transactions'), small loans to directors and their spouses, and transactions involving wholly-owned subsidiaries.

## Corporate Insolvency

47. The following significant amendments have been made to Part 4 of the draft exposure Bill:

- provision has been made for registered liquidators, as well as official liquidators, to be appointed as administrators (new section 448B):
  - proposed Part 5.3A of the draft exposure Bill provides for a voluntary scheme to allow an independent administrator to prepare a scheme of arrangement for putting a company which has been in financial difficulties back on its feet;
  - submissions on the draft exposure Bill have pointed out that the additional resources and experience of official liquidators will only be needed where there are large and complex administrations, that in the majority of cases a registered liquidator will be appropriate to perform the functions of an administrator and that creditors will be able to take remedial action (eg, replacing the administrator) if an administrator is unsuitable for the task;
- the provisions which would have allowed creditors an automatic right to take part in examinations of persons before a court (proposed paragraph 597 (5A)(b) in the draft exposure Bill) have been deleted, on the grounds that this would have caused unnecessary procedural problems and expense, particularly given that creditors can apply to the ASC to be represented before the court;
- the provisions which prohibit enforcement of guarantees during the administration of a company (proposed section 440J) have been amended so that the prohibition applies only to guarantees by a director (or relative of a director) and does not inhibit guarantees the enforcement of which in the ordinary course of business (eg, guarantees between entities in a corporate group) would not influence whether a company was placed into voluntary administration;
- the provisions which prevent agreements for the sale or lease of property being determined solely because a company has become insolvent (proposed section 564A in the draft exposure Bill) have been deleted, on the grounds that further consultation is required to ensure that any prohibition does not impede rights usually arising in respect of the trading of financial products; and
- the provisions which set out the circumstances where a company will be presumed to be insolvent (proposed section 588E) have been amended so that failure to keep proper accounting records will not establish this presumption in the case of preferences involving unrelated parties, on the grounds that those parties would not have control over the keeping of the company's books.

## Miscellaneous Amendments

48. Part 6 of the draft Bill also includes an amendment to section 187 of the Corporations Law to require a company to lodge with the ASC together with any return of allotment of shares a certificate to the effect that the contract has been duly stamped as required by any applicable law relating to stamp duty. The amendment has been drafted in accordance with a resolution of the Ministerial Council for Corporations that section 187 be changed to bring it into line with the corresponding stamp duty certification provisions in section 265. The corresponding provisions in section 265 require that a notice in respect of a charge on property of a company be accompanied by a certificate to the effect that all documents provided with the notice have been duly stamped as required by any applicable law relating to stamp duty.

49. Part A of the draft exposure Bill provided for the staggered lodgment of annual returns and the separate lodgment of financial returns (new sections 334A and 334B). These provisions were intended to allow the more even distribution of annual return lodgments and to remove the current administrative peak in the processing of annual returns during December and January of each calendar year. The provisions have, however, been deleted, pending the outcome of a current review of annual financial disclosure requirements for exempt proprietary companies. This will also enable an investigation of alternative lodgement systems which takes into account likely technological developments, such as the electronic lodgment of corporate information.

50. A clause-by-clause commentary follows. The index at the back of this Explanatory Memorandum provides a detailed key to the Bill, the commentary and, where relevant, to current provisions.

## CLAUSE-BY-CLAUSE COMMENTARY

51. There is an index (both to the Bill and to this commentary) at the end of this explanatory memorandum.

### PART 1 - PRELIMINARY

#### Clause 1 - Short title

52. Upon enactment, the Bill will be known as the Corporate Law Reform Act 1992.

#### Clause 2 - Commencement

53. Proposed subclause 2(1) provides that Part 1 of the Bill, entitled ‘Preliminary’ and comprising clauses 1 to 3, will commence on the day the Bill receives the Royal Assent.

54. Subclause (2) provides that subclauses 26(2) and 28(1) of the Bill commence on 1 February 1994. These provisions relate to Part 3 of the Bill, entitled ‘Financial Benefits to Related Parties of Public Companies’. Part 3 proposes the insertion into the Corporations Law of a new section 232A, entitled ‘Voting by interested directors of public company’, and Part 3.2A, entitled ‘Financial Benefits to Related Parties of Public Companies’. The 1 February 1994 commencement for these provisions will give companies affected by these provisions time to prepare for their commencement. Subclause 2(3) provides that the remaining provisions in the Bill will commence upon proclamation. This is because, in many cases, supporting regulations will need to be in place before the relevant provisions can be commenced. However, subclause 2(4) ensures that all the remaining provisions will commence within 6 months of Royal Assent.

#### Clause 3 - Meaning of ‘Corporations Law’ and ‘Principal Act’

55. This clause is self-explanatory.

### PART 2 - DUTIES OF OFFICERS OF CORPORATIONS

56. Part 2 implements a number of amendments to the Corporations Law foreshadowed by the Government in its response to the report by the Senate Standing Committee on Legal and Constitutional Affairs on its inquiry into the Social and Fiduciary Duties and Obligations of Company Directors. The response was tabled in the Senate on 28 November 1991 and is printed in full at Senate Hansard Thursday, 28 November 1991, pages 3611-3620.

#### Division 1 - Amendments of the Corporations Law

57. Division 1 of Part 2, entitled “Amendments of the Corporations Law”, makes a number of amendments to the Corporations Law concerning the duties of officers of corporations. The principal amendments are made by clauses 11, 13, 16 and 17. The remaining amendments are consequential upon these principal changes.

58. Clause ii implements the Government's decision to accept the Senate Committee's recommendation that an objective duty of care for directors be established by the Corporations Law.

59. Clause 13 will oblige the directors of a public company that is not a wholly-owned subsidiary of another company or of a recognised company to include in the company's annual report to its members a statement indicating the number of board meetings (including meetings of committees of the board) convened that year and the number of meetings attended by each person who was a director of the company at any time during that year. The provision was proposed by the Government as part of its response to the Senate Committee's recommendation that directors be required to attend board meetings unless there is reasonable excuse.

60. Clause 16 implements the Government's decision to accept the Senate Committee's recommendation that a system of on-the-spot fines for minor offences be introduced to the Corporations Law. The clause amends sections 1313 of the Corporations Law by extending the availability of penalty notices to all offences under the Corporations Law not involving imprisonment and having a maximum fee not exceeding \$500.

61. Clause 17 inserts a new Part 9.4B into the Corporations Law. It implements the Government's decision to accept the Senate Committee's recommendations that criminal liability under the Corporations Law not apply in the absence of criminality, that subsection 232(4) of the Corporations Law be amended so that criminal liability under that section only applies where the conduct is criminal in nature, and that civil penalties be provided in the Corporations Law for breaches where no criminality is involved, and, in appropriate circumstances, people suffering loss as a result of a breach be enabled to bring a claim for damages in the proceedings taken to recover the penalty.

#### Clause 4 - Dictionary

62. This clause adds a number of definitions to section 9 of the Corporations Law. Section 9 is the main definition section in the Corporations Law. The definitions of 'civil penalty disqualification', 'civil penalty order', 'civil penalty provision', 'find' and 'guilty' to be inserted are relevant to proposed Part 9.4B of the Corporations Law.

63. The words 'find' and 'guilty', in the case of a reference to a court finding a person guilty of an offence, will have a meaning affected by proposed section 73A, proposed to be inserted into the Corporations Law by clause 5 of the Bill.

64. Proposed section 1317EA will enable the Court to make a 'civil penalty order' in relation to a person who contravenes, or is involved in a contravention, of a 'civil penalty provision'. The expression 'civil penalty order' will be defined to mean an order made under proposed section 1317EA of the Corporations Law of this jurisdiction. The expression 'civil penalty provision' will have the meaning given by proposed section 1317DA, which provides that each of the following provisions will be a civil penalty provision: subsections 232(2), (4), (5) and (6), subsections 243ZE(2) and (3), subsection 318(1), and section 588G.

65. The expression ‘civil penalty disqualification’ will have the meaning given by proposed subsection 91(4A). A person will become subject to a ‘civil penalty disqualification’ if a disqualification order made under proposed section 1317EA is in force in relation to the person. In accordance with proposed paragraph 1317FA(1), a person who is subject to a civil penalty disqualification must not manage a corporation except with the leave of the Court.

66. Each of the civil penalty provisions relate to an important aspect of the role of a company director in the management of the company. Section 232 establishes the fundamental duties of honesty, care and diligence owed by a director to the company. A person contravenes subsection 243ZE(2) if he, she or it is a related party of a public company and receives a financial benefit in certain circumstances from the public company, or from a child entity of the public company. Subsection 243ZE(3) applies to persons who are involved in or recklessly concerned with a contravention of section 243H. Subsection 318(1) obliges a company director to take all reasonable steps to ensure that the company maintains required accounting records and prepares the appropriate financial statements. Section 588G, to be inserted by clause 111, requires a director to prevent the company from engaging in insolvent trading.

67. The Court will be authorised by proposed Part 9.4B, to be inserted by clause 17, to make compensation and civil penalty orders in relation to a person who contravenes a civil penalty provision. A civil penalty order may be a declaration that the person has contravened a specified civil penalty provision in relation to a specified corporation and an order that the person pay a pecuniary penalty not exceeding \$200,000 or be disqualified from managing a corporation for such period as is specified in the order (see proposed section 1317EA). A person who contravenes a civil penalty provision with a dishonest intent commits an offence having a maximum penalty of a fine of \$200,000 or imprisonment for 5 years, or both (see proposed section 1317FA(1)). Section 229 of the Corporations Law provides that person who has been convicted of certain offences may not, within 5 years after the conviction or release from prison, manage a corporation without leave of the Court. Clause 9 will extend the operation of section 229 to convictions for an offence against proposed section 1317FA(1)

#### Clause 5 - When a court is taken to find a person guilty of an offence

68. This clause inserts a new section 73A into the Corporations Law. Proposed 73A will define when a person will be found by an Australian court to be guilty of an offence. The section will provide that an Australian court finds a person guilty of an offence in either of two situations. The first situation is where the court convicts the person of the offence. The other situation is where the person is charged before the court with the offence and is found in the court to have committed the offence, but the court does not proceed to convict the person of the offence.

#### Clause 6 - Being or becoming subject to a section 229 prohibition, a section 230 or 599 order, a section 600 notice or a civil penalty disqualification

69. Section 91 of the Corporations Law currently defines the circumstances under which a person will be or become under a section 229 prohibition, section 230 or 599 order, or section 600 notice. Each of the 4 specified provisions concern the disqualification of a person from

managing a corporation. Section 230, for example, provides that in certain circumstances the Court may by order prohibit a person from managing a corporation. Other provisions of the Corporations Law address the consequences of being under a section 229 prohibition, a section 230 or 599 order, or a section 600 notice. Paragraph 224(1)(e) provides, for example, that if a person who occupies the office of director becomes subject to a section 230 order, the office is, by force of the section, vacated.

70. Clause 6 extends the operation of section 91 to civil penalty disqualifications, Proposed subsection 91(4A) will provide that a person is or becomes subject to a civil penalty disqualification if, and only if, an order relating to the person is in force, or is made, as the case may be, under section 1317EA. Proposed paragraph 1317EA(3)(a) provides that in certain circumstances the Court may by order prohibit a person from managing a corporation for such period as is specified in the order. A number of other proposed provisions will set out the consequences (for example, loss of office) of becoming subject to a civil penalty disqualification. Clause 15, for example, proposes the amendment of a number of provisions of the Corporations Law through the insertion of a reference to a civil penalty disqualification order.

#### Clause 7 - Effect of such a prohibition, order, notice or disqualification

71. A person who is subject to a civil penalty disqualification may not manage a corporation. Section 91A provides that for certain purposes a person manages a corporation if the person is a director or promoter of, or is concerned in or takes part in, the management of the corporation. Clause 7 extends the operation of section 91A to where a person is subject to a civil penalty disqualification.

#### Clause 8 - Vacation of office of director

72. Corporations Law section 224 provides that the office of a director is, by force of the section, vacated in a number of circumstances. It provides, for example, that an office of a director becomes vacant if the person becomes an insolvent under administration or becomes subject to a section 230 order. Clause 8 extends those circumstances to include where the director becomes subject to a civil penalty disqualification because of an order made under proposed paragraph 1317EA(3)(a). The clause also inserts a proposed subsection 224(6A), extending the effect of section 224, so that a person who has vacated a directorship because he or she has become subject to a civil penalty disqualification may not be re-appointed as a director until the end of the period specified in the order establishing the civil penalty disqualification.

#### Clause 9 - Certain persons not to manage corporations

73. Subsection 229(3) provides that a person may not, within 5 years of the occurrence of certain events, manage a corporation without the leave of the Court. It provides, for example, that a person who has been convicted of serious fraud may not manage a corporation during the 5 years after the conviction, or release from a consequent period of imprisonment, whichever is the later, without leave the Court. Clause 9 amends subsection 229(3) through the insertion of a reference to the offence established by proposed subsection 1317FA(1). Consequently, a person convicted of an offence against proposed subsection 1317FA(1) will be prohibited for 5 years

from managing a corporation. A person will be guilty of the offence established by proposed subsection 1317FA(1) if he or she knowingly, intentionally or recklessly contravenes a civil penalty provision with a dishonest intent.

#### Clause 10 - Court may order person not to manage corporation

74. Where the Court is satisfied that an officer of a body corporate has acted ‘dishonestly, or failed to exercise a reasonable degree of care and diligence’, it may, in accordance with Corporations Law paragraph 230(1)(d), disqualify the person from managing a corporation for such period as is specified in the order. Clause 10 omits from paragraph 230(1)(d) the test that the officer must have acted ‘dishonestly, or failed to exercise a reasonable degree of care and diligence’. Upon commencement of the amendment, the Court will be able to disqualify a person from managing a corporation if, whilst an officer ‘of a body corporate (other than a corporation), the relevant person did an act, or made an omission, that would have constituted a contravention of subsection 232(2) or (4) in relation to the body if the body had been a corporation at that time.’

75. An officer of a corporation who acts dishonestly, or fails to exercise the appropriate standard of care and diligence, will be liable to disqualification from managing a corporation because of a civil penalty disqualification established pursuant to proposed paragraph 1317EA(3)(a). Consequently, it should not be possible to make an order under paragraph 230(1)(d) in relation to a person’s conduct in connection with a corporation, and clause 10 achieves this result. It will, however, remain possible to make an order under paragraph 230(1)(d) in relation to a person’s conduct in connection with a body corporate that is not a corporation (e.g. an incorporated association).

76. Clause 10 also obliges the Court, in its consideration of whether the officer has acted dishonestly or with insufficient care and diligence, to apply the test specified in relation to corporations in subsections 232(2) and proposed subsection 232(4). It is appropriate that if an order under paragraph 230(1)(d) prohibits a person from managing a corporation, the conduct complained of should be such as to warrant disqualification because of subsection 232(2) or proposed subsection 232(4).

#### Clause 11 - Duty and liability of officer of corporation

77. This clause omits Corporations Law subsections 232(3) and (4), and substitutes a new subsection 232(4).

78. Subsection 232(3) specifies the sanction which currently applies in relation to a contravention of subsection 232(2). Subsection 232(2) provides that an officer of a corporation shall at all times act honestly in the exercise of his or her powers and the discharge of the duties of his or her office. Subsection 232(2) will be a civil penalty provision for the purposes of proposed Part 9.4B. The sanctions available in relation to a contravention of subsection 232(2) will therefore be determined in accordance with Divisions 2 and 3 of Part 9.4B.

79. Proposed section 1375, to be inserted by clause 185, preserves the effect of Corporations Law section 232 in relation to contraventions of that section which occur before the commencement of the Bill. Those contraventions may therefore be prosecuted as if the Bill had not been enacted.

80. However, proposed section 1389, to be inserted by clause 185, will allow a civil penalty application to be made in relation to a contravention of section 232 committed before the commencement of proposed Part 9.4B, provided the defendant consents in writing to the making of the application.

81. Clause 11 will omit the present subsection 232(4) and substitute a revised subsection (4).

82. Subsection 232(4) currently provides that an officer of a corporation shall at all times exercise a reasonable degree of care and diligence in the exercise of his or her powers and the discharge of his or her duties. Clause 11 amends subsection 232(4) to reinforce that the duty of care is an objective one, requiring a company officer to exercise the degree of care and diligence that a reasonable person in a like position as an officer of a corporation would exercise in the corporation's circumstances.

83. The Government considers that proposed subsection (4) does not change the law, but merely confirms the present position expounded in recent decisions such as: Hussein v Good (1990) 8 ACLC 390; Heide Pty Ltd v Lester (1990) 8 ACLC 958; Statewide Tobacco Services Ltd v Morley (1990) 8 ACLC 827; Commonwealth Bank of Australia v Freidrich (1991) 9 ACLC 946; AWA Ltd v Daniels (1992) 10 ACLC 933.

84. The inclusion of the expression 'a reasonable person' is intended to confirm that the required standard of care and diligence is to be determined objectively.

85. The proposed new subsection obliges a Court to place the reasonable person 'in a like position' with the relevant officer. Australian law recognises that the special background, qualifications and management responsibilities of the particular officer may be relevant in evaluating his or her compliance with the standard of care. At the same time, Australian law also recognises that decisions must be made on the basis of the circumstances at the time and without the benefit of hindsight.

86. The proposed new subsection 232(4) also obliges the Court to place the reasonable person in the position of an officer 'in the corporation's circumstances'. Thus, the proposed subsection 232(4) will recognise that what constitutes the proper performance of the duties of a director of a particular corporation will be influenced by matters such as the state of the corporation's financial affairs, the size and nature of the corporation, the urgency and magnitude of any problem, the provisions of the corporation's constitution, and the composition of its Board.

87. In the case of a business corporation, the standard would reflect the fact that corporate decisions involve risk-taking. The courts have in the past recognised that directors and officers

are not liable for honest errors of judgement: Ford's Principles of Company Law (6th ed., 1992) at p.528-9. They have also shown a reluctance to review business judgments taken in good faith. Thus, in Harlowe's Nominees Pty. Limited v Woodside 121 CLR 483 at 493, the High Court said:

Directors in whom are vested the right and duty of deciding where the company's interests lie and how they are to be served may be concerned with a wide range of practical considerations, and their judgment, if exercised in good faith and not for irrelevant purposes, is not open to review in the courts.

88. In addition, the courts have exercised their discretion to excuse directors who have acted honestly and who ought fairly to be excused: Re Claridge's Patent Asphalte Company, Limited [1921] 1 Ch 543. The Corporations Law already contains a provision of this nature (section 1318) and the application of that section is effectively being extended by clause 17 of this Bill.

89. The Government endorses this approach and does not intend any change in the law by the revised wording of subsection 232(4). No attempt has been made in the Bill to enact a U.S. style of Business Judgment Rule since no State in the USA has adopted a legislative statement of the Rule. Instead the matter has been left to the courts to develop. Similarly the Government considers that the development of similar principles in Australia is better left to the courts.

90. Proposed subsection 232(6B) provides that subsections 232(2), (4), (5) and (6) are civil penalty provisions as defined by proposed section 1317DA, and that proposed Part 9.4B provides for civil and criminal consequences of contravening any of them, or of being involved in a contravention of any of them.

91. Clause 11 omits Corporations Law subsections 232(7) and (8), concerning an officer's civil liability on a contravention of section 232. These provisions have been replaced by proposed sections 1317HA, 1317HB and 1317HD in proposed Part 9.4B of the Corporations Law.

92. Clause 11 also omits Corporations Law subsections 232(9) and (10). Those subsections provide that where a person has been found to have contravened section 232, and liable to pay compensation in accordance with subsections 232(7) or (8), the Court must reduce the amount of that compensation by any amount that the person has been found liable to pay because of a contravention of Part 7.11. These provisions have not been relocated to proposed Part 9.4B of the Corporations Law. It is expected that in awarding compensation under proposed sections 1317HA, 1317HB and 1317HD the Court would avoid 'double-counting' and have regard to any other liability to pay compensation incurred by the person in relation to the conduct or omission constituting the contravention.

93. Corporations Law subsection 232(11) is not affected by the Bill. This provision will give effect to the intention that section 232 will have an effect in addition to, and not in derogation of, any rule of law relating to any duty or liability of a person by reason of the person's office or employment in relation to a corporation. The section will therefore preserve

the common law concerning directors' duties.

#### Clause 12 – Register of disqualified company directors and officers

94. Corporations Law subsection 243(1) obliges the Commission to maintain a Register of Disqualified Company Directors and Other Officers. The clause will amend subsection 243(1) to oblige the Commission to include in the register persons who become subject to a civil penalty disqualification order made pursuant to proposed paragraph 1317EA(3)(a).

95. This clause also corrects an erroneous reference in section 243 to “this Act”, which should be a reference to the Corporations Law.

#### Clause 13 – Public companies

96. This clause inserts a proposed subsection 307(2) into the Corporations Law. The new subsection will require the directors of a public company that is not a wholly-owned subsidiary of another company or of a recognised company to include in their annual report to the company's members a statement indicating the number of meetings of directors (including meetings of committees of directors) convened that year and the number of meetings attended by each person who was a director at any time during the year.

97. Clause 185 of the Bill inserts proposed section 1377 into the Corporations Law. That section provides that the obligation to comply with proposed subsection 307(2) will arise in relation to a financial year of the company that ends at or after the commencement of clause 13 of the Bill.

#### Clause 14 - Contravention of Part

98. This clause omits the present Corporations Law subsection 318(2), which specifies the sanction which currently applies in relation to a contravention of Corporations Law subsection 318(1), and substitutes a new subsection (2). Corporations Law subsection 318(1) obliges a director of a company to take all reasonable steps to comply with, or secure compliance with, certain provisions of Corporations Law Part 3.6, concerning the preparation of company financial statements. Corporations Law subsection 318(1) will be a civil penalty provision for the purposes of proposed Corporations Law Part 9.4B. The sanctions available in relation to a contravention of Corporations Law subsection 318(1) will therefore be determined in accordance with proposed Part 9.4B.

99. Proposed Corporations Law subsection 318(2) provides that subsection 318(1) is a civil penalty provision as defined by proposed section 1317DA, and that Part 9.4B provides for civil and criminal consequences of contravening it, or of being involved in such a contravention. It is a pointer intended to assist the reading of the Corporations Law.

#### Clause 15 - References to civil penalty disqualification inserted in certain provisions

100. This clause makes a number of amendments consequential upon proposed Part 9.4B.

Each of the following provisions of the Corporations Law will be amended by the insertion of a reference to a civil penalty disqualification order subsections 1280(3), 1282(4), 1287(4), and paragraph 1292(7)(a).

101. Subsection 1280(3) provides that the Commission shall not register as an auditor a person who is subject to a section 229 prohibition, a section 230 order, a section 599 order or a section 600 notice. Each of these provisions concerns the disqualification of a person from managing a corporation. Section 230, for example, provides that in certain circumstances the Court may by order prohibit a person from managing a corporation. The effect of the amendment will be that the Commission may not register as an auditor a person who is subject to a civil penalty disqualification order.

102. Subsection 1282(4) provides that the Commission shall not register as a liquidator a person who is subject to a section 229 prohibition, a section 230 order, a section 599 order or a section 600 notice. The effect of the amendment will be that the Commission may not register as a liquidator a person who is subject to a civil penalty disqualification order.

103. Subsection 1287(4) provides that an auditor or liquidator who becomes subject to a section 229 prohibition, a section 230 order, a section 599 order or a section 600 notice must notify the Commission of that fact within three days. The effect of the amendment will be that an auditor or a liquidator who becomes subject to a civil penalty disqualification order will also be obliged to notify the Commission of that fact within three days.

104. Paragraph 1292(7)(a) provides that the Companies Auditors and Liquidators Disciplinary Board shall, on the application of the Commission, by order cancel the registration of a prescribed person who has become subject to a section 229 prohibition, a section 230 order, a section 599 order or a section 600 notice. For the purposes of paragraph 1292(7)(a) a prescribed person is a person who is registered as an auditor or liquidator. The effect of the amendment will be that the Board shall, on the application of the Commission, by order cancel the registration of a prescribed person who has become subject to a civil penalty disqualification order.

#### Clause 16 - Penalty notices

105. Clause 16 will extend the availability of the penalty notice provisions of the Corporations Law to all offences to which the default penalty (a fine of \$500) established by Corporations Law subsection 1311(5) applies.

106. The penalty notice provisions of the Corporations Law, at Corporations Law section 1313 and Schedule 12 to the Corporations Regulations, implement an 'on-the-spot fine' regime in relation to a wide range of minor offences such as the failure to keep certain registers or lodge certain documents with the Commission. Compliance with a penalty notice, by paying the penalty and remedying the contravention, precludes the initiation of criminal proceedings in relation to the contravention and is not to be taken as an admission by the person of any liability in connection with the offence.

107. Subsection 1313(1) currently provides that a penalty notice may be issued in relation to a ‘prescribed offence’. The amount of the penalty that applies in relation to a prescribed offence is referred to in subsection 1311(1) as the ‘prescribed penalty’. The prescribed offences and prescribed penalties are currently specified in Schedule 12 to the Corporations Regulations.

108. Clause 16 amends subsection 1313(8) by inserting new definitions of the expressions ‘prescribed offence’ and ‘prescribed penalty’.

109. The expression ‘prescribed offence’ will be defined to mean an offence that is prescribed by the regulations or a ‘subsection 1311(5) offence’. The expression ‘subsection 1311(5) offence’ will be defined by proposed subsection 1313(8) to mean an offence the penalty applicable to which is provided for by subsection 1311(5). Subsection 1311(5) is the default penalty provision. It provides that where no other penalty is specified in relation to an offence against the Corporations Law the applicable penalty is a fine of \$500.

110. The expression ‘prescribed penalty’ will be defined by proposed subsection 1313(8) to mean the amount prescribed in the regulations in relation to the prescribed offence. However, an exception is provided in relation to subsection 1311(5) offences (i.e. offences to which the default penalty of a fine of \$500 applies). If the offence is a subsection 1311(5) offence the prescribed penalty will generally be one-quarter of the amount applicable to the offence (i.e. \$125). The regulations may, however, prescribe another amount that is not more than one half of the default penalty (i.e. not more than \$250).

111. Section 1312 provides that the maximum penalty which applies in relation to an offence committed by a body corporate is five times that which would apply where the offence was committed by a natural person. In order to maintain consistency with section 1312, if the alleged contravention was committed by a body corporate, the prescribed penalty in relation to a subsection 1311(5) offence will be five times that which would otherwise apply (i.e. \$625 or five times the amount prescribed by the regulations).

112. Clause 16 also corrects the inadvertent omission of the word “not” from paragraph 1313(4)(b) on the enactment of the Corporations Act 1989.

#### Clause 17 - Insertion of New Part 9.4B

#### Proposed Part 9.4B - Civil and Criminal Consequences of Contravening Civil Penalty Provisions

113. Clause 17 inserts into the Corporations Law a new Part 9.4B entitled ‘Civil and Criminal Consequences of Contravening Civil Penalty Provisions’ and comprising six Divisions.

114. Proposed Part 9.4B implements the Senate Committee’s recommendations that:

- criminal liability under the companies legislation not apply in the absence of criminality;

- subsection 232(4) of the Corporations Law be amended so that criminal liability under that section only applies where conduct is genuinely criminal in nature; and
- civil penalties be provided in the Corporations Law for breaches where no criminality is involved and people suffering loss as a result of a breach be enabled to bring a claim for damages in the proceedings taken to recover the penalty.

115. Proposed Division 1 of Part 9.4B, entitled ‘Preliminary’ and comprising proposed sections 1317DA to 1317DD, identifies each of the following provisions of the Corporations Law as a ‘civil penalty provision’: subsections 232(2), (4), (5) and (6), subsections 243ZE(2) and (3), subsection 318(1) and section 5880. It also includes provisions relating to the Court’s original jurisdiction to hear a matter involving a civil penalty provision.

116. Proposed Division ‘2 of Part 9.4B, entitled ‘Civil penalty orders’ and comprising proposed sections 1317EA to 1317EH, enables the Court to make a civil penalty order in relation to a person who has contravened a civil penalty provision. A civil penalty order may be a declaration that the person has contravened a specified civil penalty provision in relation to a specified corporation, an order prohibiting the person from managing a corporation for such period as is specified in the order, or an order that the person pay a pecuniary penalty of an amount not exceeding \$200,000. An application for a civil penalty order will generally be made by the Commission and it will be tried in accordance with the civil standard of proof, rules of evidence, and practice and procedure. The Division also establishes the offence of managing a corporation whilst subject to a civil penalty disqualification order, punishable by a maximum fine of \$5000 or imprisonment for 1 year or both.

117. Proposed Divisions 3 and 4 of Part 9.4B will generally prevent a person being subjected to both a criminal and civil proceedings out of the one contravention.

118. Proposed Division 3 of Part 9.4B, entitled ‘Criminal proceedings’ and comprising proposed sections 1317FA and 1317FB, retains criminal sanctions in relation to a contravention of a civil penalty provision committed with a dishonest intent. The Division will also prevent criminal proceedings for these offences from being commenced if an application has already been made for a civil penalty order in relation to the contravention.

119. Proposed Division 4 of Part 9.4B, entitled ‘Effect of criminal proceedings on application for civil penalty order’ and comprising proposed sections 1317GA to 1317CL, provides that where criminal proceedings have commenced in relation to a contravention of a civil penalty provisions, and the defendant is not convicted at the trial because the court is not satisfied that the element of dishonesty required by section 1317FA has been proved beyond reasonable doubt, the court will be able to go on to consider whether a civil penalty order (which requires no element of dishonesty) should be made. This will generally avoid the need for a separate proceeding to deal with the civil penalty issue.

120. Proposed Division 5 of Part 9.4B, entitled ‘Compensation for loss suffered by corporation’ and comprising proposed sections 1317HA to 1317HF. enables the Court to order a person who has contravened a civil penalty provision to compensate the company for any profits

made by the person (or any other person) or loss to the company.

121. Proposed Division 6 of Part 9.4B, entitled 'Miscellaneous' and comprising proposed sections 1317JA to 1317JC, includes provisions based on section 1318 enabling the Court to relieve a person from liability arising out of certain contraventions of a civil penalty provision where the person has acted honestly and, having regard to all the circumstances of the case, the person ought fairly be excused for the contravention.

#### Proposed Division 1 - Preliminary

##### Proposed section 1317DA - Civil penalty provisions

122. This proposed section identifies each of the following provisions of the Corporations Law as a 'civil penalty provision': subsection 232(2), (4), (5) and (6), subsections 243ZE(2) and (3), subsection 318(1) and section 5880.

123. Subsection 232(2) provides that an officer of a corporation shall at all times act honestly in the exercise of his or her powers and the duties of his or her office. Subsection 232(4), which will be omitted and substituted by clause 11, will provide that in the exercise of his or her powers and the discharge of his or her duties, an officer of a corporation must exercise the degree of care and diligence that a reasonable person in a like position in a corporation would exercise in the corporation's circumstances. Subsections 232(5) and (6) provide that an officer may not make improper use of information or his or her position as an officer.

124. A person contravenes subsection 243ZE(2) if he, she or it is a related party of a public company and receives a financial benefit in certain circumstances from the public company, or from a child entity of the public company. Subsection 243ZE(3) applies to persons who are involved in, or recklessly concerned in, or a party to, a contravention of subsection 243ZE(2).

125. A director contravenes subsection 318(1) if he or she fails to take all reasonable steps to ensure compliance with certain obligations concerning the preparation of company financial statements.

126. Section 5880, which will be inserted into the Corporations Law by clause 111 of the Bill, and will be located in Division 3 of Part 5.7B of the Corporations Law, will impose a duty upon company directors to prevent the company incurring debts when the director is aware, or ought reasonably be aware, that the company is insolvent.

##### Proposed section 1317DB - Persons involved in contravening a provision taken to have contravened the provision

127. This section provides that, for the purposes of proposed Part 9.4B, a person who is involved in a contravention of the Corporations Law is to be taken to have contravened that provision.

128. Corporations Law section 9 provides that the term ‘involved’, in relation to a contravention, has the meaning given by Corporations Law section 79. Section 79 provides, for example, that a person is involved in a contravention if, and only if, the person has aided, abetted, counselled or procured the contravention. Proposed section 1317DB is based on section 5 of the Crimes Act 1914 (Cth) which provides, in effect, that any person who is involved (as that term is defined in section 79 of the Corporations Law) in any offence against the law of the Commonwealth shall be deemed to have committed that offence and shall be punishable accordingly.

129. Proposed Part 9.4B will similarly apply to a person involved in the contravention of a civil penalty provision as if the person had personally contravened the provision.

#### Proposed section 1317DC - Contravention committed partly in, and partly out of, the

130. This section is based on Corporations Law section 1313A. It provides that where an act or omission, if done or omitted to be done wholly within the jurisdiction, would constitute a contravention of a civil penalty provision, it nevertheless remains a contravention where it is partly done or omitted to be done outside the jurisdiction. The provision is required because, in relation to some contraventions, a court might not have the power to hear a matter unless the contravention was committed wholly within the jurisdiction. The provision therefore gives a court the power to hear a matter where only part of the contravention was done within the jurisdiction.

#### Proposed section 1317DD - Reciprocity in relation to contraventions

131. This section is based on Corporations Law section 131 3B. It provides that where a person does or omits to do an act within the jurisdiction, which would be a contravention of a civil penalty provision of the Corporations Law of another jurisdiction had the act or omission occurred in that other jurisdiction, the person will be taken to have contravened the relevant civil penalty provision of the Corporations Law in which the contravention was committed.

#### Proposed Division 2 - Civil penalty orders

##### Proposed section 1317EA - Court may make civil penalty orders

132. Section 1317EA provides that the Court may in certain circumstances make a civil penalty order in relation to a person. A civil penalty order may be a declaration that the person has contravened a specified civil penalty provision in relation to a specified corporation, an order prohibiting the person, for such period as is specified in the order, from managing a corporation and/or an order that the person pay to the Commonwealth a pecuniary penalty of an amount not exceeding \$200,000.

133. Subsection (1) provides that the section applies if the Court is satisfied that a person has contravened a civil penalty provision, whether or not the contravention also constitutes an offence because of section 1317FA.

134. Subsection (2) provides that in the circumstances to which the section applies the Court is to declare that the person has, by a specified act or omission, contravened that provision in relation to a specified corporation. Proposed Division 4 of Part 9.4B allows a court to make a declaration that a person has contravened a civil penalty provision in certain circumstances connected with the prosecution of an offence constituted by a contravention of a civil penalty provision. Subsection (2) therefore provides that the Court need not make a civil penalty declaration where another court has already made a declaration under proposed Division 4 that the person has contravened a civil penalty provision.

135. Paragraph 1317EA(3)(a) enables the Court to make an order prohibiting the person, for such period as is specified in the order, from managing a corporation. Subsection (4) provides that the Court is not to make a civil penalty disqualification order under paragraph (3)(a) against a person if it is satisfied, despite the contravention, that the person is a fit and proper person to manage a corporation.

136. Paragraph 1317EA(3)(b) enables the Court to make an order that the person pay a pecuniary penalty of an amount not exceeding \$200,000. Subsection (5) provides that the Court is not to make an order under paragraph (3)(b) that the person pay a pecuniary penalty unless it is satisfied that the contravention is a serious one. Subsection (6) provides that the Court is not to make a pecuniary penalty order under paragraph (3)(b) if it is satisfied that an Australian Court has ordered the person to pay damages in the nature of punitive damages because of the act or omission constituting the contravention. While an application may be made for a civil penalty order whether or not the contravention also constitutes an offence, once an application for a civil penalty order has been made in relation to a particular contravention, proposed section 1317FB provides that criminal proceedings cannot ever be commenced in relation to that contravention.

#### Proposed section 1317EB - Who may apply for a civil penalty order

137. This provision is based on Corporations Law section 1315 and provides that an application for a civil penalty order may only be made by the Commission, a Commission delegate, or some other person authorised in writing by the Minister to make applications.

138. Once an application for a civil penalty order has been made in relation to a particular contravention, proposed section 1317FB provides that criminal proceedings cannot be commenced in relation to that contravention. Consequently, and notwithstanding the civil nature of an application for a civil penalty order, proposed Corporations Law section 1317EB is necessary to ensure that a person may not, by making an application for a civil penalty order, frustrate a prosecution proposed to be commenced in relation to the same contravention.

#### Proposed section 1317EC - Time limit for application

139. This section establishes a limitation period for the bringing of actions under proposed section 1317EA. It provides that an application for a civil penalty order may be made within 6 years after the contravention.

Proposed section 1317ED - Application for civil penalty order is a civil proceeding

140. This section provides that, subject to the rules of the Court, an application for a civil penalty order is to be tried in accordance with the rules of evidence and procedure that the Court applies in determining civil matters. Applications for a civil penalty order will, in accordance with Corporations Law section 1332, be tried on the balance of probabilities.

Proposed section 1317EF - Person must comply with order not to manage corporation

141. This section is based on Corporations Law subsections 229(3A), (5), (6), and (7). A person who manages a corporation whilst subject to a civil penalty disqualification is guilty of an offence carrying a maximum penalty of \$5,000 or imprisonment for 1 year, or both (see the amendment to Schedule 3 to the Corporations Law proposed to be made by clause). The Court may, however, grant a person leave to manage a corporation on such conditions or restrictions as it thinks appropriate. In order to give the Commission notice of the application in sufficient time to allow it to decide whether it should intervene in any proceedings for leave, an applicant for leave must give the ASC 21 days notice of the application.

142. A person who contravenes a condition or restriction imposed by the Court will be guilty of an offence carrying a maximum penalty of \$5,000 or imprisonment for 1 year, or both (see the amendment to Schedule 3 to the Corporations Law proposed to be made by clause 18 of the Bill).

Proposed section 1317EG - Enforcement of order to pay pecuniary penalty

143. Proposed paragraph 1317EG(a) provides that a pecuniary penalty payable pursuant to a civil penalty order must be paid to the ASC.

144. Proposed paragraph 1317E0(b) provides that a pecuniary penalty payable pursuant to a civil penalty order may be enforced by the ASC or the Commonwealth as if it were a judgment of the Court.

Proposed section 1317EH - Commission may require a person to give assistance in connection with application for civil penalty order

145. This section is based on subsections 49(3) and (4) of the Australian Securities Commission Act 1989 and subsection 1317(3) of the Corporations Law. It will enable the ASC to oblige any person whom it believes may provide information relevant to the making of an application for a civil penalty order, other than the alleged contravener and his or her lawyer, to provide the ASC with all reasonable assistance that that person can provide in connection with the making of the application. The powers conferred on the ASC under this provision will be in addition to, and not in derogation of, any of its powers under Part 3 of the Australian Securities Commission Act 1989 or section 1317 of the Corporations Law.

### Proposed Division 3 - Criminal proceedings

#### Proposed section 1317FA - When contravention of civil penalty provision is an offence

146. This section provides that contraventions of a civil penalty provision which are committed with a dishonest intent will constitute an offence carrying a maximum penalty of \$200,000 or imprisonment for 5 years, or both (see amendments to Schedule 3 to the Corporations Law proposed to be made by clause 18 of the Bill). Clause 9 of the Bill also amends section 229 of the Corporations Law with the effect that a person convicted of the offence established by proposed section 1317FA will be prohibited from managing a corporation, without the leave of the Court, during the 5 years after the conviction or release from prison, whichever is the later.

147. A person will have a dishonest intent for the purposes of proposed subsection 1317FA(1) if he or she knowingly, intentionally or recklessly contravened the civil penalty provision, and did so either dishonestly (intending to gain an advantage for a person other than the corporation), or with an intent to deceive or defraud someone (including the corporation).

#### Proposed section 1317FB - Application for civil penalty order precludes criminal proceedings

148. Proposed section 1317FB provides that where civil penalty proceedings are initiated in respect of a contravention of a civil penalty provision, no criminal proceedings may be initiated in respect of the same contravention (irrespective of the outcome of the civil penalty proceedings). This provision is necessary because of the lower standard of proof, and more liberal rules relating to the discovery of evidence, which apply in civil proceedings. To allow a criminal prosecution to follow a civil action could significantly disadvantage a defendant in the criminal prosecution.

#### Proposed Division 4 - Effect of criminal proceedings on application for civil penalty order

149. The criminal offence constituted by proposed section 1317FA is basically a contravention of a civil penalty provision which is committed with a dishonest intent. It is conceivable that, upon a prosecution under that section, a court may be satisfied that the civil penalty contravention has been established but not be satisfied that there was any dishonest intent. In such a situation, no conviction would be possible, but it ought to be possible for a civil penalty to be applied if a court considers that that would be appropriate.

150. One way to achieve this would be to allow the ASC to initiate a separate civil penalty action. This would, however, be very inefficient. The evidence that would have to be adduced in the second proceeding would usually be much the same as in the earlier proceeding and much court time could be wasted. More importantly, the defendant would face two trials in respect of the same breach, and this could operate quite unjustly.

151. It is accordingly proposed that, in such a situation, the court should be able to proceed straight from the acquittal in respect of the criminal offence to the imposition of a civil penalty order. This is the effect of Division 4.

152. It has, however, been necessary to address a number of different situations where the above problem might arise. For instance, if a trial is taking place in a Supreme Court, then that Court will itself have jurisdiction to issue the civil penalty order. In contrast, a lower court, which would not itself have the jurisdiction to issue a civil penalty order, will make a declaration that it is satisfied that the civil penalty provision has been contravened, and that declaration will constitute conclusive evidence in subsequent proceedings in a Supreme Court. The Division also addresses situations where the problem arises on appeal or on committal.

#### Proposed section 1317GA - When Division applies

153. A number of provisions in proposed Division 4 refer to both ‘the court’ and ‘the Court’. Section 9 of the Corporations Law provides that a reference to ‘the court’ is a reference to any court exercising the jurisdiction of this jurisdiction, while a reference to ‘the Court’ means the Federal Court, or the Supreme Court of this or any other jurisdiction, when exercising the jurisdiction of this jurisdiction.

154. Proposed section 1317AG provides that proposed Division 4 applies if criminal proceedings are begun against a person for an offence constituted by a contravention of a civil penalty provision (see proposed subsection 1317FA(1)).

155. Proposed Division 4 establishes the double jeopardy rules that are to be applied when criminal proceedings have been commenced for an offence constituted by a contravention of a civil penalty provision. Once criminal proceedings are begun an application may nevertheless be made for a civil penalty order, but the application is to be stayed until the criminal proceedings (including any appeals) are concluded. If the defendant is acquitted of the criminal charge, but the criminal court is satisfied beyond reasonable doubt that the defendant contravened the civil penalty provision, the court may make a declaration to that effect. If the criminal court is not the Court, an application may be made to the Court for a civil penalty order. Alternatively, if the criminal court is the Court, it may then go on to make a civil penalty disqualification order or a pecuniary penalty order and no further proceedings may be taken for a civil penalty order.

#### Proposed section 1317GB - Effect during criminal proceedings

156. In accordance with proposed section 1317GB, this proposed section will apply if criminal proceedings are begun for an offence constituted by a contravention of a civil penalty provision. It provides that an application may nevertheless be made for a civil penalty order in relation to the same contravention, but the application is to be stayed until the criminal proceedings (including any appeals) have been finally determined.

#### Proposed section 1317GC - Effect of final outcome

157. Proposed subsection 1317GC(1) provides that proposed section 1317GC will apply when the criminal proceedings (including any appeals) are finally disposed of.

158. Subsection (2) provides that in certain circumstances an application for a civil penalty

order may not be made, and any application that has been made is to be automatically dismissed. These circumstances are the following:

- A court has found the person guilty of the offence. Proposed section 73A, to be inserted by clause 5 of the Bill, defines when a person will be taken to have found a person guilty of the offence.
- The person has been acquitted of the offence, unless there is in force a declaration that the person committed the contravention. A declaration of this type may be made under proposed subsections 13170F(3), 13170(3(3) or 1317GH(2).
- At the hearing for the commitment of a person for trial of the offence the committal court makes a declaration that it is satisfied that the evidence given in the committal proceeding could not satisfy the Court, on an application for a civil penalty order in relation to the contravention, that the person committed the contravention. A declaration of this type may be made under proposed subsection 1317GE(1).
- The Court has made a declaration that the person committed the contravention. A declaration of this type may be made under proposed sections 1317GF(3) or 1317GH(2).
- A court has made an order prohibiting an application for a civil penalty order in relation to the contravention from being made or proceeding. A declaration of this type may be made under proposed section 13 170J.
- The Court, on an appeal or review, makes an order affirming, varying or substituting a declaration that the person has, by a specified act or omission, contravened the civil penalty provision in relation to a specified corporation. A declaration of this type may be made under proposed subsections 1317GK(1).

#### Proposed section 1317GD - Final outcome not precluding application for civil penalty order

159. This proposed section will allow an application for a civil penalty order to be made or carried on after criminal proceedings are concluded provided:

- a court (other than the Court) has made a declaration that the person committed the contravention; or
- none of the results referred to in proposed section 1317GC has occurred.

160. Where a court (other than the Court) has made a declaration that the person committed the contravention, proposed section 1317HF provides that a certificate by a court that the court has declared a person to have contravened a civil penalty provision is conclusive evidence of the contravention. As the fact of the contravention will have been proved in the earlier proceedings, the use of the certificate will prevent the parties litigating again the issue whether the person has

committed the contravention.

Proposed section 1317GE - After unsuccessful committal Proceeding, court may preclude application for civil penalty order

161. A committal court has an opportunity to assess the strength of the evidence against the defendant for a proposed trial on indictment for an offence constituted by a contravention of a civil penalty provision. The committal court may decide not to commit the person for trial because the prosecution has not shown that the defendant had the dishonest intent required by proposed section 1317FA. Similarly, the court may also be satisfied that the defendant has not contravened the civil penalty provision.

162. Proposed subsection (1) will enable the committal court to make a declaration that it is satisfied that the evidence in the proceeding could not satisfy the Court, on an application for a civil penalty order in relation to the contravention, that the person committed the contravention. Once the committal court makes the declaration an application may not be made for a civil penalty order in relation to the contravention, and any application stayed because of proposed section 1317GB is automatically dismissed in accordance with proposed section 1317GC. However, if the committal court does not make the declaration, an application may be made for a civil penalty order under proposed section 1317EA.

163. Subsection (2) provides that a declaration made under subsection (1) is subject to appeal or review in the same manner as any other order or decision made in the proceeding.

Proposed section 1317GF - Application for civil penalty order based on alternative verdict at jury trial

164. Proposed subsection 1317GF(1) provides that this proposed section applies where, on the trial on indictment for an offence constituted by a contravention of a civil penalty provision, the jury acquits the defendant but nevertheless finds, as an alternative verdict, that it is satisfied beyond reasonable doubt that the defendant has contravened the civil penalty provision.

165. Subsection (2) provides that in these circumstances the jury may find the defendant not guilty of the offence, but guilty of the contravention.

166. Subsection (3) provides that if the court finds as mentioned in subsection (2) then it is to declare that the person has, by a specified act or omission, contravened the civil penalty provision in relation to a specified corporation.

167. Subsection (4) provides that if the court is the Court it may, on the application of the prosecutor (or a person referred to in proposed subsection 1317EA(3)), make orders under proposed subsection 1317EA(3) (ie a civil penalty disqualification order or an order that the person pay a pecuniary penalty to the Commonwealth). The effect of subsection (5) is that an application may be made under proposed section 1317EA notwithstanding that the 6 year limitation period established by proposed section 1317EC for the making of applications under proposed section 1317EA has expired.

168. Subsection (6) provides that a declaration under subsection (3) is subject to appeal or review as if it were a conviction by the court for an offence constituted by the contravention.

Proposed section 13170(3) - Application for civil penalty order based on alternative finding by court of summary jurisdiction

169. Proposed subsection (1) provides that this section will apply where on a summary trial a person has been found guilty of an offence constituted by a contravention of a civil penalty provision, but on an appeal the conviction is overturned.

170. Subsection (2) provides that in these circumstances, if the appeal court is nevertheless satisfied that the person has contravened the civil penalty provision, it may make a civil penalty declaration. Subsection (4) provides that a declaration under subsection (3) is subject to appeal or review as if it were a conviction by the court for an offence constituted by the contravention.

Proposed section 1317GH - Application for civil penalty order based on alternative finding

171. This proposed section applies where a court has found a person guilty of an offence, but the conviction is overturned on appeal and the court is satisfied beyond reasonable doubt that the person committed the contravention of the civil penalty provision.

172. Subsection (2) provides that in these circumstances the appeal court may make a declaration that the person has, by a specific act or omission, contravened the civil penalty provision in relation to a specified corporation. Subsection (5) provides that a declaration under subsection (2) is subject to appeal or review as if it were a conviction by the court for an offence constituted by the contravention.

173. Subsection (3) provides that if the court is the Court it may, on the application of the prosecutor (or a person referred to in proposed subsection 1317EA(3)), make orders under proposed subsection 1317EA(3) (ie a civil penalty disqualification order or an order that the person pay a pecuniary penalty to the Commonwealth). The effect of subsection (4) is that an application may be made under proposed section 1317EA notwithstanding that the 6 year limitation period established by proposed section 1317EC for the making of applications under proposed section 1317EA has expired.

Proposed section 1317GJ - After setting aside declaration, court may preclude application for civil penalty order

174. This proposed section applies where an appeal court has set aside a declaration that a person has contravened a civil penalty provision. It will allow the appeal court to make a further order prohibiting an application for a civil penalty order to be made in relation to the contravention.

Proposed section 13170K - On unsuccessful appeal against declaration, Court may make civil penalty orders

175. Proposed subsection (1) provides that this proposed section applies where the Court, on an appeal, affirms or varies a declaration that a person has committed a contravention of a civil penalty provision, or substitutes another declaration to that effect

176. Subsection (3) provides that the Court it may, on the application of the prosecutor (or a person referred to in proposed subsection 1317EA(3)), make orders under proposed subsection 1317EA(3) (ie a civil penalty disqualification order or an order that the person pay a pecuniary penalty to the Commonwealth). The effect of subsection (3) is that an application may be made under proposed section 1317EA notwithstanding that the 6 year limitation period established by proposed section 1317EC for the making of applications under proposed section 1317EA has expired.

#### Proposed section 1317GL - Appeals under this Division

177. This proposed section provides that where an appeal is made in accordance with this proposed Division, a law about appeals has effect in relation to the appeal with such modification as the circumstances require.

#### Proposed Division 5 - Compensation for loss suffered by corporation

##### Proposed section 1317HA - On application for civil penalty order. Court may order compensation

178. This provision is based on Corporations Law subsection 232(7), which will be repealed by clause 11 of the Bill. Where an application has been made for a civil penalty order, and the Court is satisfied that the person committed the contravention and the corporation has suffered loss or damage, the Court may order the person to pay compensation to the corporation.

179. The corporation may intervene in an application for a civil penalty order, but only if the Court is satisfied that the person committed the contravention, and only on the question whether the Court should order the person to pay compensation (including compensation by way of punitive damages). The corporation will therefore be able to intervene for the purpose of putting before the Court material relevant to the amount of any compensation order.

##### Proposed section 1317HB - On finding of guilt. criminal court may order compensation

180. This section is based on Corporations Law subsection 232(7), which will be repealed by clause 11 of the Bill.

181. Proposed subsection (1) provides that where a court finds a person guilty of an offence constituted by a contravention of a civil penalty provision the Court may order the person to pay compensation to the corporation. Proposed section 73A, to be inserted by clause 5 of the Bill, defines when a court is taken to find a person guilty of an offence.

182. Proposed subsection (2) provides that if a court makes a declaration under proposed Division 4 that a person has contravened a civil penalty provision, the court may order the person to pay compensation. The Court may make a compensation order under this proposed section irrespective of whether it imposes a penalty in relation to the offence.

Proposed section 1317HC - Enforcement of order under section 1317HA or 1317MB

183. This section allows a corporation to enforce a compensation order made under proposed section 1317HA or 1317HB as if it were a judgment of the court

Proposed section 1317HD - Recovery of profits. and compensation for loss, resulting from contravention

184. This section is based on Corporations Law subsection 232(8), which will be repealed by clause 11 of the Bill. It applies where a person contravenes a civil penalty provision in relation to a corporation. It allows the corporation to recover from the person, as a debt due to the corporation, an amount equal to the loss or damage caused to the corporation because of the contravention, and any profit made because of the contravention by any other person.

185. An application may be made under the section irrespective of whether the person has been convicted of an offence, or a civil penalty order has been made, in relation to the contravention, but must be made within 6 years of the contravention.

Proposed section 1317HE - Effect of sections 1317HA, 1317MB and 1317HD

186. This section is based on Corporations Law subsection 232(11). The section provides that the compensation orders made available by proposed sections 1317HA, 1317HB and 1317HD are in addition to, and not in derogation of, any rule of law which provides a remedy in circumstances which would constitute a contravention of a civil penalty provision. The section therefore preserves any equitable remedies which might be available in relation to such conduct, such as an injunction in relation to a threatened breach of duty by a company director.

Proposed section 1317HF - Certificates evidencing contravention

187. This section is based on Corporations Law section 1333. It provides that, for the purposes of proposed Part 9.4B, a certificate signed by the Registrar or other proper officer of an Australian court and stating:

- that the court has declared that a person has contravened a civil penalty provision;
- that a specified person was convicted by that court of an offence constituted by a contravention of a civil penalty provision (see proposed section 13 17FA); or
- that a specified person charged before the court with such an offence was found to have committed the offence, but that the court did not proceed to convict the

person of the offence,

is, unless it is proved that the declaration, conviction or finding was set aside, quashed or reversed, conclusive evidence:

- that the declaration was made, that the person was convicted of the offence, or that the person was so found (as the case may be); or
- that the person committed the contravention.

188. This section will help the corporation to rely on earlier proceedings to make a later application for compensation under proposed section 1317HD, without having to 'reprove' all the matters that were decided in the earlier proceedings. It will have a similar operation where a court (other than the Court) has made a declaration under proposed Division 4 that a person has contravened a civil penalty provision, and will in this context facilitate the making of applications under proposed section 1317EA for a civil penalty order.

#### Proposed Division 6 - Miscellaneous

##### Proposed section 1317JA - Relief from liability for contravention of civil penalty Provision

189. This section is based on Corporations Law section 1318. It will enable the Court, where it appears that a person may have contravened a civil penalty provision, to relieve the person from any civil liability to which the person might be subject because of the contravention, such as a liability to pay a pecuniary penalty pursuant to an order made under Corporations Law paragraph 1317EA(3)(b) or a compensation order made under proposed Division 4 of Part 9.4B.

190. The Court may only make an order relieving a person from liability if it is satisfied that the person acted honestly and that, having regard to all the circumstances of the case, the person ought fairly be relieved from liability. In the case of liability arising out of a contravention of proposed Corporations Law section 588G, concerning insolvent trading, the Court must also have regard to any action the person took with a view to appointing an administrator to the company and the results of that action.

##### Proposed section 1317JB - Effect of contravening civil penalty provision of Corporations Law of 2 or more jurisdictions

191. This section specifies the rules which will apply where, in another jurisdiction, an application has been made for a civil penalty order, or a prosecution commenced or concluded.

192. Proposed Corporations Law subsection 1317JB(2) provides that a person who has been punished in another jurisdiction, in relation to an offence constituted by a contravention of a civil penalty provision, may not be punished in the local jurisdiction in relation to an offence constituted by the same contravention.

193. Proposed Corporations Law subsection 1317JB(3) precludes the making of a civil penalty order if an order has already been made in another jurisdiction in relation to the same contravention.

194. Proposed subsection 13171B(4) precludes the commencement of criminal proceedings in another jurisdiction if an application has been made for a civil penalty order in relation to the same contravention. This provision complements proposed section 1317FB, which provides that once an application has been made for a civil penalty order, criminal proceedings cannot be commenced in that jurisdiction in relation to the same contravention.

195. Subsection (5) extends the operation of the double jeopardy rules proposed to be established by sections 1317GB, 1317GC and 1317GD to cases where criminal proceedings have been commenced in one jurisdiction and it is proposed to commence or carry on an application for a civil penalty order in another jurisdiction.

#### Proposed section 1317JC - Part does not limit power to award punitive damages

196. Proposed section 1317JC provides that nothing in proposed Part 9.4B limits a court's power to order someone to pay damages in the nature of punitive damages because of an act or omission constituting a contravention of a civil penalty provision. This provision is necessary because of proposed paragraph 1317EA(6), which provides that the Court may not make an order under proposed paragraph 1317EA(3)(b) that a person pay a pecuniary penalty if an Australian court has already made an order that the person pay punitive damages in respect of the contravention.

#### Clause 18 - Schedule 3

197. Schedule 3 to the Corporations Law sets out the penalties which apply to certain contraventions of the Corporations Law. Clause 18 omits the penalties which presently apply in relation to contraventions of Corporations Law subsections 232(4), (5) and (6). These provisions will be civil penalty provisions, and the appropriate sanction will therefore be determined in accordance with proposed Part 9.4B.

198. The clause also inserts the penalty which will apply in relation to the offences to be established by proposed subsections 1317EF(1) and (4) of managing of corporation whilst subject to a civil penalty disqualification and proposed subsection 1317FA(1) of contravening a civil penalty provision with a dishonest intent

#### Division 2 - Amendment of the Australian Securities Commission Act 1989

##### Clause 19 – Recovery of expenses of investigation

199. Section 91 of the Australian Securities Commission Act 1989 provides that where a person is convicted of an offence, or has a judgment awarded against him or her, as a result of an ASC investigation, the ASC may order the person to pay the costs of the investigation and may recover the costs in Court proceedings if the order is not fully complied with.

200. Clause 19 extends the operation of section 91 to the cost of investigations which result in the making of an order, which would include a civil penalty order under proposed Corporations Law Part 9.4B.

### Division 3 - Amendment of the Bankruptcy Act 1966

#### Clause 20 - Debts provable in Bankruptcy

201. This clause amends section 82 of the Bankruptcy Act 1966. It inserts a new subsection 82(3A) providing that a pecuniary penalty payable under a civil penalty order is not provable in bankruptcy. Thus, if a person to whom a civil penalty order applies becomes a bankrupt, any pecuniary penalty payable by the bankrupt will not reduce the amount received by the bankrupt's other creditors in the bankruptcy. The bankrupt will, however, remain liable to pay the civil penalty out of his or her post bankruptcy income or assets.

### Part 3 – FINANCIAL BENEFITS TO RELATED PARTIES OF PUBLIC COMPANIES

#### Introduction

202. Proposed Part 3 proposes the insertion into the Corporations Law of a new section 232A, entitled 'Voting by interested director of public company', and a new Part 3.2A, entitled 'Financial Benefits to Related Parties of Public Companies'.

203. Proposed section 232A requires directors who have an interest in a matter involving a public company to refrain from participating in Board consideration of the matter.

204. Proposed Part 3.2A will prohibit a public company, and entities over which the public company exercises control, from giving a financial benefit to a related party of the public company, except in a number of specified circumstances.

205. The notion of 'related party' is defined to comprise the public company's directors and several other classes of persons who are in a position to influence the company's decision to give them a financial benefit.

206. The Part is intended to protect shareholders of public companies against the possibility that the value of their investment will be eroded by a related party arranging for the company to enter into a transaction which gives a benefit to the related party. The Part will not prevent a public company from entering into full value, commercial transactions with related parties. The proposed Part 3.2A will prevent only 'uncommercial' transactions, as these are the kinds of transactions which have a potential to adversely affect shareholders' interests. And even in this case, proposed Part 3.2A will allow any transaction that has been agreed to by a majority of the public company's disinterested shareholders, provided they have been fully informed about the transaction and its likely impact upon the company.

207. One existing provision which has an important role in this area and which Part 3.2A

will not affect in any way is section 232 of the Corporations Law, which sets out a series of basic duties for officers of companies, including the duties to act honestly and with an appropriate degree of care and diligence. Clearly, uncommercial transactions which inappropriately benefit related parties can involve breaches of such duties. Indeed, prosecutions have already been commenced in respect of some such transactions which took place in the 1980s.

208. But all those prosecutions are taking place years after the transactions involved. And in most cases the assets involved are long gone.

209. Appropriate retribution for past breaches of duty is an important objective of proper corporate law, but Part 3 seeks to add to that by encouraging directors to bring such transactions to shareholders before they take place, therefore preventing unauthorised losses from taking place.

210. One cannot prevent dishonesty by legislation. What can be done, though, is to establish an environment which makes dishonesty less likely to result in losses for investors. Better enforcement is a key aspect of this, but the content of the law can also help, by establishing simple rules with a bias in favour of disclosure.

211. Proposed Part 3.2A accordingly seeks to establish such a set of simple rules. It says to the honest director, 'If the related party transaction which is proposed is on ordinary commercial terms, it can be approved by the Board. But if it is an uncommercial transaction, it must be referred to shareholders, and shareholders must be fully informed of the details'. If all directors are aware of these rules, inappropriate transactions should not slip through unchallenged, as they often did during the 1980s.

212. Once the Part comes into effect, shareholders, creditors and others will know that, having appointed competent and honest directors to the Board, those directors will have clear and simple rules which will help them to ensure that a transaction with a related party which might threaten investors' interests will not take place without the matter being referred to shareholders.

213. The basic principle of proposed Part 3.2A is that 'uncommercial' transactions with related parties should be referred to disinterested shareholders before the transactions take place.

214. The following types of financial benefits do ~j have to be referred to shareholders:

- benefits provided on the same terms and conditions as would be provided to an unrelated party;
- the payment of reasonable remuneration;
- advances totalling less than \$2,000 or such other amount as is prescribed;
- intra-group benefits given by a 'closely-held subsidiary' (a company in which another company controls 100% of the voting shares);

- benefits provided to related parties as part of a proposal to provide benefits to members of the company (provided the proposal does not unfairly discriminate in favour of related parties);
- benefits paid under a court order.

215. The Part also exempts benefits paid under arrangements existing before the Part commences.

216. Details on how these various exemptions will operate are set out in the clause-by-clause commentary following this introduction.

217. The Part does not become compulsory until 1 February 1994. This will allow all public companies a lengthy period to prepare for the new requirements and to bring any necessary resolutions before an annual general meeting. At the same time, public companies may choose to apply Part 3.2A at an earlier date. There are some transactions which are regulated under the current law which are not regulated by proposed Part 3.2A, so there could be advantages for some companies in applying the new provisions before 1 February 1994.

218. The following paragraphs provide some information on some of the key concepts used in proposed Part 3.2A.

219. The Part defines ‘related party’ in a way which focuses on persons who may be able to influence the decision to give the benefit. The simplest case is a benefit given by the company to one of its directors - there is the obvious potential for that director to have influenced the decision to give the benefit and, if the transaction is uncommercial, it should be referred to shareholders before the benefit is given. The following are also ‘related parties’:

- the spouse (including a de facto spouse) of a director;
- a parent, son or daughter (but not any remoter family) of a director or the director’s spouse;
- any entity that may exercise control over the public company, such as its holding company (referred to as a “parent entity” of the public company); and
- any entity (other than a child entity of the public company) over which the above people (or entity) have control.

220. Entities over which the public company has control are referred to in the proposed Part 3.2A as ‘child entities’ of the public company. Proposed Part 3.2A does not affect transactions between a public company and its child entities, unless the child entity is itself a public company. Thus, a public company may enter into an uncommercial transaction with a proprietary company subsidiary, and vice versa. Similarly, proposed Part 3.2A does not affect uncommercial transactions between the various subsidiaries of a public company. These transactions are

exempted because they do not involve the transfer of the public company's resources to an entity outside its control. Consequently, for example, proposed Part 3.2A will not affect transactions involving a public company and another entity established for the purpose of enabling it to pursue a joint venture with a third party.

221. Where a financial benefit is provided to an associate of a related party, in the expectation that a person will give a corresponding financial benefit to a related party of the public company, the associate will be a related party for the purposes of the proposed Part 3.2A. This provision is intended to address the situation where the public company enters into an uncommercial transaction with a 'friendly' third party on the understanding that a corresponding benefit will be given to a related party.

222. The related party concept also addresses a number of other situations where a person has the power to exercise control over a company. For example, proposed Part 3.2A extends to the situation where the directors of a parent entity of a public company cause the public company to give a benefit to them. Once the benefit has been given, the assets of the public company child entity would, if the transaction was uncommercial, be diminished to the prejudice of the minority shareholders of the public company. A transaction such as this should be referred to those minority shareholders for their approval before it is undertaken.

223. Similarly, a holding company may wish to assist one subsidiary by transferring assets to it from another subsidiary. Proposed Part 3.2A will allow this where the 'donor' subsidiary is a wholly-owned subsidiary of the holding company (subject, of course, to the laws protecting creditors). In that case, it is merely a matter of the holding company shifting what are, in effect, entirely its own resources. However, where the 'donor' subsidiary is a public company with minority shareholders, proposed Part 3.2A expects that the subsidiary's directors will have the proposed transfer approved by its minority shareholders. This is because the transaction involves a transfer of the subsidiary's assets to a company in which the minority shareholders have no interest,

224. The need to have transactions such as these approved by the minority shareholders reflects a policy that if the transaction is of a kind which might prejudice the interests of the giving company, it is appropriate that the shareholders of that company have the opportunity to consider whether to approve the transaction.

225. Proposed Part 3.2A will require shareholders to be given enough information about the proposed benefit for them to be able to decide whether they should agree to it. The ASC must also be given the opportunity to comment on the transaction before it is considered by the shareholders, and, if the ASC decides to comment on the transaction, those comments must be sent to shareholders before the meeting. The ASC will, however, not be able to comment on whether the proposal is in the best interests of the company, this being a question for the shareholders of the public company and not the ASC. The ASC will, however, be able to comment on whether, for example, the form that the material the company has provided makes it difficult for shareholders to discern the essential elements of the proposal.

226. Proposed Part 3.2A defines the concepts of 'control' and 'entity' by reference to

appropriate accounting standards. The definitions in the standards are general and concentrate on commercial realities rather than on black letter legal concepts such as particular percentage shareholdings. The boundaries for the application of proposed Part 3.2A should be drawn where commercial reality dictates and not according to narrow legal formulations.

#### Clause by clause summary

#### Clause 21 - How to read references to provisions of this Law

227. Subsection 8(2) of the Corporations Law provides that references to the Corporations Law are to be read as references to this Corporations Law or the Corporations Law of another jurisdiction. Subsection 8(3) of the Corporations Law provides that references to a provision of the Corporations Law are to be read as references to a provision of this Corporations Law or a provision of the Corporations Law of another jurisdiction. Paragraph 8(5)(c) provides that subsections (2) and (3) do not apply in relation to certain provisions of the Corporations Law. Clause 21 amends paragraph 8(5)(c) by inserting 'Part 3.2A (except subsection 243L(2))'. Consequently, in Part 3.2A (except subsection 243L(2)) references to the Corporations Law, or a provision of the Corporations Law, will be to the Corporations Law or a provision of the Corporations Law of this jurisdiction alone.

#### Clause 22 - Dictionary

228. This clause sets out amendments to section 9 of the Corporations Law. The terms 'control', and 'parent entity' are to have in proposed Part 3.2A the meaning given by proposed sections 243H and 243F respectively. The term 'public company' will be given an expanded meaning for the purposes of proposed Part 3.2A to include a body corporate incorporated in this jurisdiction that is listed in the official list of a securities exchange. The terms 'child entity', 'financial benefit', 'related party' and 'sibling entity' are to have the meanings given by subsection 243D(2), sections 2430 and 243F and subsection 243FD(3) respectively.

#### Clause 23 - Effect of certain contraventions of this Law

229. This clause will amend section 103 of the Corporation Law to include proposed sections 232A, 243H and 243ZE in that section.

230. Section 103 provides that an action is not rendered invalid merely because there has been a contravention of one of a number of specified sections. The effect of clause 23 will be that if a benefit is given in contravention of proposed section 232A or proposed Part 3.2A, it will still be valid. This protects innocent parties who might be involved in transactions leading up to the contravention, or following the contravention. The company will still be able to recover compensation from the related party under proposed Part 9.4B

#### Clause 24 - Directors to disclose certain interests

231. Subsection 231(1) provides that a director of a company who is interested in any way with a contract or arrangement with the company shall declare the interest at a meeting of the

directors of the company. Subsection 231(6) provides that a director of a company who holds any office or possesses any property which might conflict with the director's duties as a director interest shall declare the interest at a meeting of the directors of the company. It is intended that proposed section 232A, to be inserted by clause 25, will address conflicts of interest involving directors of public companies. Clause 24 therefore proposes to confine the effect of subsections 231(1) and (6) to companies that are proprietary companies.

#### Clause 25 - (Insertion of new section 232A)

##### Proposed section 232A - Voting by interested directors

232. This section establishes a prohibition on directors of public companies voting or being present at board meetings in relation to matters in which they have a material personal interest.

233. Proposed subsection 232A(1) provides that a director who has a material personal interest in a matter being considered by the board must not vote on the motion in relation to the matter or be present at the meeting while the motion is being discussed.

234. Proposed subsection (2) provides that subsection (1) does not apply to an interest that the director has as a member of the company and in common with other members of the company.

235. Subsection (3) provides an exception where the other directors decide that the interest should not disqualify the director from voting or being present. Subsection (1) also provides that a director who is interested in the matter may not vote on this resolution.

236. Subsection (4) provides that a quorum is not present while a matter is being considered at a meeting of the board of the directors of a public company unless two directors are present who are entitled to vote on any motion that may be moved in relation to the matter. This contrasts with the position under the existing law where there is no general statutory prohibition on directors voting in matters in which they have an interest. subsection (5) provides that a general meeting of a public company may deal with a matter if it may not be dealt with by the board because of subsection (4).

237. Subsection (6) allows a director who has a material personal interest in a matter to vote on a resolution that the matter be considered by a general meeting of the company. Subsection (7) provides that if a director who has a material personal interest in a matter votes on a resolution to refer a matter to a general meeting then the directors must ensure that the minutes of the directors' meeting records that the interested directed so voted.

238. Subsection (8) confirms the existing law that the constitution of a public company may include further provisions in connection with who may be present and vote at meetings of directors of a public company.

#### Clause 26 - Loans to directors

239. Subsection 234(1) of the Corporations Law provides that a company may not make a loan to a number of persons, or give a guarantee, or provide security in connection with a loan given to such a person. Subsection 234(3) lists a number of circumstances in which subsection 234(1) does not apply.

240. Subclause 26(1)(a) proposes the insertion of a reference to public companies in subsection 234(1). The effect of this amendment is that subsection 234(1) will cease to apply to proprietary companies on the commencement of subclause 26(1)(a). In accordance with subclauses 2(3) and (4), this will be on proclamation and, in any event, within 6 months of the Bill receiving the Royal Assent.

241. It is intended that, in relation to public companies, section 234 will be replaced by proposed Part 3.2A, to be inserted by clause 27. Subclause 26(1)(b) therefore proposes the insertion of a new paragraph 234(3)(aa), having the effect that subsection 234(1) is not to apply to anything done by a public company after proposed Part 3.2A commences to apply to that company.

242. Proposed Part 3.2A will apply to all public companies with effect from 1 February 1994 (see proposed subsection 1376(1) to be inserted by clause 185 of the Bill). However, a public company may elect that the Part apply to it at an earlier date (see proposed subsection 1376(2) to be inserted by clause 185 of the Bill).

243. Section 234 will therefore cease to apply to all companies by 1 February 1994. Subclause 26(2) therefore repeals section 234. In accordance with subclause 2(2), the repeal will take effect from 1 February 1994.

#### Clause 27 - Insertion of New Part

244. This clause provides for the insertion after Part 3.2 of the Corporations Law of proposed Part 3.2A which is titled 'Financial Benefits to Related Parties of Public Companies'.

#### Division 1 - Object and outline of Part

##### Proposed section 243A - Object

245. This section sets out the object of proposed Part 3.2A.

##### Proposed section 243B - Outline

246. This section briefly sets out the content of each Division in the proposed Part 3.2A.

#### Division 2 - The meaning of expressions

##### Proposed section 243C - Entities

247. Proposed section 243C(1) sets out a non-exclusive list of bodies and structures which

are to be taken to be an 'entity' for the purposes of the proposed Part.

248. Subsection (2) provides that if a trust has two or more trustees, those trustees, in their capacity as such, together constitute an entity.

249. Subsection (3) has the effect that other bodies and structures which fall within the definition of 'entity' in Approved Accounting Standard AASB 1017 ('Related Party Disclosures') are also included. This subsection is intended to add to subsections (1) and (2). AASB 1017 defines 'entity' in the following terms:

'entity' means any legal, administrative or fiduciary arrangement, organisational structure or other party (including a person) having the capacity to deploy scarce resources in order to achieve objectives.

#### Proposed section 243D - Parent entities, child entities and sibling entities

250. Proposed section 243D gives the meanings for the terms 'parent entity', 'child entity' and 'sibling entity'.

251. Subsection (1) provides that an entity will be a parent entity of another entity if one of two conditions is satisfied. First, both entities are bodies corporate and the parent entity is a holding company of the other entity. Second, the parent entity has control over the child entity.

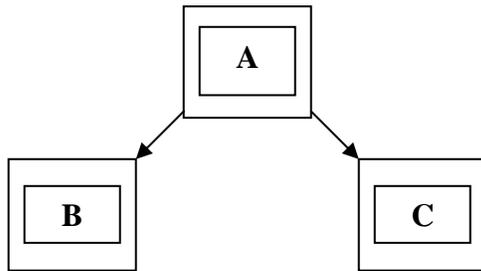
252. Subsection (2) provides that an entity is a child entity of another entity if, and only if, the other entity is its parent entity.

253. Subsection (3) provides that an entity is a sibling entity of another entity if, and only if, two conditions are satisfied. First, there must be an entity that is a parent entity in relation to both entities. Second, the sibling entity must be neither a parent entity nor a child entity of the sibling entity.

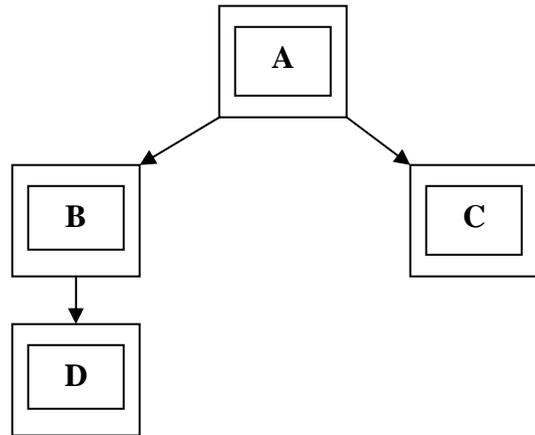
254. Diagrams 1A and 1B illustrate the expressions 'parent entity', 'child entity' and 'sibling entity'. These concepts are relevant to the new Part because a public company (and any entity that is a child entity of the public company) may not give a financial benefit to a parent entity or sibling entity of the public company.

- Parent entity: In diagram 1A, A has control over both B and C. A is a parent entity in relation to both B and C.
- Child entity: B and C are child entities in relation to A.
- Sibling entity: C is a sibling entity in relation to B, and B is a sibling entity in relation to C.

*Diagram 1A: Parent Entity, Sibling Entity and Child Entity*



*Diagram 1B: Parent Entity, Sibling Entity Child Entity*



255. Diagram 1B is the same as Diagram 1A, except that B has control over D.

256. A is a parent entity of both B and D. However, B is also a parent entity of D. Therefore, B is not a sibling entity in relation to D. C is a sibling entity of both B and D.

Proposed section 243E - Control

257. Proposed section 243E defines the concepts of ‘control’ by reference to Approved Accounting Standard AASB 1017. The Standard includes the following definition:

‘control’ means the capacity of an entity to dominate decision-making, directly or indirectly, in relation to the financial and operating policies of another entity so as to enable that other entity to operate with it in pursuing the objectives of the controlling entity;

Proposed subsection 243F - Related party of a public company

258. Proposed subsection 243F(1) lists the persons and entities who are ‘related parties’ for the purposes of proposed Part 3.2A.

259. Subsection (2) is intended to prevent the giving of a financial benefit to a person or entity who has recently ceased being a related party of the public company.

260. Subsection (3) is intended to prevent a person or entity from receiving a financial benefit and then becoming a related party. However, it is not necessary for such a person or entity to actually become a related party. It is sufficient if the person or entity believes (or has reasonable grounds to believe) that it is likely that he, she or it is likely to become a person or entity of a particular kind; and by becoming an entity of that kind the person or entity would become a related party at that time because of subsection (1). Subsection (4) provides that, for

the purposes of subsection (3), where an entity is constituted by more than 1 person (other than a body corporate) the entity will be taken to have a belief if any one of those persons has that belief.

261. Subsection (5) provides that where a related party acts in concert with another person or entity (an associate) in relation of the giving of a financial benefit (“the primary benefit”) and so acts for the reason, or for reasons including the reason, that a financial benefit may be given to a related party of the public company, the associate is a related party of the public company in relation to the giving of the financial benefit. It is not necessary for the associate to provide the second financial benefit to the related party. Nothing in the rest of the section is intended to limit subsection (5).

262. A person or entity may only be a related party of a public company because of proposed section 243F.

#### Proposed section 243G - Giving a financial benefit

263. This provision is intended to ensure that the proposed Part 3.2A is not interpreted in a narrow or formalistic way.

264. In accordance with paragraph 243G(1)(b) a reference to giving a financial benefit will include the giving of a benefit indirectly, such as through one or more interposed entities (even if any of them is a principal), or by making or giving effect to a relevant agreement as defined in section 9. The use of ‘indirectly’ in this sense is to be contrasted with the narrower use discussed by Lockhart J. of the Federal Court of Australia in Trade Practices Commission v. Australian Iron & Steel Pty Ltd and others 22 FCR 305. It will include, for example, the case where a financial benefit is given by a public company to an entity that is not a related party of the public company, in the expectation that that entity will pass the financial benefit to a related party of the public company.

265. Subsection (2) provides that in deciding whether an entity has given a financial benefit:

- the economic and commercial substance and effect of what the entity has done is to prevail over its legal form; and
- any consideration that has or may be given for the benefit is to be disregarded, even if it is full or adequate.

266. The effect of this provision is that in determining whether an entity has given a financial benefit, regard is not to be had to any resources or services received by the entity. This question will only become relevant when one comes to consider the availability of the exceptions established by proposed Division 4 (for example, whether the services provided by an officer in relation to the financial benefit given by an entity satisfy proposed section 243K, relating to reasonable remuneration).

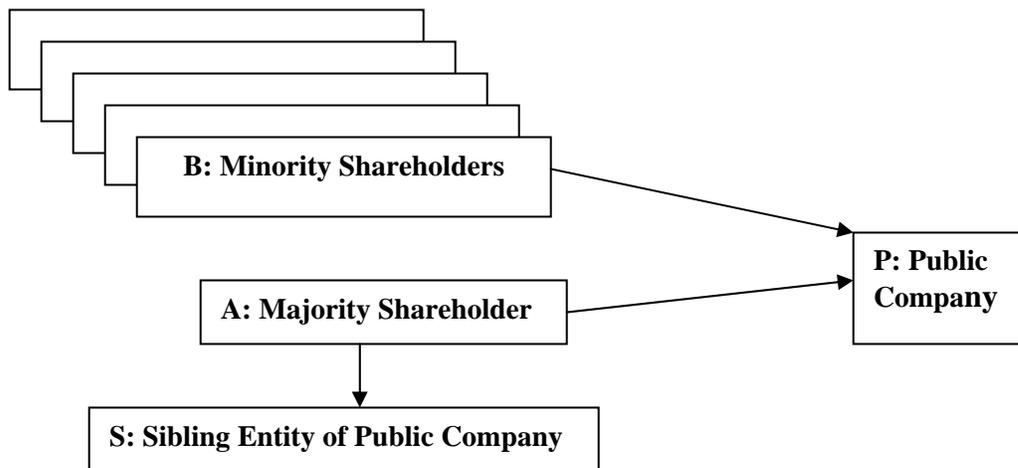
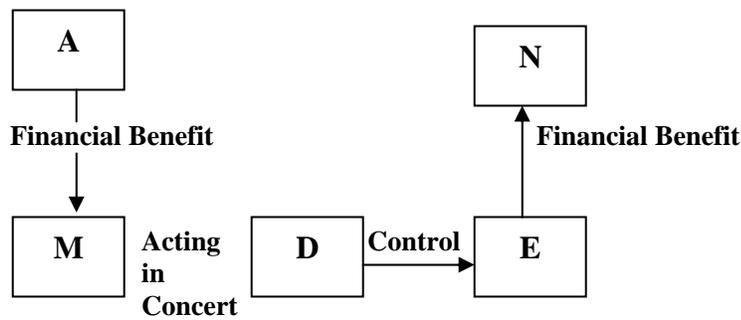
267. Subsection (4) provides a few examples of when an entity will be taken to have given a

financial benefit to a person. The examples are intended to be illustrative only and not exhaustive of all the possibilities.

Examples

268. In Diagram 2, A is a public company. D is a director of A. E is a company over which D exercises control. D proposes to act in concert with M for the purposes of A giving a financial benefit to M. D is acting in concert with M because another person has or will give a financial benefit to a related party of A, in this instance E.

269. The plan between D and M is that E should receive a benefit because M has been given a benefit. It may be that M gives N a benefit to induce N to give a benefit to E, but this need not be so. It is not necessary for E to receive the same benefit as M for M to be a related party. It is the acting in concert to achieve the ultimate benefit to E which makes M a related party.



270. In Diagram 3, A exercises control over both P and S. P is a public company. B represents the minority shareholders in P. P wishes to give an uncommercial financial benefit to S. However, to do so would diminish the value of B’s investment in P. P must therefore have the transaction approved by B before it gives the financial benefit to S.

### Proposed Division 3 - The prohibitions

#### Proposed section 243H - Prohibited financial benefits to related parties of public companies

271. This section establishes a general prohibition on public companies, and their child entities, giving financial benefits to a related party of the public company, subject to exceptions specified in proposed Divisions 4 and 5.

272. Proposed section 243G outlines when an entity will be taken to have given a financial benefit. The related parties of a public company are defined by reference to particular relationships between the public company and a related party. For example, proposed paragraph 243F(1)(a) provides that the related parties of a public company include each of its directors. Proposed section 243H would regulate all benefits given to a director, in whatever capacity.

### Proposed Division 4 - General Exceptions

#### Proposed section 243J - Financial benefit under contract made before section 243H begins to apply

273. Proposed section 243J has the effect that financial benefits required to be given by a contract made before section 243H applies to the company will not be subject to proposed Part 3.2A. Section 234 of the Corporations Law will cease to have effect in relation to a public company when proposed section 243H first applies to that company. However, subsection (2) preserves the effect of section 234 of the Corporations Law in relation to contracts made before proposed section 243H first applies to the public company.

274. Proposed section 243K provides that a body corporate may pay or provide remuneration to its officers provided it is reasonable for a body corporate in the body's circumstances to pay or provide that remuneration to an officer in the person's circumstances. The proposed section will therefore allow a public company, and a child entity of the public company, to pay reasonable remuneration to its officers.

275. Provided it is reasonable to do so, subsection (2) will allow a company to enter into employment contracts with its officers that have a period longer than the 15 months referred to in proposed paragraph 243R(1)(b), which deals with contracts required to be approved by the general meeting.

276. Subsection (3) will allow the remuneration to be paid by the public company or any of its child entities.

277. Subsections (4), (5), (6) and (7) expressly provide that remuneration includes salary, wages, bonuses, allowances, other payments in the nature of fringe benefits, benefits given in connection with retirement from office, and superannuation contributions. The inclusion of the words 'in the nature of' is intended to give subsection (5) a wide effect. Examples of remuneration in the nature of a fringe benefits could include discounted loan financing and employee housing and share acquisition schemes.

#### Proposed section 243L - Advances up to \$2,000

278. Proposed subsection 243L(1) provides that a body corporate may advance money to a director of the body or a spouse or de facto spouse of such a director. The total amount advanced at any one point must not exceed \$2,000 or such greater amount as is prescribed by the regulations. The amount owing for the purposes of this provision is to be the sum of the amount of the advance under consideration and each amount (if any) that is still owing and was advanced to the person by the body, or by a parent entity, child entity or sibling entity of the body. Where the advance is being made by a public company the provision will require the aggregation of any advances already made by the public company and its child entities that remain outstanding.

279. Proposed subsection 243L(1) will therefore allow a body corporate to provide a small advance to the directors of the body corporate or a spouse or de facto spouse of such a director. It may be convenient, for example, for the related party to receive a small advance to cover certain expenditure rather than for the company to incur the expenditure itself. The relative minor nature of such advances could not ordinarily be said to constitute a significant diminution of the resources of the company. Potentially more significant advances, such as a travelling allowance advance in respect of international travel, would be permitted under section 243K.

280. The effect of subsection (2) is that a particular advance is only to be counted towards the limit allowed by this exception if it does not fall within any of the other exceptions to proposed section 243H to be established by proposed Division 4 or Division 5.

#### Proposed section 243M - Financial benefit given to or by closely-held subsidiary

281. Part 3.2A seeks to protect the interests of members with a minority interest by including as related parties the holding body corporate of the public company and any subsidiary of that body corporate. However, where there are no minority interests to protect, the Part allows the public company to give a financial benefit to the holding body corporate and other subsidiaries. In the case of a subsidiary with a share capital, shares without any voting rights attached will be disregarded for the purposes of applying this exception. For example, non-voting redeemable preference shares may be used as a means of debt financing. They do not effectively dilute ownership of the subsidiary, and the Part is not intended to impose extra obligations in such situations.

#### Proposed section 243N - Financial benefit on arm's length terms

282. The object of Part 3.2A is the protection of a public company's resources by requiring that transactions with related parties that could diminish or endanger those resources be disclosed and approved by the members at a general meeting of the company. Transactions with related parties that are on terms and conditions no more favourable to the related party than would apply if the transaction was on arm's length terms do not endanger or diminish the public company's resources and the Part therefore includes an exemption for such transactions. The time for determining whether a transaction is on arm's length terms is when the transaction was entered into.

283. While this exception will have its most frequent application where a company deals with a related party in the ordinary course of its ordinary business, it also applies to transactions that are not in the ordinary course of the company's business. If directors were concerned as to whether a particular transaction was on arm's length terms because, for example, the transaction did not come within the ordinary business of the entity, it would be possible for them to obtain an independent expert's report on the transaction.

284. The exception could apply, for example, to:

- management services provided to the public company by its holding company, or a company controlled by its directors; or
- equity or debt financing provided to the public company by its directors, holding company or any other related party.

285. Subsection (2) provides that in determining whether a loan to a related party is on arms length terms regard may be had to not only the amount of the loan and the rate of interest, but also the credit risk associated with the loan (including what security has been given) and the timetable proposed for repayment of the loan.

#### Proposed section 243PA - Financial benefits to members as such

286. The prohibition on a public company giving a financial benefit to a related party extends to transactions with related parties in their capacity as a shareholder of the public company. For example, the prohibition would affect the payment of dividends, rights and bonus issues, and any privileges made available by the company to its members in their capacity as members (such as discounts for the goods and services supplied by the company).

287. Proposed section 243PA therefore allows a public company to undertake 'shareholder transactions' with its related parties who are members. These transactions will be allowed so long as they do not discriminate unfairly in favour of one or more related parties.

288. The normal operation of different classes of shares will not infringe proposed section 243H, but section 243PA will not provide an exemption for shareholder transactions where there has been unfairness in the treatment accorded to members who are not related parties as against those members who are related parties.

#### Proposed section 243PB - Financial benefit under court order

289. Proposed section 243PB allows financial benefits to be paid in accordance with a court order.

## Proposed Division 5- Financial benefits approved by general meeting of public company

### Subdivision A - Exceptions from the prohibitions

#### Proposed section 243O - Financial benefit permitted by resolution of members

290. Proposed section 243Q will allow the giving of an otherwise prohibited financial benefit provided three conditions are satisfied. First, a resolution of the public company must permit the benefit to be given. Second, the benefit must be given within 15 months of the passing of the resolution. Third, the conditions prescribed by proposed Subdivision B of Division 5 of Part 3.2A must have been satisfied.

#### Proposed section 243R - Financial benefit under contract permitted by resolution of members

291. Proposed section 243R deals with the situation where financial benefits are required to be given under a contract more than 15 months after the general meeting has approved the contract, but under a contract made within 15 months of the general meeting. Proposed section 243R includes conditions similar to those in proposed section 243Q.

#### Proposed section 243S - Resolution may specify matters by class or kind

292. Proposed section 243S provides that a resolution under the Division may specify anything either in particular or by reference to class or kind. The section will therefore allow the resolution to specify by class or kind:

- the financial benefits that it permits to be given;
- the related parties to whom it permits financial benefits to be given;
- contracts that it permits to be made; or
- related parties with whom it permits contacts to be made.

293. The resolution could therefore specify ‘the directors’ as a class of related parties to whom it proposes that a financial benefit be given, without naming each director.

#### Proposed section 243T - Effect of resolution

294. Proposed Section 243T deals with the situation where a public company that is a child entity of a public company gives a financial benefit to a related party of the parent public company. Proposed section 243T has the effect that both public companies will be required to pass resolutions in order for proposed Division 5 to have effect. A resolution of the parent public company will not authorize the child public company to give a financial benefit to a related party of the parent public company.

## Subdivision B - Conditions to be satisfied

### Proposed section 24311 - Company must lodge material that will be put to members

295. Proposed section 243U specifies the material which must be lodged with the ASC prior to holding a meeting of the company to obtain the approval of the general meeting. In particular, it will oblige a company to lodge an explanatory statement containing the matters set out in proposed section 243U and a copy of every document that will accompany the notice of meeting. The company must also lodge a copy of every document that will be given by potential beneficiaries of the resolution and their associates to members of the public company before or at the meeting. The effect of this provision is that potential beneficiaries will only be able to give to members copies of documents that are lodged with the ASC, and the provision of further documents will not allow proposed Division 5 to have effect in relation to the proposed financial benefit

### Proposed section 243V - Requirements for explanatory statement to members

296. Proposed section 243V sets out those matters which must be included in the explanatory statement which is provided to members in order to obtain their approval for an otherwise prohibited benefit. In particular, the statement must include all information reasonably required by members of the public company in order to decide whether or not it is in the public company's interests to pass the proposed resolution.

### Proposed section 243W - Commission may comment on proposed resolution

297. Proposed section 243W will allow the ASC to comment on a proposed resolution but any such comments must be provided within 14 days of the material being lodged with the ASC under proposed section 243U. The ASC may not comment on whether the proposed resolution is in the best interests of the company. The ASC will be obliged to make copies of any comment it might make on the resolution available for public inspection. Any comment made by the ASC will not affect its ability to subsequently take other action as appropriate.

### Proposed section 243X - Requirements for notice of meeting

298. Proposed section 243X sets out the requirements for the giving of notice of the general meeting. The notice must be the same as that lodged under proposed section 243U, and be accompanied by the explanatory statement prepared in accordance with proposed section 243V. The notice may not be accompanied by material that was not lodged with the ASC under proposed section 243U. In accordance with subsection 247(1) of the Corporations Law, at least 14 days notice, or such longer period as the articles allow, must be given of the meeting, unless the notice requirements have been waived in accordance with that section.

### Proposed section 243Y - Other material put to members

299. Proposed section 243Y is intended to ensure that any documents circulated by the public company, the potential beneficiaries of the resolution and their associates are the same in

all material respects as documents lodged with the ASC under paragraph 243U(1)(d).

Proposed section 243ZA - Proposed resolution cannot be varied

300. Proposed section 243ZA provides that the resolution lodged with the ASC must be the same as that put to the general meeting.

Proposed section 243ZB - Voting on the resolution

301. Proposed section 243ZB sets out the requirements for taking a vote on the proposed resolution. Subsection (1) provides that it will be condition of the giving of the benefit that the resolution was passed by a majority of disinterested shareholders. In order to assist with checking compliance with this condition, subsections (2), (3) and (4) provide that it will be a further condition that, if a poll is demanded, a record must be kept of the manner in which those shareholders who voted cast their vote. The conditions set out in subsections (2), (3) and (4) are part of the conditions which must be satisfied for proposed section 243Q to apply.

Proposed section 243ZC - Notice of resolution to be lodged

302. Proposed section 243ZC obliges a public company to lodge a copy of the resolution with the ASC. This will ensure that there is public access to resolutions passed by public companies under which financial benefits are given to related parties.

Proposed section 243ZD - Declaration by Court of substantial compliance

303. A failure to comply with any of the conditions prescribed in proposed Division 5 will render the giving of the financial benefit a contravention of proposed section 243J, notwithstanding that there may be substantial compliance with those conditions. To avoid injustices in the case of technical breaches, proposed subsection 243ZD(1) provides that the Court may declare that a specified condition has been satisfied in relation to a resolution of the company if it finds that they have been substantially complied with.

Proposed Division 6 - Enforcement

Proposed section 243ZE - Consequences of a public company dying financial benefit when not permitted

304. A related party of a public company who, contrary to proposed section 243H, receives a benefit from the public company or a child entity of the public company, contravenes proposed subsection 243ZE(2). A person who is involved in, or is recklessly concerned with, a contravention of proposed subsection 243H(2) contravenes subsection 243ZE(3). The civil penalty provisions, contained in proposed Part 9.4B, are to apply to these contraventions.

Proposed section 243ZF- Voting by or on behalf of related party interested in proposed resolution under Division 5

305. Proposed subsection 243ZF(1) prohibits a related party to whom it is proposed to give a financial benefit, or an associate of such a related party, from voting at a general meeting on a resolution which would permit a financial benefit to be given to the related party.

306. Subsection (2) provides that subsection (1) will not prevent the casting by a related party of the directed proxy vote of another member. Subsection (4) confers on the ASC a power to declare that a particular entity may vote on the resolution, notwithstanding subsection (1). The ASC may exercise this discretion only if it is satisfied that to do so would not cause unfair prejudice to the interests of any member of the public company. It is therefore anticipated that the ASC would not usually exercise its discretion under this provision.

#### Proposed section 243W - Contraventions by an entity that is not a legal person

307. Proposed section 243ZG provides that if an entity (that is not a body corporate) constituted by 2 or more persons contravenes proposed subsection 243ZE(2) or 243ZF(3), then each of those persons will be taken to have contravened those proposed subsections.

#### Proposed section 243ZH -Retaining records made under section 243ZB

308. Proposed section 243ZH provides that where a resolution is passed under proposed Division 5, records made under proposed section 243ZB must be kept for 7 years.

#### Proposed section 243Z1 - Effect of Part

309. While compliance with Divisions 4 and 5 will provide an exemption to proposed section 243I1, it is not intended that they will have the effect of authorising conduct that is prohibited by another law. For example, while proposed section 243K provides that superannuation will fall within the concept of remuneration, section 237 of the Corporations Law regulates the amount of superannuation that officers of a company, including directors, may receive. A company's constitution will also often regulate remuneration received by the company's directors. The operation of such provisions will not be affected by the proposed Part.

#### Clause 28 - Schedule 3

310. Clause 28 provides for proposed amendments to Schedule 3 of the Corporations Law setting out the penalties for the contravention of particular sections in Part 3.2A.

## PART 4- EXTERNAL ADMINISTRATION OF COMPANIES AND PART 5.7 BODIES

### Introduction

311. Part 4 contains the amendments to be made to the Corporations Law in implementing the Harmer Report. A summary of the major proposed amendments appears at the front of this Explanatory Memorandum under the heading 'Summary of Main Features of Bill'.

### Division 1 - Amendments of the Corporations Law

#### Clause 29- Dictionary

312. This clause will add to and alter definitions appearing in section 9, the main definitions section of the Corporations Law. A brief explanation of each proposed new definition and each proposed amendment follows.

#### 'company'

313. The reference to '444' in paragraph (a) of the definition of 'company' will be omitted, in line with the proposed repeal of Part 5.3, including section 444. A reference to '600F' will be inserted, in line with the insertion of proposed section 600F.

314. The definition of 'company' will also be amended by inserting a reference to Part 5.7B in paragraph (c), consequent on the proposed insertion of Part 5.7B into the Corporations Law.

#### 'contributory'

315. The reference to a 'body corporate to which Part 5.7 applies,' in the definition of 'contributory', will be replaced with a reference to a 'Part 5.7 body'. There will be no change to the substance of the definition.

#### externally-administered body corporate

316. The definition of 'externally-administered body corporate' will be amended to reflect the proposed repeal of Part 5.3, which provides for the official management of a company, and the proposed insertion of Part 5.3A, which will provide for the administration of a company's affairs with a view to executing a deed of company arrangement.

#### liquidator

317. The reference to sections 475, 531, 532 and 535 to 540 inclusive, will be omitted from the definition of 'liquidator' in line with the proposed amendment of each of those sections to expressly apply to provisional liquidators.

‘prove’

318. The definition of ‘prove’ will be amended by inserting ‘(for example, but without limitation, through the operation of a presumption for which this Law or any other law of this jurisdiction provides)’ after ‘way’. This is consequential upon the inclusion of a number of presumptions in proposed Part 5.7B.

‘entity’

319. This definition will be expanded to define ‘entity’, not only for the purposes of Parts 3.6 and 3.7 as at present, but also for the purposes of Pan 3.2A and otherwise.

320. For the purposes of Part 3.2A, ‘entity’ will have the meaning given by proposed section 243C,

321. For the purposes of Parts other than Parts 3.2A, 16 and 3.7, ‘entity’ will have the meaning given by proposed section MA. Proposed section 64A is based upon the definition of ‘entity’ in subsection 5(1) of the Bankruptcy Act, where it is defined to mean a natural person, company, partnership or trust. This definition of ‘entity’ will be relevant to the proposed definition of ‘examinable affairs’ to be adopted in relation to the questions which can be put to an examinee under proposed subsection 597(SB). The effect will be to allow an examinee to be questioned about all the entities related to the company which is the primary subject of inquiry, so as to ensure that all the matters relevant to that inquiry are able to be addressed.

‘party’

322. A new paragraph (a) is to be inserted into this definition to define ‘party’, in relation to a transaction, to include, if the transaction has been completed, given effect to, or terminated, a person who was a party to the transaction.

‘relevant date’

323. The existing definition of ‘relevant date’ will be omitted and a new definition inserted. ‘Relevant date’ will now mean, in relation to a winding up, the day on which the winding up is taken, because of proposed Division .1A of Part 5.6, to have begun.

‘resolution’

324. A new paragraph (b) will be added to the existing definition of ‘resolution’ to provide that ‘resolution’, where used in relation to creditors or contributories, means a resolution passed at a meeting of the creditors or contributories. The inclusion of proposed paragraph (b) is a technical amendment consequential upon the proposed implementation of the Harmer Report’s recommendation that in an insolvency administration, all matters requiring the decision or resolution of creditors be reduced to a single voting formula, in place of the existing variety in requirements for a valid resolution. A large part of that reform will be implemented by amendment of the Corporations Regulations.

325. However, consequential amendments of the following sections are proposed by the Bill to delete existing requirements for a resolution of creditors or contributories to be passed by other than a simple majority:

- Subparagraph 473(3)(b)(i), which provides for remuneration of a liquidator to be determined, in some circumstances, by a resolution passed at a meeting of creditors (see clause 70);
- Paragraph 510(l)(b), which provides that an arrangement entered into between a company being wound up and its creditors is binding on the creditors if a resolution in favour of the arrangement is passed at a meeting of creditors (see clause 83); and
- Subsection 532(5), which provides that paragraph 2(c) (which details persons disqualified as a liquidator except with leave of the Court) does not apply to a creditors' voluntary winding up if the creditors determine that that paragraph shall not so apply (see paragraph 89(b)).

#### 'administration'

326. This new definition will define the concept of 'administration', a new, largely voluntary procedure for companies in financial difficulties, that is to be inserted as Part 5.3A. 'Administration' will have the meaning given by proposed sections 435C and 1381.

#### 'administrator'

327. Under paragraph (a) of this new definition, the administrator of a company will be the person appointed under the new administration procedure to be provided by Part 5.3A to take over the affairs of the company and make recommendations to a meeting of the creditors about what should be done. In the exceptional case of a very large company, paragraph (a) of the definition allows the appointment of 2 or more administrators.

328. Under paragraph (b) of the definition, the administrator of a deed of company arrangement will be a person appointed by the creditors of a company to administer a deed of company arrangement, which will often involve some compromise of creditors' claims in exchange for greater creditor control over company management. Once again, in the exceptional case of a very large company, paragraph (b) of the definition allows the appointment of 2 or more administrators of a deed of company arrangement.

329. 'Affairs' will be defined, in relation to a body corporate, to have in the provisions referred to in section 53, a meaning affected by that section. This proposed definition is relevant to paragraph (b) of the proposed definition of 'examinable affairs', which is also to be inserted in section 9. 'Examinable affairs' will in turn define those matters in respect of which an examinee under proposed subsection 597(5B) may be examined. The effect of the proposed definition of 'affairs' will be to broaden the meaning of 'examinable affairs' to ensure that all matters

concerning the company can be canvassed during an examination.

330. This new definition will define the commencement of a winding up. The point at which a winding up is taken to have begun is explained in detail at the paragraphs of this memorandum relating to proposed sections 513A to 513C inclusive.

‘business affairs’

331. ‘Business affairs’ will be defined, in relation to an entity, to have a meaning affected by sections 53AA, 53AB, 53AC and 53AD. These sections will give broad definitions of ‘business affairs of a body corporate’, ‘business affairs of a natural person’, ‘business affairs of a partnership’ and ‘business affairs of a trust’.

332. This new definition of ‘business affairs’ is relevant to paragraph (c) of the proposed definition of ‘examinable affairs’ which is also to be inserted in section 9. ‘Examinable affairs’ will in turn define those matters in respect of which an examinee under proposed subsection 597(5B) may be examined. The effect of the proposed definition of ‘business affairs’ will be to broaden the meaning of ‘examinable affairs’ to ensure that all matters concerning the company can be canvassed during an examination.

‘commence’

333. This proposed new definition is closely related to the proposed new definition of ‘begin’ that is also to be inserted in section 9. The point at which a winding up is taken to have commenced is explained in detail at the paragraphs of this memorandum relating to proposed sections 513A to 513C inclusive.

‘committee of creditors’

334. A ‘committee of creditors’ is to be defined as a committee appointed at a meeting of creditors of a company convened under proposed section 436E. Proposed section 436E will provide for the appointment of a committee of creditors early in the administration of a company, thus allowing creditors to be informed about the company’s financial position and to be consulted, as the administrator begins to compile the details of any deed of company arrangement. Such a committee will only be appointed where the meeting of creditors convened under proposed section 436E resolves to do so.

‘connected entity’

335. ‘Connected entity’, in relation to a corporation, will be defined to mean:

- a body corporate that is, or has been, related to the corporation (existing section 50 sets out the circumstances in which bodies corporate are taken to be related); or
- an entity that is, or has been, connected (as defined by proposed section 64B) with the corporation.

336. The concept, ‘connected’, in proposed section 64B is drawn from the Bankruptcy Act and is intended to cover cases where a body is able to exercise a significant influence over a corporation.

337. The proposed definition of ‘connected entity’ is relevant to the proposed definition of ‘examinable affairs’ which is also to be inserted in section 9. ‘Examinable affairs’ will in turn define those matters in respect of which an examinee under proposed subsection 597(5B) may be examined. The effect of the proposed definition of ‘connected entity’ will be to broaden the meaning of ‘examinable affairs’ to ensure that all matters concerning the company can be canvassed during an examination.

#### ‘control day’

338. The amendments proposed by this Bill to Part 5.2 will result in duties being imposed on receivers and other ‘controllers’ of company property (such as mortgagees in possession). These duties are expressed to operate from the ‘control day’. ‘Control day’ is to be defined as the day on which a receiver was appointed or the day on which any other person who is in possession of or has control of property for the purpose of enforcing a charge, so entered into possession or took control. Where a ‘new’ controller acts with an existing controller, or in the place of a controller who has died or otherwise ceased to be a controller, the ‘control day’ will remain the day the existing or former controller was appointed or entered into possession or took control.

339. ‘Controller’ is to be defined for the purposes of provisions imposing duties on receivers and others who control company property, to include receivers and all other persons (for example, mortgagees in possession) who have control of company property for the purpose of enforcing a charge.

#### ‘decision period’

340. One of the protections that will be provided to secured creditors under the new administration scheme proposed by Part 5.3A will be that where such a creditor is secured over the whole, or substantially the whole, of a company’s property, the creditor will have 10 business days after the appointment of an administrator to decide to appoint a receiver to that property, notwithstanding the appointment of an administrator.

#### ‘deed of company arrangement’

341. This new definition will define a ‘deed of company arrangement’ to mean a deed of company arrangement (or such a deed as varied and in force from time to time) through the execution of which the creditors of a company under the new administration procedure agree with the company on a course of action to tackle the company’s solvency difficulties. The matters to be included in a deed of company arrangement are set out in proposed section 444A.

‘defacto spouse’

342. ‘Defacto spouse’ will be defined to be an individual of the opposite sex to the person who is living with that person as his or her spouse on a genuine domestic basis although not legally married to that person. This definition is drawn from the Sex Discrimination Act 1984. This definition is used in the broad definition of ‘related entity’, which is used to ensure that transactions with any creditor related to a company or its officers can be unwound by a liquidator where appropriate.

‘defect’

343. Under proposed section 459J, restrictions are to be placed on the circumstances in which a statutory demand can be resisted on the basis of a technical defect in the demand. To assist with the operation of these provisions, ‘defect’ is to be defined broadly to include an irregularity, a misstatement of an amount or total, a misdescription of a debt or other matter and a misdescription of a person or entity.

‘eligible applicant’

344. The proposed definition of ‘eligible applicant’ sets out the persons who may apply under proposed sections 596A and 596B for the examination of a person about a corporation. The list of persons is similar to the list in existing subsection 597(1), except that an administrator of a corporation and an administrator of a deed of company arrangement, who may be appointed under the new administration procedure proposed by Part 5.3A, have been added. In the light of the proposed repeal of the official management procedure currently provided by Part 5.3, official managers have been omitted from the list of eligible applicants.

‘enforce’

345. This definition will provide a summary of the various ways in which a secured creditor might exercise a security over property of a company that is under administration. The proposed definition will be relevant to those provisions of proposed Part 5.3A that will give a secured creditor a right to enforce his or her charge, notwithstanding the appointment of an administrator.

‘enforcement process’

346. This definition will confine enforcement process, in relation to property, to execution and other enforcement process of a judicial nature. The proposed definition will be relevant to proposed section 440F, which will proscribe enforcement process in relation to the property of a company during the administration of that company.

‘examinable affairs’

347. The proposed definition of ‘examinable affairs’ is based upon the definition of that term in the Bankruptcy Act and defines the questions that can be put to an examinee under proposed subsection 597(5B). ‘Examinable affairs’ will be defined, in relation to a corporation, to mean:

- the promotion, formation, management, administration or winding up of a corporation; or
- any other affairs of the corporation (the term ‘affairs’ is also to be defined in section 9 to have a meaning affected by section 53); or
- the business affairs of a connected entity of the corporation in so far as they are relevant to the corporation or to the corporation’s ‘examinable affairs’ (the terms ‘business affairs’, ‘connected entity’ and ‘entity’ are also each to be defined in section 9).

#### ‘examinable assets and liabilities’

348. ‘Examinable assets and liabilities’ is to be defined, in relation to an ‘entity’ (the term ‘entity’ is also to be defined in section 9) to mean the entity’s property and assets (whether present or future, held alone or jointly, or held as agent, ballet or trustee) and the entity’s liabilities (whether present or future, actual or contingent, owed alone or jointly, and whether or not owed as trustee).

349. The proposed definition of ‘examinable assets and liabilities’ is relevant to the proposed definition of ‘examinable affairs’ which is also to be inserted in section 9. ‘Examinable affairs’ will in turn define those matters in respect of which an examinee under proposed subsection 597(5B) may be examined. The effect of the proposed definition of ‘examinable assets and liabilities’ will be to broaden the meaning of ‘examinable affairs’ to ensure that all matters concerning the company can be canvassed during an examination.

#### ‘examinable officer’

350. The proposed definition of ‘examinable officer’ will prescribe the persons who the Court is to, under proposed section 596A, summon for examination about the ‘examinable affairs’ (also to be defined in section 9) of a corporation upon the application of an ‘eligible applicant’ (also to be defined in section 9). It will include all persons who might have a significant role in the management of a company.

#### ‘examinable operations’

351. The proposed definition of ‘examinable operations’ in relation to an ‘entity’ (also to be defined in section 9) will be relevant to the definitions of the ‘business affairs’ of a natural person and a partnership (to be defined in proposed sections 53AB and 53AC respectively). The definitions of ‘business affairs’ are in turn relevant to the proposed definition of ‘examinable affairs’ which is also to be inserted in section 9. ‘Examinable affairs’ will in turn define those matters in respect of which an examinee under proposed subsection 597(5B) may be examined. The effect of the proposed definition of ‘examinable operations’ will be to broaden the meaning of ‘examinable affairs’ to ensure that all matters concerning the company can be canvassed during an examination.

‘insolvent’

352. The term ‘insolvent’ will be particularly relevant to the capacity to recover compensation from directors who have allowed a company to engage in insolvent trading, and to recover money under the provisions dealing with preferences. ‘Insolvent’ will be defined to have the meaning given by subsection 95A(2). Under proposed subsection 95A(2), a company will be insolvent if it is not able to pay its debts as and when they become due and payable. Where the term ‘insolvent’ is used in Part 7.10, it will have a meaning affected by section 922.

‘insolvent transaction’

353. An insolvent transaction that gives an unfair preference to a particular creditor of a company will be able to be set aside if the company subsequently becomes insolvent, ‘Insolvent transaction’ will be defined to have the meaning given by proposed section 588FC. The meaning of the term given by proposed section 588FC is explained in the paragraphs of this memorandum relating to proposed section 588FC.

‘managing controller’

354. Most of the powers and duties to be conferred or imposed on insolvency administrators under Part 5.2 as amended by Part 4 of this Bill, will apply to all receivers and others who control company property under a charge. However, the conferral of one power, and the imposition of one duty, are appropriate in relation only to those controllers who have a general management role in addition to their role in taking possession of company property under the charge. These are the power to dispose of property which is subject to a prior charge (proposed section 420B) and the duty to report within 2 months about the company’s affairs (proposed section 421A). The Bill accordingly imposes these duties on ‘managing controllers’, which are to be defined to be those ‘controllers’ who have a management function.

‘misconduct’

355. The proposed definition of ‘misconduct’ is relevant to the circumstances in which a person may be summonsed under subsection 596B(1) for examination about a corporation’s examinable affairs. ‘Misconduct’ is to be defined to include fraud, negligence, default, breach of trust and breach of duty.

‘national newspaper’

356. Several of the notices which must be given under the new administration procedure proposed by Part 5.3A (for example, notice of the appointment of an administrator required by proposed paragraph 450A(1)(b)) must be published, and one of the options for publication is to publish the notice in a national newspaper. ‘National newspaper’ is to be defined to mean a daily newspaper that circulates generally in each State, the Capital Territory and the Northern Territory.

'related entity'

357. A 'related entity' is to be defined, in relation to a body corporate, to be any of:

- a promoter of the body;
- a relative or defacto spouse of such a promoter.
- a relative of a spouse or defacto spouse of such a promoter,
- a director or member of the body or of a related body corporate (section 50 of the Corporations Law defines the concept of a 'related body corporate');
- a relative or defacto spouse of such a director or member,
- a relative of a spouse or of a defacto spouse of such a director or member,
- a body corporate that is related to the first mentioned body;
- a beneficiary under a trust of which the first mentioned body is or has at any time been a trustee;
- a relative or defacto spouse of such a beneficiary;
- a relative of a spouse or of a defacto spouse of such a beneficiary;
- a body corporate, one of whose directors is also a director of the first-mentioned body; and
- a trustee of a trust under which a person is a beneficiary, where the person is a related entity of the first mentioned body because of any other application of the definition of related entity.

358. The extensive definition of 'related entity' proposed by this Bill is for the purpose of widening the application of provisions allowing a liquidator greater capacity to recover assets which have been disposed of to persons who are related entities, such as where an action is brought to recover the benefit of reviewable transactions under proposed section 588FE or recover the benefit of a reviewable transaction which involves the liability of a related entity under a guarantee (proposed section 588FH).

359. The consequence of being a related entity in connection with a reviewable transaction is that instead of a 6 month time zone prior to the relation-back day in which transactions may be reviewed, transactions in which one of the parties is a related entity attract a time zone of four years prior to the relation-back day.

360. Being a related entity is also of consequence for the purposes of proposed section

588FH. Under that proposed section, where a transaction is an insolvent transaction of the company and is reviewable under proposed section 588FE, and has had the effect of discharging a liability of a related entity of the company, the company's liquidator may by proceedings in a court recover from the related entity as a debt due to the company an amount by which the liability has been discharged.

361. This means that a director who has given a personal guarantee to a particular creditor, for example, cannot escape the consequences of the guarantee by arranging for that creditor to be paid out ahead of others just prior to the company's insolvency, since this would, in effect, reduce the pool of money available for other creditors.

362. The Harmer Report took the view that related creditors should not be treated equally, because persons in this class are not in a similar position to the general body of unsecured creditors. It further took the view that it is the natural tendency of a person facing insolvency to dispose of property in an endeavour to put it beyond the reach of creditors. Such a disposition is more likely to be made in favour of the related person with the object of the debtor retaining the benefit and enjoyment of the property.

363. The definition of 'related entity' will include also a trustee of a trust of which another related entity is a beneficiary. This is to deter directors of insolvent companies placing assets beyond the reach of the liquidator through the use of such devices.

#### 'relation-back day'

364. The 'relation-back day' is to be used as a reference point for the measurement of the time periods prior to the winding up within which transactions must occur in order for them to be categorised as reviewable under proposed Part 5.7B, and also as the reference point from which time periods in connection with presumptions of insolvency are measured for the purposes of proposed Part 5.7B.

#### 'section 513C day'

365. This day is a reference point for the review of transactions such as insolvent transactions. Such a transaction will need to have occurred within a certain time of the 'section 513C day' in order for it to be reviewable. The term is defined substantively in proposed section 513C.

#### 'solvent'

366. The substantive definition of this term is at proposed section 95A. A company is solvent if it is able to pay its debts as and when they become due and payable.

#### 'statutory demand'

367. A 'statutory demand' is a demand for repayment of a debt of, or debts totalling, at least the 'statutory minimum' (also to be defined in section 9). When served on a company and not

complied with within the time prescribed by proposed section 459F for compliance, it results in a presumption that the company is insolvent and can lead to the court ordering that the company be wound up.

‘statutory minimum’

368. A valid ‘statutory demand’ must be for a debt of, or debts totalling, at least the ‘statutory minimum’. Unless another figure is prescribed, the ‘statutory minimum’ will be \$2,000.

‘swear’

369. Swear will be defined to include ‘affirm’.

‘transaction’

370. ‘Transaction’ will be defined to mean, in Part 5.7B, in relation to a body corporate or Part 5.7 body, a transaction to which the body is a party. The definition will set out a number of examples (but without limitation) and will include a transaction that has been completed or given effect to or that has terminated. It will be broad enough to include a contract for services supplied to the company.

371. The proposed definition is based on a recommendation of the Harmer Report and will be sufficiently extensive as to embrace a wide range of means by which property may be disposed of. The definition applies to each of the reviewable transaction provisions. The definition extends the description of transactions to which the corresponding provision of the Bankruptcy Act section 122 relates to. Section 122 of the Bankruptcy Act refers only to ‘a conveyance or transfer of property, a charge on property, or a payment made, or an obligation incurred’.

‘uncommercial transaction’

372. ‘Uncommercial transaction’ will be defined substantively in proposed section 588FB. It refers to a transaction entered into by a company where a reasonable person in the company’s circumstances would not have entered into the transaction. If entered into while the company is insolvent, such a transaction can be an ‘insolvent transaction’, liable to be set aside under proposed sections 588FE and 588FF.

‘unfair loan’

373. ‘Unfair loan’ will be defined substantively in proposed section 588FD, to mean a loan in respect of which the interest rate or charges were extortionate at the time the loan was entered into. An unfair loan is liable to be set aside under proposed sections 588FE and 588FF.

‘unfair preference’

374. ‘Unfair preference’ will be defined substantively in proposed section 588FA to mean a transaction that gives a company’s creditor an advantage over the company’s other creditors, If entered into when the company is insolvent, such a transaction can be an ‘insolvent transaction’, liable to be set aside under proposed sections 588FE and 588FF.

‘unsecured’

375. ‘Unsecured’ is a term used in proposed section 588D, which makes the obvious but important point that, for the purposes of proposed Part 5.7B (which deals with recovering company property or compensation for the benefit of creditors of an insolvent company), a secured debt becomes an unsecured debt if the creditor proves for the debt as an unsecured creditor. Under Part 5.7B, moneys will generally be reserved for the benefit of unsecured creditors.

‘winding up by the Court’

376. The proposed inclusion of a definition of ‘winding up by the Court’ to include winding up in insolvency is a technical drafting amendment consequential upon the proposal to implement the Harmer Report’s recommendation to adopt the phrase ‘winding up in insolvency’ to distinguish between the winding up of solvent and insolvent companies. The amendment will obviate the need to amend every reference to ‘winding up by the Court’ throughout the Corporations Law to read ‘winding up by the Court or winding up in insolvency’.

‘wound up by the Court’

377. The proposed inclusion of a definition of ‘wound up by the Court’ to include winding up in insolvency is another technical drafting amendment consequential upon the proposal to implement the Harmer Report’s recommendation to adopt the phrase ‘winding up in insolvency’ to distinguish between the winding up of solvent and insolvent companies. The amendment will obviate the need to amend every reference to ‘wound up by the Court’ throughout the Corporations Law to read ‘wound up by the Court or wound up in insolvency’.

Clause 30 - Affairs of a body corporate

378. Clause 30 will amend existing section 53. As amended by paragraph 30(a), section 53 will provide that the definition of the affairs of a body corporate prescribed by existing section 53 will also be relevant for the purposes of the proposed definition of ‘examinable affairs’ to be inserted in section 9 and for the purposes of proposed section 53AA, as well as for the purposes of the sections already referred to in existing section 53 (namely section 260, paragraph 461(e), section 487, sub-section 1307(1) and section 1309).

379. Existing section 53 also defines the term ‘affairs of a body corporate’ for the purposes of section 597, among others. However, the amendments proposed to section 597 by clauses 116,

117 and 118 of this Bill will delete the term ‘affairs of a body corporate’ from section 597, and thus the existing reference to section 597 in section 53 will be superfluous. Paragraph 30(b) will therefore amend section 53 to delete the existing reference to section 597.

380. Paragraph 30(c) will omit the existing reference to official management in subparagraph 53(d)(ii) (to reflect the proposed repeal of Part 5.3 which provides for official management) and substitute references to a body that is under administration and a deed of company arrangement executed by the body (to reflect the proposed insertion of the new voluntary administration procedure at Part 5.3A).

381. Paragraph 30(d) will omit the existing reference to an official manager or deputy official manager in paragraph 53(d) (to reflect the proposed repeal of Part 5.3 which provides for official management) and substitute references to an administrator of the body and an administrator of a deed of company arrangement (to reflect the proposed insertion of the new voluntary administration procedure at Part 5.3A).

#### Clause 31 - (Insertion of new sections 53AA to 53AD)

#### Proposed sections 53AA, 53AB, 53AC and 53AD - Business affairs of a body corporate, a natural person, a partnership and a trust respectively.

382. Proposed sections 53AA, 53AB, 53AC and 53AD will prescribe an inclusive definition for the business affairs of each of a body corporate, a natural person, a partnership and a trust, respectively. The proposed definitions are based upon the definitions of ‘financial affairs’ in relation to each of a company, a natural person, a partnership and a trust in sections 5G, 5H, 5J and 5K of the Bankruptcy Act

383. The proposed definitions will be relevant to paragraph (c) of the proposed definition of ‘examinable affairs’ which is to be inserted in section 9. ‘Examinable affairs’ will in turn define those matters in respect of which questions which can be put to an examinee under proposed subsection 597(5B). The effect will be to expand the issues which may be investigated upon an examination to include all relevant affairs of the company and related entities. This expansion of the issues in relation to which a person may be examined will implement the Harmer Report’s recommendation that a wide definition of ‘examinable affairs’, similar to that provided by the Bankruptcy Act, be extended to companies.

#### Clause 32 (- Insertion of new sections 64A and 64B)

#### Proposed section 64A - Entities.

384. Proposed section 64A will define the term ‘entity’ where used except in Parts 3.2A, 3.6 and 3.7 (proposed section 243C will define ‘entity’ for the purposes of Part 3.2A and current section 294A defines ‘entity’ for the purposes of the accounting provisions in Parts 3.6 and 3.7). The proposed definition in section 64A will be relevant to the definition of ‘examinable affairs’ which is to be inserted in section 9. ‘Examinable affairs’ will in turn define those matters in respect of which questions which can be put to an examinee under proposed subsection 597(5B).

### Proposed section 64B - Entities connected with a corporation

385. Proposed section 64B will prescribe the circumstances in which each of a body corporate, a natural person, a partnership and a trust will be connected with a corporation. The proposed provisions are based on sections 5B, 5C, 5D and 5E of the Bankruptcy Act, which prescribe the circumstances in which an entity is associated with a bankrupt

386. The proposed provisions will be relevant to paragraph (c) of the definition of 'examinable affairs' which is to be inserted in section 9. 'Examinable affairs will in turn define those matters in respect of which questions can be put to an examinee under proposed subsection 597(5B). The effect will be to widen the matters that may be canvassed in an examination.

### Clause 33 - Officers of bodies corporate and other entities

387. Existing section 82A defines the expression 'officer'. The expression is used in a wide variety of situations throughout the Corporations Law to refer to all persons who may have a role in the management of a company. As administrators under the new voluntary administration procedure in proposed Part 5.3A will usually control the affairs of the company which is being administered, the definition of 'officer' is to be expanded to include references both to the administrator originally appointed to take control of the company and to the administrator of any deed of company arrangement.

### Clause 34 – (Insertion of proposed section 95A)

#### Proposed section 95A - Solvency and insolvency

388. Proposed section 95A will establish a clear statement of when a person is or is not solvent. A person will be solvent under subsection 95A(1) where the person can pay all the person's debts as and when they become due and payable. Under proposed subsection 95A(2), a person who is not solvent will be insolvent. Existing section 922 defines when a person becomes insolvent for the purposes of Part 7.10 (proposed subsection 95A(3)).

### Clause 35- Interpretation

#### 'externally- administered company'

389. Upon the proposed repeal of the official management procedure in Part 5.3, the existing reference in paragraph (c) of the definition of 'externally-administered company' to a company under official management will no longer be required. Accordingly that reference will be deleted by paragraph 35(a) and in its place will be inserted references to a company that is under administration and a company that has executed a deed of company arrangement, consequent on the proposed insertion of a new voluntary administration procedure for companies experiencing financial difficulties at Part 5.3A.

### 'national newspaper'

390. Proposed Part 5.3A will require notices to be published in a number of situations (for example, when an administrator is appointed to a company). One of the options for publication to be provided in Part 5.3A will be publication in a 'national newspaper'. 'National newspaper' will be defined in section 9 to mean a daily newspaper that circulates generally in each State, the Capital Territory and the Northern Territory.

391. Existing section 206BB already contains a definition of 'national newspaper', but that definition is currently confined in its operation to the share buy-back provisions contained in Division 4B of Part 2.4 of the Corporations Law. So that the definition might be applicable both in relation to that Division and in relation to the proposed new Part 53.A, paragraph 35(b) will omit the definition in section 206BB and it will be relocated to section 9.

### 'relevant date'

392. Existing section 206BB contains a definition of 'relevant date' which will be overtaken by the changes to be effected by proposed Division 1A of Part 5.6 which deals with the commencement of windings up, and thus the definition will be omitted by paragraph 35(b). The point at which a winding up is taken to have begun is explained in detail at the paragraphs of this memorandum relating to proposed sections 513A to 513C inclusive.

### 'solvent'

393. Existing section 206BB already contains a definition of 'solvent', but that definition is currently confined in its operation to the share buy-back provisions contained in Division 4B of Part 2.4 of the Corporations Law. So that the definition might be applicable in relation to the entire Corporations Law, paragraph 35(b) will omit the definition in section 206BB and it will be relocated to section 9.

### Clause 36 - Duty and liability of officer of corporation

394. Existing section 232 sets out general duties which are owed to a company by all its 'officers'. The term 'officer' is defined in section 232 to include all those who might have a significant role in its management. The existing reference in paragraph (c) of the definition of 'officer' to an official manager and a deputy official manager will be deleted to reflect the proposed repeal of Part 5.3. In its place will be inserted references to an administrator of a company and an administrator of a deed of company arrangement, to reflect the proposed insertion of a new voluntary administration scheme at Part 5.3A.

### Clause 37 - Substitution of Part heading

395. A number of the obligations presently imposed on receivers by Part 5.2 are to be extended to mortgagees in possession and other persons who control company property for the purposes of enforcing a charge over that property. Accordingly, the current heading to Part 5.2

(‘Receivers and managers’) will be replaced with the broader expression (‘Receivers, and other controllers, of property of corporations’) to reflect the proposed wider operation of Part 5.2.

#### Clause 38 - Application of Part

396. A consequential drafting amendment will be made to existing section 417 to take account of the proposed insertion of new commencement and application provisions in Part 9.11 relating to changes proposed by this Bill to Part 5.2.

#### Clause 39 - (Insertion of proposed section 418A)

##### Proposed section 418A - Court may declare whether controller is validly acting

397. The Corporations Law contains no provision which expressly allows a person to test the validity of appointment of a receiver or the entry into possession by a mortgagee. The Harmer Report concluded that the addition of an express provision on this topic was desirable. The Report made particular comment on the desirability of unsecured creditors having a right to test the validity of an appointment or entry into possession under a security.

398. Proposed section 418A will implement the Harmer Report’s recommendation. It will allow a receiver, a person who has entered into possession or assumed control, the company or any of the company’s creditors to apply to the Court for a declaration concerning the validity of the appointment, entry into possession or assumption of control.

#### Clause 40 - (Insertion of proposed section 419A)

##### Proposed section 419A - Liability of controller under pre-existing agreement about property used by corporation

399. At present, a receiver is liable for debts incurred in the course of the receivership but is not liable for, or deemed to have adopted, a pre-receivership contract for the lease or hire of property merely because the company remains in occupation or retains possession of the property.

400. The Harmer Report was of the view that, although a receiver should not be considered to have adopted a lease merely because the company remains in occupation of the leased property, it does not appear equitable that a receiver should permit a company to continue to obtain the benefit of the occupation of premises or the use of chattels under a lease agreement, without being liable for the payments which the company is liable to make for that continued occupation or use. The Report proposed that a receiver be personally liable for rent or similar payments payable by the company in respect of the possession, use or occupation of property the legal title to which belongs to another person, where the company continues in that possession, use or occupation while the receiver is in control. As a safeguard for receivers, the Report proposed that this liability not apply for a period of seven days immediately after the appointment of the receiver.

401. It is also appropriate that this liability be imposed upon other persons who have control of company property under a charge (for example, mortgagees in possession) or their agents.

402. These changes are implemented in proposed section 419A. The operative provision will be subsection (2), which will make a ‘controller’ (to be defined in section 9 to mean a receiver and any other person who has control of company property under a charge, such as a mortgagee in possession) liable for rent or other amounts payable under a relevant agreement, from the seventh day after the controller is appointed or enters into possession of property of the company of which someone else is the owner or lessor (‘third party property’). The controller will be liable only in relation to third party property that is actually used or occupied or in the possession or control of the controller (proposed paragraph 419A(1)(b) and proposed subparagraph 419A(2)(b)(ii)).

403. It may be that in some circumstances, such as where the third party property consists of a chattel that is not capable of being moved within 7 days, or where an owner or lessor declines to take possession of the property, the personal liability imposed on controllers may be unduly onerous. Proposed subsections (3) and (4) will alleviate such situations by allowing a controller 7 days in which to give to the owner or lessor notice that the controller does not propose to use or occupy certain property. Where such a notice is given, the controller will be relieved of liability in respect of that property. Such a notice will, however, cease to have effect if expressly revoked by the controller or where the controller uses or exercises or purports to exercise a right in relation to the property (proposed subsections (5) and (6)).

404. Proposed subsection (7) will also allow the Court to excuse the controller from liability. This might be appropriate in a case where the controller could not have been expected to have been aware of the existence of a relevant lease or agreement until after the 7 day period had expired.

405. Subsection (8) will provide that, notwithstanding subsection (2), the controller is not to be taken to have adopted the agreement or be liable under it otherwise than as mentioned in subsection (2).

#### Cause 41 - (Insertion of proposed sections 420A to 420C)

##### Proposed section 420A - Controller’s duty of care in exercising power of sale

406. It is sometimes said of receivers that they are prepared to sell property at a price less than the best obtainable, so long as it is sufficient to cover the debt of the chargeholder who appointed them. Proposed section 420A will make it clear that, in selling company property, a controller (to be defined in section 9 to mean a receiver and any other person who has control of company property under a charge, such as a mortgagee in possession) must take all reasonable care to sell the property for its market value (if, when sold, it has a market value) or otherwise for the best price that is reasonably obtainable, having regard to the circumstances existing when the property is sold. The controller’s duty under proposed subsection 420A(1) will be owed to the company. Proposed subsection 420A(1) will not affect any duties the controller may owe to others under the common law or otherwise.

407. Proposed subsection (2) will also make it clear that nothing in subsection (1) will limit the generality of the statements of duty of company officers contained in section 232 of the Corporations Law, and which apply to receivers by virtue of the definition of “officer” in subsection 232(1).

Proposed section 420B - Court may authorise managing controller to dispose of property despite prior charge

408. The Harmer Report observed that a charge under which a receiver is appointed will often embrace all, or nearly all, the assets of a company. However, there was the possibility that another secured creditor may have security in priority to the chargeholder over a crucial part of the property of the company. In such a case, the receiver could be effectively prevented from disposing of all of the saleable property of the company, particularly the business of the company as a going concern, at the most favourable price.

409. The Report recommended that a receiver in such circumstances have a right to sell the property in question, provided the rights of the other chargeholder are adequately protected. Proposed section 420B will implement the Harmer Report’s recommendations on this topic.

410. Subsection (1) will empower the Court to authorise a ‘managing controller’ (to be defined in section 9 to mean those receivers and other persons in possession of company property or their agents who have a management function) to sell or dispose of specified property of a company even though that property is subject to a prior charge.

411. Subsection (2) will set out four preconditions for the making of such an order. The first is that the controller has power to sell or dispose of the property apart from the existence of the prior charge. The second is that the controller must have taken all reasonable steps to obtain the consent of the holder of the prior charge to the sale or disposal. The third is that the sale or disposal must, in the Court’s view, be in the best interests both of the body of the company’s creditors and of the company itself. Finally, the Court must consider that the sale or disposal will not unreasonably prejudice the rights or interests of the holder of the prior charge.

412. Under proposed subsection 420B(3), the Court is to have regard to the need to protect adequately the rights and interests of the holder of the prior charge.

413. Proposed subsections (4) and (5) will address matters to which the Court may have regard if the property would be sold or disposed of together with other property that is subject to the controller’s charge. Subsection (4) will deal with the situation where the controller is trying to sell the business as a going concern, and it will specifically empower the Court, in such a situation, to consider the likely effect on the net proceeds from the sale or disposition of the business if the property in dispute is not included in the sale or disposition. The sale of the equipment in a factory together with the land upon which the factory is situated may, for example, yield far more than the separate sales of the equipment and the interest in the land. The Court will not be limited in the matters which it may consider in this regard. In fact, subsection (5) specifically provides that nothing in subsection (4) (or (3)) will limit the matters to which the

Court may have regard.

414. Proposed subsection (6) will further protect the position of the holder of the prior charge by specifically empowering the Court to make its order subject to conditions. The proposed subsection goes on to give two examples of the kinds of conditions which might be imposed by the Court. The first is that the net proceeds of the sale imposed by the managing controller be applied in payment of the prior chargee's claim. The second example is that the controller pay a specified amount to the prior chargee. This might be relevant where there is a doubt about whether the proposed sale will yield sufficient proceeds to cover the interests of the prior chargee.

#### Proposed section 420C - Receiver's power to carry on corporation's business during winding up

415. This proposed section is intended to deal with the situation where a liquidator is appointed to a company which is under the control of a receiver. Under the current law, a liquidator cannot control property in respect of which a receiver has been appointed. Conversely, a receiver ceases to act as agent for the company upon commencement of a winding up; and is therefore exposed to personal liability if he or she continues the company's business.

416. To meet these difficulties, proposed subsection 420C(1) will provide that a receiver of a company that is being wound up may carry on the company's business where the receiver obtains the written approval of the liquidator or the approval of the Court.

417. Proposed paragraph (2)(a) will make it clear that the power conferred by subsection (1) is additional to any other power which a receiver may have. An example of such a power would be a power of attorney granted under a mortgage security under which a receiver was appointed, enabling the receiver to act as agent of the company in order to realise assets of the company. Proposed paragraph (2)(b) will make it clear that subsection (1) does not empower a receiver to do an act he or she would not otherwise have had the power to do if the company were not being wound up.

418. Proposed subsection (3) is intended to make it clear that where a receiver carries on business with the approval of a liquidator or the Court, he or she does so as agent of the company, and thus has a right of indemnity from the company assets for expenses and liabilities incurred in carrying on the business.

419. Proposed paragraph 4(a) will impose on a receiver statutory personal liability for debts incurred in carrying on the business, although that personal liability is without prejudice to the rights of a receiver against the company or any other person. Thus it is without prejudice to a receiver's rights as an agent of the company (under proposed subsection (3)), to be indemnified from the company's assets.

420. Proposed paragraph (4)(b) is intended to make it clear that liabilities incurred by a receiver in carrying on the business are liabilities incurred in the receivership and not in the liquidation. Thus, the liabilities will not attract the special payment priority available under proposed section 556(1)(a).

#### Clause 42 - Controller's duties in relation to bank accounts and accounting records

421. The proposed amendment of section 421 implements the Harmer Report's recommendation that a number of sections of the Corporations Law which regulate the conduct and duties of receivers be applied to mortgagees in possession and their agents.

422. Existing subsection 421(1) will be amended by providing that the existing duties imposed by that subsection on a receiver with respect to bank accounts and accounting records be imposed upon a controller (to be defined in section 9 to include a person who has control of company property under a charge, for example, a mortgagee in possession or its agent, in addition to a receiver).

423. Provision will also be made for the operation of one or more accounts to facilitate the placement of monies received by controllers direct into an investment account. The controls proposed by subsection 421(1) (including that an account bears the controller's name and title as well as the corporation's name; that money be paid into the account within 3 business days; that the account only contain the corporation's money and that the controller keep appropriate accounting records) will apply to each such account.

424. The reference in existing subsection 421(2) to a 'receiver' is also to be replaced by reference to a 'controller'.

#### Clause 43 - (Insertion of proposed section 421A)

##### Proposed section 421A - Managing controller to report within 2 months about corporation's affairs

425. When a company enters into receivership, or a mortgagee takes possession of key assets of a company, it is most important that the company's shareholders and unsecured creditors have access to adequate information about the financial position of the company and its future prospects. There is, however, no obligation on a receiver or a mortgagee in possession to make available any information to shareholders and creditors on these matters. A receiver is obliged to report to the ASC on possible offences and is also obliged to lodge periodic accounts relating to the receivership, but these documents may contain inadequate information for the needs of shareholders and unsecured creditors.

426. The Harmer Report observed that there seemed to be no good reason, in the majority of cases, why a receiver should not be required to make relevant information available to all unsecured creditors. The Report was concerned, however, to ensure that such a requirement was imposed in a way that did not become unreasonably burdensome or expensive. The Report recommended that receivers be required to produce a report on the affairs of the company and lodge it within 2 months of the receiver's appointment and that unsecured creditors should have access to the report. The Harmer Report also recommended that the obligation to report extend to mortgagees in possession and their agents, and that adequate provision should be made to protect confidential information, such as that which might prejudice a planned sale of company property.

427. However, the imposition of the duty to produce such a report is only appropriate in relation to those receivers and mortgagees in possession (or their agents) who have a general management role in addition to their role in taking possession of company property under the charge. The Bill accordingly proposes that the duty be imposed on ‘managing controllers’ which are to be defined in section 9 to mean those receivers and others in possession (or their agents) who have a management function.

428. Proposed subsections (1) and (2) will require a managing controller to prepare and lodge with the Commission, within 2 months after appointment, a report about the corporation’s affairs.

429. Proposed subsection (3) will require the managing controller to advertise, within 14 days after lodging the report, the existence of the report

430. Proposed subsection (4) will allow a controller to omit from the report information that, in the controller’s opinion, would seriously prejudice the corporation’s interests or the achievement of the objectives for which the controller was appointed. In those circumstances the controller must include, instead, a notice stating that certain information has been omitted, and summarising what the information is about, without disclosing the information itself (proposed subsection (5)).

Causes 44 to 54 (excluding clause 46 - see following for an explanation of clause 46) – (Amendment of existing sections)

Proposed section 423 - Supervision of controller

Proposed section 424 - Controller may apply to Court

Proposed section 426 - Controller has qualified privilege in certain cases

Proposed section 427 - Notification of matters relating to controller

Proposed section 428 - Statement that receiver appointed or other controller acting

Proposed section 429 - Officers to report to controller about corporation’s affairs

Proposed section 430 - Controller may require reports

Proposed section 431 - Controller may inspect books

Proposed section 432 - Lodging controller’s accounts

Proposed section 434 - Enforcing controller’s duty to make returns

431. Each of clauses 44, 45, 47, 48, 49, 50, 51, 52, 53, and 54 is consequential upon

implementation of the Manner Report's recommendation that a number of sections of the Corporations Law which regulate the conduct and duties of receivers be also applied to mortgagees in possession and their agents.

432. Each of existing sections 423, 424, 426, 427, 428, 429, 430, 431, 432 and 434 will be amended by extending its application from a receiver to a 'controller' (to be defined in section 9 to include a mortgagee in possession and its agent, in addition to a receiver).

#### Clause 46 - (Amendment of section 425)

##### Proposed section 425 - Court's power to fix receiver's remuneration

433. Existing section 425 will be amended to allow an administrator of a corporation and an administrator of a deed of company arrangement (in addition to a liquidator and the ASC) to make application to the Court to fix the remuneration of a receiver. This amendment is consequential on the proposed inclusion of a voluntary scheme of administration in Part 5.3A. An official manager of the corporation will be omitted from the list of persons who may make such an application, consequential on the proposed repeal of the official management procedure in Part 5.3.

#### Cause 55 – (Insertion of proposed sections 434A to 434C)

##### Proposed section 434A - Court may remove controller for misconduct

434. The Manner Report recommended that the power of the Court, on the application of a corporation, to remove a receiver from office or to terminate the possession or control by a person of property of the corporation where the person entered into possession or control of the property for the purpose of enforcing a charge, should be expressly stated in the Corporations Law.

435. Proposed section 434A will allow the Court, on the application of the company, to order that a controller cease to act as receiver or give up possession or control of the company's property where the controller has been guilty of misconduct. The proposed section has application to a 'controller' (to be defined in section 9 to include a mortgagee in possession and its agent, in addition to a receiver), in line with the Harmer Report's recommendation that certain sections regulating the conduct of receivers also be applied to mortgagees in possession and their agents.

##### Proposed section 434B - Court may remove redundant controller

436. There is at present no statutory device for ending prolonged receiverships. The Manner Report recommended that this matter be made explicit in the Corporations Law. The Commission was particularly concerned that the continuation in office of a receiver who has already realised sufficient funds to satisfy the claims of the relevant chargeholder could unnecessarily impede the conduct of a winding up by a liquidator and increase the costs of the liquidation.

437. The Harmer Report accordingly recommended that the Court be empowered to remove a receiver in this situation. The Report said that it was difficult to provide precise criteria for exercising the Court's discretion.

438. Proposed subsection (1) will provide that the Court may order a controller of property of a corporation to cease to act in relation to the whole or specified property of the corporation.

439. Proposed subsection (2) will provide that such an order may only be made if the Court is satisfied that the controller has achieved the objectives for which he or she was appointed.

440. Proposed subsection (3) will set out factors to which the Court must have regard in deciding whether to make an order. These include the company's interests, the interests of the holder of the relevant charge, the interests of the company's other creditors and any other relevant matter. An order may only be made on the application of a liquidator (proposed subsection (4)).

441. Proposed subsection (5) will provide that the Court may also prohibit the holder of the charge from appointing a receiver, entering into possession or taking control of property or appointing a person to so enter into possession or take control.

#### Proposed section 434C - Effect of sections 434A and 434B

442. Proposed section 434C will set out the effect of proposed sections 434A and 434B. Under proposed subsection (1), an order will not affect a charge on property of the company to day operations of the company will be able to continue notwithstanding the appointment of an administrator.

#### Clause 56 - (Repeal of Part 5.3 and substitution of new Part 53A)

443. This clause will repeal Part 5.3 of the Corporations Law (which deals with the outmoded official management procedure in relation to an insolvent company) and will replace it with a new Part 5.3A which will provide for a voluntary scheme of administration of companies in financial difficulties.

#### Proposed part 5.3A - Administration of a company's affairs with a view to executing a deed of company arrangement

444. The proposed new Part 5.3A will provide for an administrator to take over the affairs of a company, with a view to developing a 'deed of company arrangement', under which the company might be restored to financial health. Proposed amendments to section 9 will define 'administrator' to mean either the administrator initially appointed to take over the affairs of the company or the person who administers the deed of company arrangement. The person who administers the deed of company arrangement (who will be appointed by the company's creditors) may be the same person as the person initially appointed to take over the affairs of the company (who will be appointed by the directors, the liquidator or a major creditor of the

company), but this need not necessarily be the case.

445. Proposed Part 5.3A will contain 17 Divisions which will deal with all aspects of the administration of a company, the preparation of a deed of company arrangement and the operation of that deed. In particular, the proposed Part will deal with:

- who may appoint an administrator and the first meeting of creditors to appoint a committee of creditors and, where appropriate, to replace the administrator (proposed Division 2);
- the powers and duties of an administrator (proposed Divisions 3 and 4);
- the meeting of creditors which considers the administrator's recommendation about what should be done with the company (proposed Division 5);
- the protection of the company's property and the rights of chargees and others, during the period of administration (proposed Divisions 6-8);
- the administrator's liability and indemnity for the debts incurred during the administration (proposed Division 9);
- the execution and effect of a deed of company arrangement (proposed Division 10); and
- the variation, termination and avoidance of a deed of company arrangement (proposed Division 11);

446. The new Part will conclude with a number of Divisions dealing with general matters including the powers of the Court (proposed Division 13), qualifications, removal, replacement and remuneration of administrators (proposed Divisions 14 and 15) and miscellaneous provisions concerning the giving of notices and other matters (proposed Divisions 16 and 17).

#### Proposed Division 1 - Preliminary

447. Division 1 will comprise 3 sections, namely sections 435A to 435C. The Division will set out the object of the new Part and define when an administration under the new Part begins and when it ends.

#### Proposed section 435A - Object of Part

448. This section will emphasise that the primary object of the Part is to maximise the chance of a company emerging from administration with as much as possible of its business continuing in existence. The insertion of the new Part is primarily designed to redress concerns that Australia's current corporate insolvency laws are inflexible and that they too easily and too often lead to the liquidation of companies, when some such companies could have been saved.

449. The new Part is accordingly intended to provide for

- speed, and ease of commencement, of administration;
- minimisation of expensive and time-consuming court involvement and formal meeting procedures;
- flexibility of action at key stages in the administration process; and
- ease of transition to other insolvency solutions where an administration does not by itself offer all the answers.

450. Proposed section 435A will also recognise that, no matter how efficiently the new administration procedure operates, there will be cases where it is not possible to save a company or its business. In this situation, the object of the new provisions will be to provide for a fair and efficient winding up, and in particular one that results in a better return for the company's creditors and members than would result from an immediate winding up of the company.

#### Proposed section 435B – Interpretation

451. The proposed new Part will refer in a number of places to a 'receiver'. For example, proposed section 441A will allow a chargee secured over 'the whole, or substantially the whole' of the property of a company a period of 14 days after the appointment of an administrator to 'enforce' a charge by, for example, appointing a receiver under the instrument relating to the charge (see the definition of 'enforce' proposed to be inserted in section 9 by clause 29). Such an instrument may provide for the appointment of a receiver and manager rather than simply a receiver. There would be no reason, arising from the policy of the new Part, to exclude the chargee whose instrument provided for the appointment of a receiver and manager. Accordingly, proposed section 435B will allow all references to 'receiver' to be read as including a reference to a receiver and manager.

#### Proposed section 435C - When administration begins and ends

452. A number of important legal consequences will flow from the fact that a company is placed under administration. For example, subject to limited exceptions, the rights of creditors to enforce any securities they may have over property of the company will be suspended. Because of the significance of these legal consequences, it is necessary to define quite precisely when a company is under administration.

453. Proposed subsection 435C(1) makes the obvious proposition that the administration of a company will begin when an administrator is appointed. The point at which the administration of a company ends is, however, more complex.

454. There will be three common causes of the end of an administration.

455. First, if the administrator puts a proposed arrangement before a meeting of creditors which is accepted by the meeting and executed by the company (proposed paragraph (2)(a)), different rules concerning the rights of creditors and other matters will commence to apply (see proposed sections 444A if). Accordingly, the rules governing the period of the administration prior to the execution of the deed of company arrangement will no longer be appropriate, and the period of administration must be ended once the deed has been executed by both the company and the deed's administrator.

456. Secondly, the company's creditors might resolve that the administration should end and that no further action in relation to the company's administration is necessary (proposed paragraph (2)(b)). This may occur where some event between the appointment of the administrator and the meeting of creditors means that the potential for insolvency which had led to the administration has ceased to exist.

457. Thirdly, the company's creditors might resolve that the company be wound up (proposed paragraph (2)(c)). This will usually happen because the creditors conclude that there is no chance of saving the company, and that the best course open is for it to be wound up. Again, a company that it is being wound up is governed by different rules concerning the parties involved, rules which are set out in Parts 5.4 to 5.6.

458. Proposed subsection 435C(3) will also contemplate seven other ways in which an administration might come to end, ways which might be expected to be used less frequently.

459. First, the Court will have a general power to order that the administration end (proposed paragraph (3)(a)). A particular example of a situation where this power might be used would be where the directors of a company use the appointment of an administrator merely as a delaying tactic to avoid an inevitable liquidation. In such a situation, a creditor will be able to seek a court order to bring the administration to an immediate end. There are two main reasons why this is unlikely to be necessary under the new procedure. First, the administrator will be required to be a registered insolvency practitioner, independent of the company. It is to be expected that an administrator would quickly identify a situation where the new procedure was being used inappropriately, and call an early meeting of creditors to vote on a recommendation that the company be wound up. Further, the new procedure guarantees creditors an opportunity within 35 days to vote on the question of whether the company should be wound-up, a period sufficiently brief that the positions of creditors would usually not be prejudiced severely by allowing it to run. Another circumstance, expressly contemplated by proposed paragraph (3)(a), where the Court may order that an administration will end, is where the Court is satisfied, on the application of an 'interested person' such as a director or shareholder, that the company is solvent.

460. Secondly, the administration will end where there is no meeting of creditors within the time provided for by proposed section 439A and where no application is made for the Court to extend the period for holding that meeting (proposed paragraph (3)(b)).

461. Thirdly, the administration will end where an application is made for the Court to

extend the period for holding the creditors' meeting but where the Court, for example, refuses to grant the extension sought (proposed paragraph (3)(c)).

462. Fourthly, the administration will end where an extension of time is granted for the holding of the creditors' meeting, but the meeting is not then held within that extended period (proposed paragraph (3)(d)).

463. Fifthly, the administration will end when creditors meet and fail to pass a resolution about what should be done with the company. Clearly, the different creditors of a company may have quite different interests. It is possible that the body of creditors will not agree about whether the company should enter into a deed of company arrangement or what the terms of such a deed should be (proposed paragraph (3)(e)).

464. Sixthly, the administration will end if the company contravenes proposed subsection 444B(2) by failing to execute a proposed deed of company arrangement that has been agreed upon by the creditors (proposed paragraph (3)(f)).

465. Finally, the administration will end where the Court appoints a provisional liquidator of the company or orders that the company be wound up (proposed paragraph (3)(g)).

466. Under proposed subsection (4), a company will be taken to be under administration during the administration of the company.

#### Proposed Division 2 - Appointment of administrator and first meeting of creditors

467. This Division will deal with who may appoint an administrator and the circumstances under which an administrator may be appointed. In order to ensure that creditors are kept fully informed during the course of an administration, in particular during the period prior to the holding of the meeting that will determine the company's future, this Division will also require an administrator to call a meeting of creditors to consider whether a committee of creditors should be appointed to liaise with the administrator during the administration. It will also be open to creditors, at that first meeting, to resolve to remove the administrator and appoint someone else in his or her place.

#### Proposed section 436A - Company may appoint administrator if board thinks it is or will become insolvent

468. The directors of a company will be able to resolve to appoint an administrator if they think that the company is insolvent or is likely to become insolvent at some future time (proposed subsection (1)). Thus the directors of a company will not have to wait until the company is actually insolvent before appointing an administrator.

469. Subsection (2) will provide that the directors may not appoint an administrator if the company is already being wound up. In that case, it will be up to the liquidator to consider whether an administrator should be appointed.

470. This proposed section will allow a liquidator or provisional liquidator of a company to appoint an administrator to the company. Again, an appointment will be available if the liquidator or provisional liquidator thinks that the company is insolvent or is likely to become insolvent at some future time. In the case of a company in liquidation this will often be the case, though not always. For example, a liquidator may be appointed in a member's voluntary winding up without any expectation of insolvency.

471. With the leave of the Court, a liquidator or provisional liquidator will be able to appoint himself or herself as administrator of the company, provided that he or she satisfies the qualifications for administrators set out in proposed Division 14.

#### Proposed section 436C - Chargee may appoint administrator

472. A person who is entitled to enforce a charge on the whole, or substantially the whole, of a company's property will be able to appoint an administrator, but only if the company is not already being wound up.

#### Proposed section 436D - Company already under administration

473. This proposed section will make the obvious point that if an administrator has already been appointed, no second appointment can be made.

#### Proposed section 436E - Purpose and timing of first meeting of creditors

474. An administrator will be required to convene a meeting of creditors, within 5 business days after the administration begins, to consider whether a committee of creditors should be appointed (proposed subsections (1) and (2)). In order to ensure that as many creditors as possible are advised of this meeting, notwithstanding the very tight time frame in which the meeting is to be called, under proposed subsection (3) the administrator must give written notice to as many of the company's creditors as is reasonably practicable and also publish notice of the meeting at least 2 business days before the meeting.

475. At that meeting the company's creditors may, in addition to appointing a committee of creditors, also resolve under proposed subsection (4) to remove the administrator and appoint someone else in his or her place. The exercise of this power would be appropriate in circumstances where, for example, an administrator was seen by creditors as being too sympathetic to the existing management

#### Proposed section 436F - Functions of committee of creditors

476. The functions of a committee of creditors will be to consult with the administrator about matters relating to the administration and to receive and consider reports by the administrator (proposed subsection (1)). While the committee will be entitled to seek information from the administrator, it will not otherwise be entitled to give directions to the administrator about how the administration is to be conducted (proposed subsections (2) and (3)).

### Proposed section 436G - Membership of committee

477. A person will only be entitled to be a member of a committee of creditors where e or she is a creditor, an attorney of a creditor, or authorised in writing by a creditor to be a member of the committee.

### Proposed Division 3 - Administrator assumes control of company's affairs

478. Proposed Division 3 will comprise 6 sections, namely sections 437A to 437F. The Division will establish that, once appointed, an administrator controls the company's affairs until the administration ends (a concept which is to be defined in proposed section 435C).

### Proposed section 437A - Role of administrator

479. This proposed section will establish the basic proposition that, while a company is under administration, the administrator

- will have control of the company's business, property and affairs;
- may carry on the business of the company and manage the property and affairs of the company;
- may terminate or dispose of all or part of that business (this power will be a useful means by which an administrator can limit his or her personal liability under proposed section 443A for the debts, liabilities and obligations he or she incurs, in circumstances where the administrator comes to the decision that the company can only continue to trade at a loss and the company's assets are likely to be insufficient to satisfy the indemnity to be provided by proposed section 443D for those debts, liabilities and obligations);
- may dispose of company property; and
- may perform any function and exercise any of the powers of the company or any of its officers.

### Proposed section 436B - Liquidator may appoint administrator

480. Under proposed subsection (2), nothing in proposed subsection (1) will limit the generality of anything else in it. Thus, the express provision of specified powers in proposed paragraphs (1)(a), (b) and (c) will not limit the generality of the very wide general power to be granted to the administrator by proposed paragraph (1)(d).

481. Additional, more specific, powers of the administrator will be set out in proposed sections 442A ff.

Proposed section 437B - Administrator acts as company's agent

482. When the administrator acts, he or she will do so as the company's agent.

Proposed section 437C - Powers of other officers suspended

483. As soon as a company comes under administration, officers of the company will lose the right to perform or exercise their functions and powers and must not purport to perform or exercise a function or power as an officer of the company (proposed subsection (1)).

484. In some cases, it may be appropriate for senior officers to continue to have a limited role in relation to the company's affairs. For example, the directors of the company may include persons with technical expertise in relation to the company's activities. Proposed subsection (1) will therefore allow the administrator to give approval to these persons continuing to exercise their powers. Proposed subsection (2), which makes it clear that subsection (1) does not remove an officer of a company from his or her office, ensures that the administrator will be able to draw on such expertise where required.

485. The express prohibition in proposed section 437D on persons other than an administrator dealing with a company's property will not limit the generality of proposed subsection 437C(1) (proposed subsection (3)).

486. For the purposes of proposed section 437C, an 'officer' will include a receiver who is not also a manager, a receiver and manager appointed by a court and a liquidator or provisional liquidator appointed by the Court before the administration began (proposed subsection (4)).

487. The suspension of the powers of company officers will extend only to the powers of senior management, not ordinary employees (proposed subsection (5)). Thus, the day to day operations of the company will be able to continue notwithstanding the appointment of an administrator

Proposed section 437D - Only administrator can deal with company's property.

488. This proposed section will complement the earlier sections in this Division by providing that dealings in the company's property are void unless they are carried out by the administrator, or with the consent of the administrator or the Court (proposed subsections (1) and (2)).

489. Proposed subsection (3) will protect, from the operation of the general rule, a payment made by an Australian bank out of a company's account in good faith and in the ordinary course of business, where such a payment is made after the administration has begun, but prior to the date on which the administrator gives the bank written notice of his or her appointment or publishes notice of that appointment under paragraph 450A(1)(b). This exemption is similar to the existing exemption for payments made by banks in relation to companies that are being wound up, under section 468(2).

490. Proposed subsection (4) will also allow the Court to ameliorate the potentially adverse impact of the general rule in the case, for example, of a bona fide purchaser of property.

491. Proposed subsection (5) will reinforce the general rule by creating an offence where an officer of a company purports to enter into a transaction which is rendered void by proposed subsection (2) or would be void if it were not a transaction of a kind protected by proposed subsection (4).

#### Proposed section 437E - Order for compensation where officer involved in void transaction

492. Where an officer is found guilty of an offence of dealing with company property in breach of proposed section 437D, proposed section 437E will make that officer liable to pay compensation to the company or to any other person who has suffered loss or damage because of the offence. An example of the application of this provision would be where a person has spent money in attempting to purchase property of the company under a transaction which is made void by proposed subsection 437D(2).

493. Proposed subsection 437E(3) will enable the Court to relieve an officer from liability to pay compensation in the circumstances set out in section 1318 (that is, where the officer acted honestly and ought fairly to be excused).

#### Proposed section 437F - Effect of administration on company's members

494. Proposed section 437F will render share transfers void (except so far as the Court orders otherwise) during the administration of a company. It will ensure that the position of shareholders is frozen during the administration, in the same way as actions by creditors are to be prevented during that period.

#### Proposed Division 4 - Administrator investigates company's affairs

495. Having taken control of a company's affairs, the primary task for an administrator will be to investigate the financial position of the company, with a view to making a recommendation to a meeting of creditors, to be convened within 35 days after the administrator's appointment, about what should be done. This Division will guarantee the administrator's right of access to the company's books to enable the administrator to investigate the company's affairs. It will also require that the directors assist the administrator during the administration. Where, in the course of his or her investigations, the administrator discovers any wrongdoing, the administrator will be required to report the matter to the ASC.

#### Proposed section 438A - Administrator to investigate affairs and consider possible counts of action

496. Upon being appointed, an administrator will have a maximum of 35 days to convene and conduct a meeting of creditors to determine the company's future. This proposed section will require the administrator to investigate the circumstances of the company as soon as practicable,

so that the administrator is in a position to put informed recommendations before that meeting of creditors.

#### Proposed section 438B - Directors to help administrator

497. In order to assist the administrator to form an informed view about the company's position, the directors of the company will be required to deliver to the administrator all the books in the directors' possession that relate to the company and identify the location of books they know of but do not themselves hold. The term 'books' is defined in section 9 in very broad terms, and includes any document

498. A director will not be required to deliver to the administrator books to which the director is entitled under, for example, the terms of a charge. Even in respect of those books, however, the administrator will be entitled to inspect and copy them (see proposed section 438C).

499. The directors will also be required to give to the administrator a statement about the company's circumstances within 7 days after the administration begins or such longer period as the administrator allows (proposed subsection (2)). This should help the administrator to ensure that all relevant matters are taken into account in the recommendations the administrator puts before creditors.

500. Having fulfilled these initial obligations, directors will be subject to on-going requirements to assist the administrator as the administrator reasonably requires (proposed subsection (3)).

#### Proposed section 438C- Administrator's rights to company's books

501. Proposed section 438B will deal with the specific obligation on directors to provide to the administrator all books relating to the company which they have in their possession. Proposed section 438C will have the effect that a person will not be entitled to retain possession of books of the company as against the administrator (although any lien claimed by the person shall not be otherwise prejudiced). An exception will be made (by proposed subsection (2)) where the terms of a security entitle a secured creditor of the company to possession of some of its books. Even in this case, however, the administrator will be entitled to inspect, and make copies of, those books at any reasonable time.

#### Proposed section 438D - Reports by administrator

502. In the course of investigating a company's affairs, an administrator may come to suspect that a person connected with the company has committed an offence or been guilty of other specified forms of misbehaviour. Proposed subsection (1) will require the administrator to lodge a report about the matter with the ASC as soon as practicable and to assist the ASC with any follow-up inquiries.

503. Proposed subsection (2) will make the more general requirement that, wherever the

administrator identifies a matter that, in his or her opinion, should be brought to the ASC's notice, the administrator must lodge a report.

504. Where the Court considers that there has been an offence or relevant misbehaviour in the administration of a company, the Court may direct the administrator to lodge such a report, even if the administrator does not intend to lodge one (proposed subsection (3)).

505. Proposed section 438D is based on section 422 of the Corporations Law, which deals with the obligations of receivers to report matters concerning companies they have been appointed to.

#### Proposed Division 5- Meeting of creditors decides company's future

506. Having formed an opinion about what should be done in relation to the company, the administrator will be required to call a meeting of creditors. Creditors may decide either to execute a deed of company arrangement, to end the administration or to wind up the company.

#### Proposed section 439A - Administrator to convene meeting and inform creditors

507. This proposed section will set out the rules for calling the meeting of creditors that will determine the company's future. Generally, the administrator will be required to call a meeting within 21 days of the day upon which the administration begins. However, where the Christmas or Easter public holidays would intervene, the administrator will be given an additional 7 days to call the meeting (proposed subsection (5)). The Court will be given a power to extend these periods (proposed subsection (6)), though it is not expected that this power would be exercised frequently, since it is an important objective of the new provisions for creditors to be fully informed about the company's position as early as possible, and to have an opportunity to vote on its future as soon as possible.

508. The administrator will be required to give written notice of the meeting to creditors at least 5 business days before the meeting. In order to ensure that as many creditors as possible are advised of this meeting, the administrator will be required to give written notice to as many of the company's creditors as is reasonably practicable, and also publish notice of the meeting in a national newspaper or in a daily newspaper that circulates in each jurisdiction in which the company has its registered office or carries on business (proposed subsection (3)). The meeting must, however, be held within 5 business days after the end of the period allowed to the administrator for calling the meeting (proposed subsection (2)). The effect of these proposed provisions will be that, subject to any extension by the Court, the meeting will have to be held within 28 days (in the usual case) or 35 days (where Christmas or Easter intervenes) of the administrator's appointment.

509. Proposed subsection (4) will set out the material which the administrator must send to the creditors with the notice of the meeting. That material will include copies of a full report on the company's position, a statement setting out the administrator's opinion about what creditors should do, and the administrator's reasons for that opinion. If the administrator proposes a deed of company arrangement, the administrator will also be required to provide creditors with details

of the proposed deed.

#### Proposed section 439B - Conduct of meeting

510. This proposed section will provide for the administrator to preside over the meeting of creditors and will allow the meeting to be adjourned from time to time, but only for 60 days. If creditors have not by that time passed a resolution on what is to be done with the company, the administration comes to an end (see proposed paragraph 435C(3)(e)), and control of the company will revert to the company's directors.

#### Proposed section 439C - What creditors may decide

511. The creditors may resolve to execute a deed of company arrangement, terminate the administration, or have the company wound up. Where the creditors resolve that the administration should end, control of the company will revert to the company's directors, and the moratorium on actions by creditors and others, which will have operated during the period of administration, will cease. This means, for example, that secured creditors will be able to exercise their security over assets of the company.

#### Proposed Division 6 - Protection of company's property during administration

512. Under proposed section 435C, a company will cease to be under administration once the creditors make a decision about its future. Until that decision is taken, a moratorium will apply. This moratorium will:

- prevent the company being wound up;
- prevent charges being enforced (though proposed Division 7 will create important exceptions to that general rule);
- prevent an owner or lessor recovering property which is being used by the company (subject also to important exceptions to be set out in Division 7); and
- prevent proceedings against the company and any enforcement action in relation to proceedings already taken.

513. The overall effect of these provisions will be that, during the moratorium; a company will be shielded from actions which might be taken against it by creditors and owners and lessors of property used by the company. This will enable creditors to decide the company's future in an orderly fashion, and without having the position of the company undermined further by individual creditors proceeding against the company during the administration.

#### Proposed section 440A - Winding up company

514. Proposed subsection (1) will provide that a company under administration cannot be wound up voluntarily (by members or creditors) except as provided by proposed section 446A.

(Proposed section 446A provides for the transition from administration to a deemed creditors' voluntary winding up where the creditors resolve that the company be wound up or the company fails to execute the deed of company arrangement agreed upon by the creditors.) Thus, only the Court may wind up a company that is under administration and it is expected that the Court would order a winding-up only in the rarest of circumstances.

515. Proposed subsection (2) will provide that the Court is not to order a winding-up if it is satisfied that it is in the interests of the company's creditors for the company to continue under administration. Where this is not the case, the Court will retain a discretion to order a winding-up. In exercising that discretion, it is expected that a Court will bear in mind that the preservation of the company or its business is a key objective of the new Part 5.3A. Generally, it would not be appropriate to wind up a company under administration unless the applicant was able to show that the position of the company was deteriorating so rapidly that, during the 28 or 35-day period prior to the meeting of creditors, or while that meeting is adjourned for up to 60 days, the applicant or other persons would be so significantly prejudiced that an immediate winding-up should be ordered.

516. Proposed subsection (3) will also preclude the appointment of a provisional liquidator by the Court while a company is under administration provided that the Court is satisfied that it is in the interests of the company's creditors for the company to continue under administration rather than have a provisional liquidator appointed.

#### Proposed section 440B - Charge unenforceable

517. This proposed section will set out the important general rule that a secured creditor cannot enforce a charge during the administration without either the written consent of the administrator or the leave of the Court. Proposed Division 7 will contain a number of important exceptions to, this general rule, the two most significant of which relate to creditors secured over the whole, or substantially the whole, of the company's property, and creditors who have commenced to enforce their security before the administration begins.

518. In practical terms, this will mean that, subject to the exceptions in proposed Division 7, no one creditor will be able to impede the administrator's task through taking control of part of the company's assets by appointing a receiver or receiver and manager or entering into possession.

#### Proposed section 440C - Owner or lessor cannot recover property used by company

519. Proposed section 440B will deal with property owned by the company which is subject to a charge, and will protect that property against enforcement of the charge. It will also be necessary, however, to protect property which, though not owned by the company, is essential to its operation. For example, a company may own the land upon which its factory is located but may have leased a key piece of machinery in that factory. Proposed section 440C will prevent the owner or lessor of property that is used by the company from taking possession of that property, except with the written consent of the administrator or the leave of the Court.

520. As with proposed section 440B, there will be set out in proposed Division 7 exceptions to the general rule in proposed section 440C. The most important of these exceptions relates to situations where the owner or lessor of property has already begun to exercise rights to repossess the relevant property before the administrator was appointed (proposed section 441F).

#### Proposed section 440D - Stay of proceedings

521. The purpose of the moratorium which commences when an administrator is appointed will be to protect the company from all civil actions, so that the administrator can formulate a rational plan for future action. Proposed subsection 440D(1) will advance this purpose by providing that a proceeding in a Court against the company or in relation to any of its property cannot be begun or proceeded with except with the approval of either the administrator or the Court.

522. It would be contrary to public policy to allow the directors of a company to prevent or postpone a criminal proceeding against the company by appointing an administrator. Further, public policy may dictate that certain other types of proceedings be allowed to continue. For instance, an action designed to secure an injunction against the company causing damage to the environment must be able to continue. Proposed subsection (2) will accordingly provide that the general prohibition on proceedings against the company which is to be effected by proposed subsection (1) will not apply to criminal proceedings or “prescribed” proceedings. An action designed to prevent imminent environmental damage would be an example of the kind of proceeding which is likely to be prescribed under this provision.

#### Proposed section 440E - Administrator not liable in damages for refusing consent

523. A number of the rules in this Division which are designed to facilitate the moratorium can be displaced if the administrator consents. In deciding whether to grant or refuse consent, the administrator must be free to act in the way that will best advance the interests of the administration. This provision will accordingly protect the administrator from any action or other proceeding for damages where consent is refused.

#### Proposed section 440F - Suspension of enforcement process

524. The earlier provisions in this Division will prevent actions being brought or continued against a company which is under administration. The final two sections in the Division will complement the earlier provisions by providing that, where a judgment against the company has been obtained, it can be enforced only in very limited circumstances. This is again designed to ensure that the financial position of the company is as nearly as possible preserved throughout the moratorium period.

525. Proposed section 440F will provide that, during the administration, no enforcement process in relation to the property of the company can be begun or proceeded with, without the leave of the Court. ‘Enforcement process’ will be defined in section 9 to mean execution against that property or any other enforcement process in relation to that property that involves a court or a sheriff. Proposed section 440F will thus prevent only enforcement process of a judicial nature

against the company, and will not prevent such 'self-help' remedies as the termination of a contract to which the company is a party, where the company is in breach of that contract.

#### Proposed section 440G - Duties of court officer in relation to property of company

526. This proposed section will impose restrictions on court officers (such as sheriffs), once they have received written notice that a company is under administration. The proposed section will prevent such a court officer from taking further enforcement action (proposed subsection (2)) and will require the officer to give to the administrator any property that has already come into the officer's possession, together with all proceeds of the enforcement action (proposed subsections (3) and (4)).

527. The proposed section will conclude with 4 subsections which will protect the rights of other people involved in the enforcement process. First, the position of the person who commissioned the enforcement action will be protected by providing that the court officer may retain, as a first charge on the proceeds or money given to the administrator, so much of the proceeds or money that the court officer thinks necessary to cover the costs of the enforcement action which has already taken place (proposed subsections (5) and (6)), costs which might otherwise be levied against the person who commissioned the enforcement action. Secondly, the Court will be given a discretion to allow enforcement action to proceed notwithstanding the appointment of an administrator (proposed subsection (7)). A situation where the exercise of such a discretion might be appropriate would be where the disadvantage which would be caused to the applicant by enforcement being prevented would far outweigh the advantage which would accrue to the administration through the suspension of that enforcement. Finally, a person who buys property in good faith under a process of execution will be protected, by providing that person with good title to the property as against the company and the administrator (proposed subsection (8)).

#### Proposed section 440H - 'Lis pendens' taken to exist

528. This proposed section will correspond with existing section 469 which provides that an application for winding up constitutes a 'lis pendens' for the purposes of any law relating to the effect of a lis pendens upon purchasers or mortgagees. However, having regard to the meaning of 'lis pendens', it is inappropriate to say that an administration, or the appointment of an administrator, will be such a lis pendens. For this reason, during the administration of a company, an application will be taken to be pending for the purposes of this section. It is that winding up application that will constitute a lis pendens.

#### Proposed section 440J - Administration not to trigger liability of director or relative under guarantee of company's liability

529. It is anticipated that the directors of companies who have personally guaranteed the obligations of a company will be discouraged from appointing an administrator to the company if, immediately upon the appointment, that guarantee became enforceable. To remove this perceived impediment to the early appointment of an administrator to a company in financial difficulties, proposed section 440J aims to impose a 'stay' on any enforcement action under a

guarantee against a director or a spouse, defacto spouse or relative of a director, while a company is under administration, except with the leave of the Court (proposed subsection (1)).

530. During the operation of the 'stay', a creditor will not, however, be prevented from applying to the Court for orders to preserve the assets of the director during the administration (proposed subsection (2)).

531. For the purposes of proposed section 440J, a 'guarantee' will be defined widely to include any agreement in consequence of which a director or relative of a director has incurred a liability (whether jointly with the company or otherwise) in respect of a liability of the company. 'Liability' will in turn be widely defined to mean a debt, liability or other obligation (proposed subsection (4)).

#### Proposed Division 7 - Rights of chargee, owner or lessor

532. This Division will protect the rights of secured creditors who have acted to enforce their security prior to the appointment of an administrator. It will also protect creditors secured over the whole, or substantially the whole, of the property of the company, and those secured over property of the company which is perishable. The Division will also contain some analogous special protections for persons who own or lease property used by the company.

533. The Division will balance these special protections for certain secured creditors and others, against the overriding objective of proposed Part 5.3A (being the preservation of businesses wherever possible), by allowing a Court to override the special protections where it is satisfied that what the administrator proposes to do during the administration will adequately protect the persons involved. This will prevent a particular creditor, owner or lessor from destroying the prospects of the business, provided the rights of those persons can be protected in some other way.

#### Proposed section 441A - Where chargee acts before or during decision period

534. Where an administrator is appointed, the administrator will be required to notify the holder of a charge on the whole, or substantially the whole, of the company's property, as soon as practicable, and in any event within one business day after the appointment (proposed subsection 450A(3)).

535. Proposed section 441A will provide such a person with a right to appoint a receiver or to enter into possession of the company's property (see definition of 'enforce' to be inserted in section 9), usually within 14 days (see definition of 'decision period' to be inserted in section 9) after being notified of the beginning of the administration. The provisions which might otherwise prevent this, namely proposed sections 437C ('Powers of other officers suspended'), 437D ('Only administrator can deal with company's property'), 440B ('Charge unenforceable') and 444F ('Court may limit rights of secured creditor or owner or lessor) will be displaced by proposed subsections (3) and (4).

536. The rationale for this exception to the general rule that all actions against the company

are suspended is that a person who has a security interest over the whole, or substantially the whole, of a company's assets deserves special consideration in tackling solvency difficulties confronting the company, especially as such a creditor will be in a position, by appointing a receiver over all the property, to achieve the same kind of orderly administration of the company's affairs that will be made possible by the appointment of an administrator.

#### Proposed section 441B - Where enforcement of charge begins before administration

537. This proposed section will allow a chargee, receiver or other person who has entered into possession of property or taken other action for the purpose of enforcing a charge, prior to the appointment of an administrator, to continue enforcing his or her security. As with proposed section 441A, provisions which might otherwise prevent this (namely, proposed sections 437C, 437D and 440B) will be displaced.

538. This exception recognises that where a creditor has moved before the company to tackle a company's solvency difficulties, the company should not be able to frustrate the actions of that creditor by superimposing an administrator. It will, of course, always be open to a company to prevent this provision from applying by making sure that it appoints an administrator before the company is in default under any of the securities relating to its property. It is an important theme of the proposed new Part 5.3A (and, indeed, many of the other Parts of this Bill) that directors are to be encouraged, in a variety of ways, to take the earliest possible action to tackle solvency difficulties.

#### Proposed section 441C - Charge on perishable property

539. This provision will allow a creditor to enforce a charge in relation to perishable property of the company, notwithstanding the appointment of an administrator. Again, provisions which might otherwise prevent this (namely, proposed sections 437C, 437D and 440B) will be displaced.

540. This proposed exception to the general moratorium recognises that even a brief moratorium against the exercise of a charge over perishable property could destroy the utility of that charge.

#### Proposed section 441D - Court may limit powers of chargee, etc in relation to charged property

541. The earlier sections in this proposed Division will create significant exceptions to the moratorium which will otherwise apply once an administrator is appointed. The danger with these exceptions will be that a single creditor may be in a position to frustrate the objectives of the administration, even though that creditor's interests may not be large compared to the interests of others involved in the administration, or may be capable of being adequately protected through alternative means which would allow the administration to proceed effectively.

542. Proposed section 441D accordingly will allow the Court to order a chargee, receiver or other person who is exercising powers under proposed subsection 441B(1) to refrain from performing specified functions or exercising specified powers, provided the administrator is able

to put before the Court a plan of action which the Court is satisfied will adequately protect the chargee's interests.

543. An example of a situation where this provision might be useful would arise where a chargee, just prior to the appointment of an administrator, has appointed a receiver in respect of a machine which is essential to the operation of the factory owned by the company. The administrator may be able to protect the interests of the creditor in a number of different ways which would avoid the frustration of the objectives of the administration which could follow from the company not being able to use that machine. For example, the administrator may propose that that creditor be paid out over a certain period of time. Alternatively, the administrator may be able to offer the creditor security over some other asset, such as a piece of real estate owned by the company which is not essential to the company's core operation. Provided the administrator is able to convince the Court that whatever plan the administrator proposes will adequately protect the creditor's interests, the Court will be able to make an order that allows the administration to proceed effectively.

#### Proposed section 441E - Giving a notice under a charge

544. This proposed section will enable a chargee to give notice under a charge to the company, even during the administration. Although the charge may not be enforced until after the administration ends, this provision enables the chargee to complete steps preparatory to enforcement during the administration, so as to be in a position to proceed with enforcement action once the administration ends.

#### Proposed section 441F - Where recovery of property begins before administration

545. This proposed section will have the effect that an owner or lessor of property used by the company will not be prevented from enforcing their rights to take possession of the property where they had commenced to do so before the appointment of an administrator. Again, provisions which might otherwise prevent this' (namely, proposed sections 437C, 437D and 440B) will be displaced.

#### Proposed section 441G - Recovering perishable property

546. This proposed section will have the effect that proposed sections 437C ('Powers of other officers suspended'), 437D ('Only administrator can deal with company's property') and 440C ('Owner or lessor cannot recover property used by company') will not prevent a person taking possession of or otherwise recovering or dealing with perishable property.

#### Proposed section 441H - Court may limit powers of receiver etc in relation to property used by company

547. This proposed section will allow the Court to limit the exceptions to the moratorium which are to be provided by proposed sections 441F and 441G. The purpose of the section is the same as the purpose of proposed section 441D: that is, to ensure that the exceptions to the moratorium, which are provided to protect the legitimate interests of individual creditors, owners

or lessors, are not used in a way that destroys the possibility of an effective administration of the company, provided those interests can otherwise be adequately protected.

548. Proposed section 441I will provide that the Court may order a owner or lessor of property used by the company to refrain from performing specified functions, or exercising specified powers in relation to the property, provided the Court is satisfied that what the administrator proposes to do during the administration will adequately protect the interests of the owner or lessor.

#### Proposed section 441J - Giving a notice under an agreement about property

549. Proposed section 441J will provide that sections 437C ('Powers of other officers suspended) and 440C ('Owner or lessor cannot recover property used by company') will not prevent an owner or lessor from giving a notice to a company under an agreement relating to property used, occupied or in the possession of the company.

#### Proposed section 441K - Effect of Division

550. Proposed sections 441D and 441H will expressly override some of the other provisions in this Division, which themselves provide exceptions to the moratorium, where the interests of a creditor, owner or lessor can otherwise be adequately protected. Proposed section 441K will say that, with the exception of such express provisions, nothing else in the Division will limit the generality of anything else in it. This will mean, for example, that a creditor who was secured over perishable property and had commenced to exercise that security prior to the commencement of the administration would be able to avail of the rights conferred by both sections 441B (Where enforcement of charge begins before administration') and proposed section 441C ('Charge on perishable property').

#### Proposed Division 8 - Powers of administrator

551. This Division will deal with a number of specific issues concerning the powers of the administrator. The overall aim of the Division is to ensure that the administrator will have sufficient powers to adequately control the company during an administration and to put forward recommendations to the meeting of creditors at the end of the administration which are based on a full understanding of the company's financial position.

#### Proposed section 442A - Additional powers of administrator

552. Proposed section 437A will provide that an administrator will have control of the company's activities, may carry on the business of the company, may terminate or dispose of all or part of that business and may exercise all the powers of the company and its directors while the company is under administration. Proposed section 442A will supplement those general provisions by conferring a number of specific powers on the administrator and then further conferring on the administrator whatever other powers are necessary for him or her to discharge his or her responsibilities under proposed Part 5.3A.

#### Proposed section 442B - Dealing with property subject to a floating charge that has crystallised

553. It is common in a debenture agreement to specify a floating charge secured over part or all of the assets and undertaking of a company, both present and future. If a floating charge were specified to crystallise on, for example, the appointment of an administrator, the debenture holder would be given an equitable interest in the property secured, which would revoke the company's power to deal with such assets in the ordinary course of business. The practical consequences of this outcome would be extremely inconvenient to the administrator, particularly where the charge extended to the company's entire undertaking. He or she would, for example, be unable to deal with its cash balances, pay any debt or sell any stocks without the debenture holder's consent. Proposed section 442B will overcome this difficulty by providing that the administrator may deal with property that is the subject of a floating charge that has crystallised, as if the charge were still a floating charge.

#### Proposed section 442C - When administrator may dispose of encumbered property

554. Other provisions in proposed Part 5.3A will suspend the rights of secured creditors to exercise their securities. In order to safeguard the interests of creditors whose rights have been suspended, this proposed section will prevent the administrator from disposing of the property that provides the security. It will also prevent disposal of property owned or leased by another and operated by the company.

555. Three exceptions to these general prohibitions on disposal will be set out in proposed subsection (2). The first will allow the administrator to dispose of such assets where this is done in the ordinary course of the company's business. An example of this being necessary might be where a creditor is secured over the stocks of the company and those stocks are constantly being used in production or turned over in a retail operation. The second exception will allow the chargee, owner or lessor to consent to the disposal. The third will allow disposal with the leave of the Court, though the capacity of the Court to grant leave will be subject to the Court being satisfied that arrangements have been made to adequately protect the interests of the chargee, owner or lessor (proposed subsection (3)).

#### Proposed section 442D - Administrator's powers subject to powers of charge, receiver etc

556. A number of the sections in proposed Division 7 provide special rights for chargees, owners and lessors to exercise their rights in particular circumstances, notwithstanding the appointment of an administrator. Proposed section 442D will complement those provisions by providing that, where they apply, the administrator's powers are subject to whatever may be done to enforce those rights under Division 7.

#### Proposed section 442E - Administrator has qualified privilege

557. The administrator must feel free to express frank and comprehensive views in the course of administering the company. This will be particularly important in respect of two types of reports which he or she may be required to prepare under the new Part, the first being the

report lodged with the ASC under proposed section 438D in relation to any misbehaviour which the administrator discovers in the course of investigating the company's affairs, and the second being the report the administrator prepares for submission to the creditors with a view to the creditors deciding what should be done with the company. Clearly, the proposed Part 5.3A will not operate as effectively as possible unless the administrator feels free to include in these reports and other necessary communications whatever information he or she considers necessary.

558. Proposed section 442E will confer qualified privilege on the administrator in respect of all statements that he or she makes during the administration. This protection is similar to the one currently conferred upon official managers and liquidators, under sections 452 and 535 respectively, of the Corporations Law.

#### Proposed section 442F - Protection of persons dealing with administrator

559. Division 1 of Part 2.3 of the Corporations Law provides that persons dealing with companies are entitled to make certain assumptions about the authority of persons to act and about compliance with the company's internal management procedures. These provisions, the predecessors of which were inserted into the former co-operative scheme legislation in the mid-1980s, largely abolish the doctrine of ultra vires, under which a person might, for example, have entered into a contract with a director, only to find that the contract was unenforceable against the company because the director had no authority to enter into it.

560. Proposed section 442F is designed to include references to the administrator in relevant sections within Part 2.3, so as to ensure that persons dealing with the administrator will be entitled to make the same kinds of assumptions (about, for instance, the validity of the appointment of the administrator) as such persons are entitled to make in dealing with other company officers.

#### Proposed Division 9 - Administrator's liability and indemnity for debts of administration

561. This Division will establish the important principle that the administrator will be personally liable for all the debts which he or she incurs in exercising powers as administrator. The Division will go on to provide that the administrator will be entitled to an indemnity in relation to such debts and that indemnity will have priority over other debts owed by the company. These rules will provide prospective creditors with the necessary reasonable assurance of payment which is necessary to encourage them to deal with the company (and hence assist it to trade out of its difficulties), and offer appropriate protection for the administrator.

#### Subdivision A - Liability

562. This subdivision will spell out in detail the debts for which the administrator will be personally liable.

#### Proposed section 443A - General debts

563. This proposed section will establish the general principle that the administrator will be

personally liable for all debts, liabilities and obligations he or she incurs as administrator (proposed subsection (1)). The administrator will be unable to contract out of this personal liability. However, the administrator's rights against the company and others will not be prejudiced (proposed subsection (2)).

Proposed section 443B - Payments for property used or occupied by, or in the possession of, the company

564. This proposed section deals with the situation where the company is renting property at the time when the administrator is appointed (proposed subsection (1)). The administrator will have 7 days after appointment during which the administrator will not be personally liable for rent payments (proposed paragraph (2)(a)). This will allow the administrator 7 days to make a preliminary assessment of the position of the company and to decide in an informed fashion whether the administration should continue, before the administrator becomes personally liable for rental payments.

565. The remaining subsections in proposed section 443B provide further protections for the administrator. First, it may be that in some circumstances, such as where the property consists of a chattel that is not capable of being moved within 7 days, or where an owner or lessor declines to take possession of the property, the personal liability imposed on administrators may be unduly onerous. Proposed subsections (3) and (4) will alleviate such situations by allowing an administrator 7 days in which to give to the owner or lessor notice that the administrator does not propose to use or occupy certain property. Where such a notice is given, the administrator will be relieved of liability in respect of that property. Such a notice will, however, cease to have effect if expressly revoked by the administrator or where the company actually uses or asserts a right as against the owner or lessor to continue to occupy or be in possession of the property (proposed subsections (5) and (6)).

566. The administrator will not be liable for rental payments in respect of a period after a secured creditor appoints a receiver or takes possession of the relevant property (proposed subsection (7)). This could occur where, for example, a creditor secured over the whole, or substantially the whole, of the property of the company exercises rights under proposed section 441A to appoint a receiver or take possession. This subsection will not, however, excuse the company from liability.

567. The Court may order that the administrator is not liable for rental payments (proposed subsection (8)). It might be appropriate for the Court to use this power when, for examples the books of the company were in such a disordered state that the administrator was unable, even using his or her best endeavours, to ascertain within 7 days whether the company had any assets. Any such order exempting the administrator from liability will not affect the liability of the company.

568. Finally, the mere fact that the administrator may be liable for rent under an agreement will not make the administrator liable for any of the other obligations imposed on the company by the agreement (proposed subsection (9)). This will enable the administrator to limit the amount to which the administrator is personally liable to an amount necessary to fulfil the

purpose of the administration.

#### Proposed section 443C - Administrator not otherwise liable for company's debts

569. This section will provide that, except insofar as proposed sections 443A and 443B make the administrator personally liable for the company's debts, the administrator will bear no such liability.

#### Subdivision B - Indemnity

570. This subdivision will spell out the priority of the administrator's indemnity in relation to other debts owed by the company.

#### Proposed section 443D - Right of indemnity

571. This section will provide an indemnity for the administrator out of the company's property for the debts, liabilities and obligations for which the administrator is made personally liable under the earlier provisions of this Division, and also in respect of the remuneration to which the administrator will be entitled under proposed section 449E

#### Proposed section 443E - Right of indemnity has priority over other debts

572. The Bill having established what will be, in effect, a statutory charge over the company's assets (by granting the administrator an indemnity under section 443D), it will be necessary to set out how this statutory charge will relate to the rights of the company's other creditors.

573. The general rule will be set out in proposed subsection (1), which will provide that a right of indemnity will have priority over all unsecured debts and (in most cases) debts secured by a floating charge. This will mean that the indemnity will generally be subordinated only to fixed charges.

574. The fact that the indemnity will take priority over floating charges, but not fixed charges, will mean that special rules will be necessary where a floating charge has become, or is to become, a fixed charge. Proposed subsection (2) will deal with the case where a floating chargeholder has moved to enforce the charge prior to the beginning of the administration. In this case, the right of indemnity of the administrator will not take priority over the chargee's debts, unless the chargee agrees.

575. Proposed subsection (3) will deal with the case where a floating charge fixes after the appointment of the administrator. This might occur where, for example, the floating charge related to the whole, or substantially the whole, of the property of the company, with the result that the chargeholder would be entitled to appoint a receiver or enter into possession under proposed section 441A during the first few days of the administration. In this case, the administrator's right of indemnity would take precedence over the right of the chargeholder only in relation to debts incurred by the administrator on behalf of the company before written notice

of the action to enforce the charge is given to the administrator.

#### Proposed section 443F - Lien to secure indemnity

576. This proposed section will give the administrator a lien over the property of the company as a means of securing the administrator's indemnity.

#### Proposed Division 10 - Execution and effect of deed of company arrangement

577. One of the most common results of the administration process will be that the company and its creditors will enter into a 'deed of company arrangement'. The contents of this deed will vary according to the needs of the particular company and its creditors, though it might often be expected to provide for some form of compromise of debts, such as repayment of debts by delayed instalments. In exchange, the activities of company management might be subjected to supervision by the creditors. The new Part 5.3A will not seek to limit in any way the scope for a company and its creditors to reach an arrangement suitable to all parties. In recognition, however, of the importance of such an arrangement, proposed Division 10 will specify certain minimum requirements, together with rules for the protection of the rights of dissenting parties.

#### Proposed section 444A - Effect of creditors' resolution

578. This proposed section will set out what a deed of company arrangement must contain. The most important matters are listed in proposed subsection (4).

579. There will be no compulsion to include all the prescribed provisions in a deed. The intention is merely that, by setting out a standard set of provisions in a readily accessible place, the contents of the deed which need to be settled by the meeting of creditors will be limited to essential matters, directly relevant to the particular company. The use of a standard set of provisions should also have the beneficial effect over time of tending to standardise the administration of deeds of arrangement. A deed will be taken to include the prescribed provisions, unless it expressly provides otherwise (proposed subsection (5)).

580. Proposed subsection (2) will provide that the administrator of the company is to be the administrator of the deed unless the creditors resolve to appoint someone else to be the administrator of the deed. The most efficient outcome would be for the administrator of the deed to be the same person as the administrator who controlled the company during the 35-day moratorium period since it would avoid the costs that would be incurred by two administrators having to familiarise themselves with the operations of the company.

#### Proposed section 444B - Execution of deed

581. A deed of arrangement will come into existence once both the company and the deed's administrator executes it. The company will have 21 days after the end of the meeting of creditors, subject to any extension granted by the Court, to execute the deed (proposed subsection (2)). The board of the company may authorise the execution of the deed by the company (proposed subsection (3)), notwithstanding that, under proposed section 437C, the

powers of the board will have been otherwise suspended (proposed subsection (4)). The administrator must execute the deed before, or as soon as practicable after, the company executes it (proposed subsection (5)).

582. When the deed is executed, the administration of the company will end (see proposed paragraph 435C(2)(a)) and the moratorium on actions against the company which prevailed during the period of administration will be replaced by the more limited restrictions on actions against the company which are set out in the succeeding provisions in this Division.

583. If the company contravenes proposed subsection 444B(2) by failing to execute the deed within the time allowed, the company will proceed to winding up in accordance with Division 12 of proposed Part 5.3A (proposed subsection (7)).

#### Proposed section 444C - Creditor etc. not to act inconsistently with deed before its execution

584. Proposed section 444C will ensure that, as far as possible, nothing happens to disadvantage the creditors during the 21-day period while the company is considering whether to execute the deed. In effect, the section will provide that nobody that would be bound by the deed if it had already been executed will be allowed to do anything that would be inconsistent with the deed, except with the leave of the Court.

#### Proposed section 444D - Effect of deed on creditors

585. The meeting of creditors may settle on a deed of company arrangement which will involve a long postponement of some of their rights. It will be possible that some creditors may oppose the deed. Dissenting unsecured creditors will be bound by the decision of the majority (though they will have an important protection against oppressive action by the majority creditors provided by proposed paragraph 445D(1)(f)).

586. However, proposed subsection (2) will provide that a secured creditor will be bound by a deed of company arrangement only to the extent to which the creditor agrees or the Court orders. There will be a similar rule for owners or lessors of property used by the company (proposed subsection (3)). The grounds upon which the Court might make an exception to these two general rules will be set out in proposed section 444F.

#### Proposed section 444E - Protection of company's property from persons bound by deed

587. While the deed of company arrangement is in place, all persons bound by the deed will be prevented from bringing or proceeding with an application for the winding up of the company or bringing or continuing a proceeding against the company or in relation to any of its property, or beginning or proceeding with any enforcement process in relation to property of the company, except with the leave of the Court.

#### Proposed section 444F - Court may limit rights of secured creditor or owner or lessor

588. As mentioned above, proposed section 444D will provide that secured creditors, owners

and lessors will be bound by the deed only to the extent to which they agree or the Court orders.

589. Special provision will be necessary for the case where a particular secured creditor or owner or lessor of property used by the company does not agree to be bound, and that party's dissent threatens the viability of the entire deed of company arrangement. In such a case, the Court will be entitled under proposed subsection (2) to order that a secured creditor refrain from exercising the creditor's security if the Court is satisfied that such an exercise would have a material adverse effect on achieving the purposes of the deed and that the creditor's interests will be adequately protected. Similar rules in relation to owners and lessors of property used by the company will be contained in proposed subsections (4) and (5).

590. In assessing whether the interests of the creditor, owner or lessor will be adequately protected, the Court will be specifically directed to have regard to the terms of the deed, the terms of the order sought and any other relevant matter. Generally, an application for such an order, which may be brought either by the administrator during the administration or by the administrator of the deed of company arrangement (proposed subsection (7)), is only likely to be successful if the applicant is able to show that arrangements have been put in place to prevent any prejudice to the creditor, owner or lessor involved. There is to be no restriction on the variety of arrangements which could be put in place to achieve this end. Obvious examples include paying out the creditor, owner or lessor, or offering a secured creditor security over an alternative asset.

#### Proposed section 444G - Effect of deed on company, officers and members

591. Earlier sections in this Division will deal with the extent to which a deed of company arrangement binds company creditors and the owners and lessors of property used by the company. Proposed section 444G will provide that a deed of company arrangement will also bind the company, its officers and members, and the administrator of the deed.

#### Proposed section 444H - Extent of release of company's debts

592. This proposed section will complement the earlier sections about the extent to which a creditor is bound by a deed of company arrangement by providing that the deed will operate to release the company from its debts only to the extent that the creditors involved are bound by the deed.

#### Proposed Division 11 - Variation, termination and avoidance of deed

593. This Division will deal with the circumstances under which a deed of company arrangement might be varied or terminated. It will provide for a deed to be terminated where false or misleading information was supplied to the administrator or the creditors while the deed was being prepared and considered, where the deed is oppressive to dissenting creditors, or where circumstances have changed to the point where the creditors wish to terminate the deed.

594. The Division will also deal with the consequences of variation and termination and with the consequences of the execution of a deed of company arrangement which in some way

contravenes the earlier provisions in proposed Part 5.3A

#### Proposed section 445A - Variation of deed by creditors

595. This proposed section will provide a company's creditors with important flexibility to vary a deed of company arrangement if circumstances so require. A deed will be able to be varied by a resolution passed at a meeting of the company's creditors, but only if the variation is not materially different from a proposed variation set out in the notice of meeting which is provided to creditors. Therefore, there will be no question of a variation being effected without the knowledge of some creditors.

#### Proposed section 445B - Court may cancel variation

596. This proposed section will provide a further protection for creditors in respect of variations, by allowing a creditor of the company to apply to the Court for an order cancelling the variation. Proposed subsection (2) will give the Court very broad powers in dealing with such an application.

#### Proposed section 445C - When deed terminates

597. This proposed section will set out the circumstances in which a deed of company arrangement might terminate. Three possibilities are contemplated:

- the Court may terminate the deed by order under proposed section 445D (this may happen where the parties associated with the deed have been misled while it was being prepared or considered);
- the creditors may pass a resolution to terminate the deed (this may happen whenever circumstances have changed sufficiently to make the continued operation of the deed inappropriate); and
- a deed may terminate where the conditions for termination of the deed which are set out in the deed itself have been fulfilled.

#### Proposed section 445D - When Court may terminate deed

598. This proposed section will set out 7 grounds upon which the Court may terminate a deed of company arrangement.

599. The first two grounds will be concerned with cases where false or misleading information was put before the administrator or the creditors of the company while they were considering what action to take in relation to the company (proposed paragraphs (1)(a) and (b)). The Court's power to terminate the deed in these situations will arise only where the false or misleading information can reasonably be expected to have been material to creditors of the company in deciding whether to vote in favour of the resolution that the company execute the deed of company arrangement

600. The third ground upon which the Court might terminate a deed will be where there is a material omission from material supplied to the creditors at the time when they are considering whether the company should execute a deed of company arrangement (proposed paragraph 1)(c)).

601. The fourth ground upon which a Court might terminate a deed will be where there is a material contravention of the deed by a person bound by the deed (proposed paragraph 1)(d)). Where one party to a deed has contravened it, the consequences of the contravention may be such that it would be inappropriate to require other parties to the deed to comply with their obligations under it.

602. The final three grounds upon which a Court might terminate a deed will be catchall provisions. Proposed paragraph 1)(e) will allow termination where effect cannot be given to the deed without injustice or undue delay. This could be the case where, for example, the deed was based upon assumptions which had been made by the creditors about some future action by a third party, and that action has not developed as anticipated. Proposed paragraph 1)(f) will allow termination where the Court considers the deed or a provision in it, or an act or omission done or made under it, to be oppressive or unfairly prejudicial to, or unfairly discriminatory against, one or more creditors; or contrary to the interests of the creditors as a whole. This could be the case where, for example, a particular 'class' of creditors has been oppressed or unfairly prejudiced by the decision of the majority of creditors. Proposed paragraph 1)(g) will allow termination where the Court considers the deed should be terminated for some other reason. It would not be appropriate to try to circumscribe more precisely the Court's powers to terminate a deed in exceptional circumstances but, having regard to the width of the previous paragraphs in proposed subsection (1), it is anticipated that the Court's power under proposed paragraph 1)(g) would be exercised at most very rarely.

603. Proposed subsection (2) will list the persons who may apply for an order terminating a deed of company arrangement

#### Proposed section 445E - Creditors may terminate deed and resolve that company be wound up

604. Proposed section 445F will allow creditors to terminate a deed of company arrangement. Proposed section 445E will provide that, where the creditors terminate the deed, they may also order that the company be wound up, provided that the notice of the meeting which was sent to all creditors prior to the meeting set out a proposed resolution that the company be wound up.

#### Proposed section 445F – Meeting of creditors to consider proposed variation or termination of deed

605. This proposed section will set out the procedures for convening a meeting of the company's creditors to consider a variation or termination of a deed of company arrangement and will deal with minor matters concerning the conduct of that meeting.

606. Proposed subsection (1) will provide that the administrator may at any time convene such a meeting and must convene a meeting if requested in writing by creditors, the value of whose claims against the company is not less than 10% of the value of all creditors' claims.

607. Under proposed subsection (2), the administrator must give written notice of the meeting to as many creditors as reasonably practicable (proposed paragraph (2)(a)) and publish notice of the meeting in a national newspaper or a daily newspaper that circulates generally in each jurisdiction in which the company has its registered office and carries on business (proposed paragraph (2)(b)), at least 5 business days before the meeting.

608. The notice which is provided to creditors under proposed paragraph (2)(a) must set out the terms of any resolution to be put to the meeting for the variation or termination of a deed of company arrangement (proposed subsection (3)).

609. Proposed subsections (4) and (5) will provide that the creditors' meeting is to be presided over by the administrator of the deed of company arrangement, and can be adjourned from time to time.

#### Proposed section 445G- When Court may void or validate deed

610. This proposed section will deal with the consequences of a deed of company arrangement being entered into in circumstances which involve a contravention of proposed Part 5.3A. An example of a possible contravention would be a failure to notify creditors as required of the meeting of creditors which resolved to enter into the deed of company arrangement.

611. Proposed subsections (2) and (3) will provide that the Court may order the deed or a provision of the deed to be void, but may alternatively declare the deed to be valid, despite a contravention of a provision of proposed Part 5.3A, if the Court is satisfied that the provision was substantially complied with, and no injustice would result for anyone bound by the deed if the contravention was disregarded.

612. Proposed subsection (4) will allow the Court, with the consent of the deed's administrator, to vary a provision in a deed which might otherwise be void. This provision will enable the Court to achieve a sensible and just result where, for example, a provision in a deed must be declared void but that provision was not central to the agreement of the parties to enter into the deed.

#### Proposed section 445H - Effect of termination or avoidance

613. This provision will have the effect that, where a party acts in reliance upon a deed, that party will not be prejudiced by the Court subsequently declaring the deed to be void, or the Court or creditors subsequently deciding to terminate the deed.

#### Proposed Division 12 - Transition to creditors' voluntary winding up

614. One of the key aspects of the Harmer Report's proposal for a voluntary scheme of

administration was that, where an administration is incapable of saving a company, the transition to winding up should be efficient and not involve a new court process. This Division will seek to give effect to that aspect of the Harmer Report by deeming steps to have been taken towards a winding up, as soon as a stage is reached in the administration where winding up emerges as the only realistic alternative.

#### Proposed section 446A - Administrator becomes liquidator in certain cases

615 This proposed section will provide for a company under administration to be deemed to have entered into a creditors' voluntary winding up, and the administrator of the company, or the administrator of a deed of company arrangement, to be deemed to have been appointed as the liquidator of the company, in three situations where the administration seems to be coming to a dead end. Those three situations are:

- where creditors, at the meeting called to decide the company's future, decide that the company should be wound up (proposed paragraph (1)(a));
- where the company fails within 21 days to execute a deed of company arrangement agreed upon by the creditors (proposed paragraph (1)(b)); and
- where the creditors terminate a deed of company arrangement and resolve that the company should be wound up (proposed paragraph (1)(c)).

616. Proposed subsections (2), (3) and (4) are technical provisions deeming certain of the requirements of a creditors' voluntary winding up to have been satisfied.

617. The liquidator must lodge notice of the resolution with the ASC within 7 days and publish such notice within 21 days (proposed subsection (5)).

618. Application may be made by the company, the liquidator, a creditor or a contributory, under section 482, to stay the winding up (proposed subsections (6) and (7)). The circumstances in which such an application would appropriately be made are where the company can establish that the company is in fact solvent, although given the entry into administration and the event that led to the deemed appointment of the administrator as liquidator of the company, it is not expected that such an application would often be successful.

#### Proposed Division 13 - Powers of Court

619. This Division will set out the powers of the Court in relation to proposed Part 5.3A. Proposed Part 5.3A specifically provides for the Court to make orders to protect creditors during an administration, a matter that is particularly important given the suspension of creditors' rights which will occur during an administration. The Division will also provide for the administrator to seek directions from the Court and for the Court to supervise the actions of the administrator, taking action where the administrator is acting improperly.

Proposed section 447A - General power to make orders

620. The Court will be given a very general power to make orders about how proposed Part 5.3A is to operate in relation to a particular company.

Proposed section 447B - Orders to protect creditors during administration

621. This proposed section will enable the Court to make any such order as it thinks necessary to protect the interests of a particular creditor, or the interests of the body of the company's creditors, while the company is under administration.

Proposed section 447C - Court may declare whether administrator validly appointed

622. This proposed section will enable the Court to make an order declaring whether or not an appointment of an administrator of a company or an administrator of a deed of company arrangement is valid. Application for an order may be made by the relevant administrator, the company or any of the company's creditors.

Proposed section 447D - Administrator may seek directions

623. This proposed section will allow an administrator of a company or an administrator of a deed of company arrangement to seek directions from the Court about how he or she should exercise his or her powers, or about any matter arising in connection with a deed of company arrangement.

Proposed section 447E - Supervision of administrator of company or deed

624. An administrator will have complete control over a company's affairs. In the light of this special responsibility, it is necessary to ensure that the Court is able to supervise the activities of an administrator.

625. Proposed subsection (1) will enable the Court to make such order as it thinks just where it is satisfied that an administrator is managing the company's affairs in a way that is prejudicial to the interests of the company's creditors, or proposes to act in such a manner.

626. Proposed subsection (2) will enable the Court to fill vacancies in the office of administrator.

Proposed section 447F - Effect of Division

627. This section will say that nothing in this Division will limit the generality of anything else in it. This provision will avoid possible technical arguments about the Court's jurisdiction to deal with a particular issue. For example, if the ASC were to seek an order from the Court on the basis that an administrator was acting contrary to the interest of the company's creditors, but the Court was not satisfied that this was the case, the Court would not have any power to make an

order under proposed subsection 447E(1). Nevertheless, the Court would retain its general power under proposed subsection 447B(1) to meet any legitimate concerns held by the ASC, by making an order under that subsection to ensure that the interests of the company's creditors were properly protected.

#### Proposed Division 14 - Qualifications of administrators

628. This Division will prescribe standards of skill and experience for prospective administrators by requiring them to be registered liquidators. The Division will go on to disqualify persons who have a connection with a company, of a kind that might affect their independence from the company, from acting as an administrator of the company or of a deed of arrangement relating to the company.

#### Proposed section 448A - Appointee must consent

629. A person will only be able to be appointed to administer a company or a deed of company arrangement if the person has consented to that appointment.

#### Proposed section 448B- Administrator must be registered liquidator

630. Only registered liquidators will be entitled to act as administrators of a company or a deed of company arrangement. The requirements to become a registered liquidator are set out in existing subsection 1282(2).

#### Proposed section 448C - Disqualification of person connected with company

631. It is important that an administrator be independent of the company. This proposed section will specify a number of possible connections between a person and a company, each of which will disqualify the person from being appointed to administer that company or to administer a deed of arrangement involving that company. Proposed section 448C is based on the relevant parts of existing section 532, which deals with the disqualification of a person from acting as a liquidator of a particular company.

632. The first disqualification to be listed in proposed subsection (1) will operate where the prospective administrator of a body corporate in which he or she has an interest in 5% or more of the shares, owes \$5,000 or more to the company or to a body corporate related to the company (proposed paragraph (a)). This will not disqualify a person who has been lent money to purchase a house by a company whose ordinary business is to make such loans (proposed subsection (2)). The second disqualification will operate where the prospective administrator is, in a private capacity, a creditor of the company or of a related body corporate in an amount exceeding \$5,000 (proposed paragraph (1)(b)).

633. The remaining disqualifications (proposed paragraphs (1)(c) to (h)) are self-explanatory. Proposed subsection (3) will catch persons who, though not in a disqualified category at the time of the proposed appointment, had been within certain key categories within the previous 2 years.

Proposed section 448D - Disqualification of insolvent under administration

634. A person will be unable be an administrator if he or she is a bankrupt.

Proposed Division 15 - Removal, replacement and remuneration of administrator

635. This Division will place significant restrictions on the removal of administrators once appointed, in order to safeguard their independence. The Division will also provide a mechanism for filling vacancies which may arise in the office of administrator. The Division will conclude by setting out the rules by which the remuneration of an administrator is to be determined.

Proposed section 449A - Appointment of administrator cannot be revoked

636. It is an important aspect of an administrator's independence that, once appointed. the appointment will not be able to be revoked.

Proposed section 449B - Court may remove administrator

637. The Court will be able to remove an administrator of a company or of a deed of arrangement and appoint a replacement. It is anticipated that this power would be exercised very rarely, particularly given the automatic loss of office which flows from becoming prohibited (proposed Division 14) from acting as an administrator, the power in the Court under proposed Division 13 to direct the administrator or to make any other order necessary to protect the interests of creditors, and the power conferred on creditors by proposed subsection 436E(4) to remove and replace an administrator.

Proposed section 449C - Vacancy in office of administrator of company

638. Where the administrator of a company dies, becomes prohibited (under proposed Division 14) from acting as an administrator of the company or resigns, the person who appointed the administrator (that is, either the Court (under proposed section 4493 or proposed subsection (6) of this proposed section), the company (under proposed section 436A), the liquidator or provisional liquidator of the company (under proposed section 4368) or a person secured over the whole, or substantially the whole, of the company's assets (under proposed section 436C)) can appoint a replacement.

639. The company will be entitled to appoint a replacement notwithstanding that, under proposed section 437C, the powers of the board will be otherwise suspended (proposed subsections 449C(3) and (7)). Within 5 business days of his or her appointment, the replacement administrator must convene a meeting of creditors to ratify that appointment, except where the appointment has been made by the Court (proposed subsection (4)). The procedure for the convening of such a meeting will be set out in proposed subsection 449C(5).

640. Proposed subsection (6) will give the Court the power to appoint an administrator on

the application of an officer of the company (notwithstanding that, under proposed section 437C, the powers of officers will be otherwise suspended: proposed subsection 449C(7)), a member or creditor of the company.

#### Proposed section 449D - Vacancy in office of administrator of deed of company arrangement

641. This will make corresponding provision, in relation to an administrator of a deed of company arrangement, as that made in relation to an administrator of a company by proposed section 449C

#### Proposed section 449E - Remuneration of administrator

642. The remuneration of an administrator of a company or of a deed of company arrangement will be determined by the creditors or, failing a decision by the creditors, by the Court (proposed subsection (1)). Where the creditors determine the remuneration, the Court may review and alter the determination if asked to do so by the administrator, an officer of the company (notwithstanding that, under proposed section 437C, the powers of officers will be otherwise suspended: proposed subsection (3)), a member or creditor of the company (proposed subsection (2)).

#### Proposed Division 16 - Notices about steps taken under Part

643. There will be a number of events provided for by the new Part 5.3A which will be required to be notified to the public. These will include the appointment of an administrator of a company, the execution of a deed of company arrangement, the failure to execute a deed of company arrangement and the termination of a deed of company arrangement.

644. This Division will set out the requirements for the publication of these notices. It will also set out requirements for the ongoing notification of the fact that a company is operating under administration.

#### Proposed section 450A - Appointment of administrator

645. The administrator of a company will be required to give notice of his or her appointment, before the end of the next business day, to the ASC (proposed paragraph (1)(a)) and to a chargee of the whole, or substantially the whole, of the company's property (proposed subsection (3)). He or she will also be required to publish such notice within 3 business days in a national newspaper or a daily newspaper that circulates generally in each jurisdiction in which the company has its registered office or carries on business (proposed paragraph (1)(b)).

646. Where the appointment is made by a chargee under section 436C, the chargee will be required to give notice to the company before the end of the next business day after the appointment (proposed subsection (2)).

#### Proposed section 450B - Execution of deed of company arrangement

647. The administrator of a deed of company arrangement will be required, as soon as practicable after execution of the deed, to notify each creditor, publish a notice of the matter in a national newspaper or daily newspaper circulating generally in each jurisdiction in which the company has its registered office or carries on business and lodge a copy of the deed with the ASC.

648. If a company does not execute a deed of company arrangement within 21 days of the meeting of creditors resolving that the company execute a deed, the deed's administrator will be required to lodge notice of the failure with the ASC and publish notice of the failure as prescribed.

#### Proposed section 450D - Termination of deed of company arrangement

649. Where a deed of company arrangement is terminated, the deed administrator will be required to lodge a notice of the termination with the ASC, send notice to each of the company's creditors and cause such a notice to be published in the prescribed manner.

#### Proposed section 450E - Notice in public documents etc, of company

650. A company that is under administration or is operating under a deed of company arrangement will be required to include a statement to this effect on all its public documents and every eligible negotiable instrument (defined in existing section 9) of the company. Similar requirements are already imposed on companies in receivership (see existing section 428) and liquidation (see existing section 541). The expression 'public document', in relation to a body corporate, is defined in sections 9 and 88A.

651. Proposed section 450E will thus have the effect that anybody dealing with a company operating under administration or under a deed of company arrangement will be made aware of that fact.

#### Proposed section 450F - Effect of contravention of this Division

652. A failure to give a notice required by Division 16 will not affect the validity of anything done, except so far as the Court otherwise orders.

#### Proposed Division 17 - Miscellaneous

653. This Division will make provision for varied matters, including: the appointment of 2 or more administrators; the effect of things done during the administration of a company; and an extension of time for the doing of an act where this proposed Part prevents the act from being done within a particular period.

#### Proposed section 451A - Appointment of 2 or more administrators of company

654. Two or more persons may be appointed as administrators of a company (proposed subsection (1)). Where there are 2 or more administrators of a company, a function or power of

an administrator may be performed or exercised by any one of them or by 2 or more of them together. except so far as the instrument or resolution appointing them otherwise provides (proposed paragraph 2(a)).

Proposed section 451B - Appointment of 2 or more administrators of a deed of company arrangement

655. Similar provision is to be made by proposed section 451B for the appointment of two or more persons as administrators of a deed of company arrangement.

Proposed section 451C - Effect of things done during administration of company

656. Any payment made, transaction entered into or any other act of, or with the consent of, the administrator will be valid and will not be liable to be set aside in a winding up of the company,

Proposed section 451D - Time for doing act does not run while act prevented by this Part

657. Where any provision of proposed Part 5.3A prevents an act that must or may be done within a particular period from being done within that time, the period will be extended according to how long proposed Part 5.3A prevented the act from being done.

Clause 57 – (Insertion of new Parts 5.4 and 5.4A)

658. The proposed new Parts 5.4, 5.4A and 5.4B represent a restructuring of that part of the Corporations Law which deals with winding up in insolvency. The Harmer Report noted that existing forms of winding up comprise voluntary winding up without Court involvement, voluntary winding up with Court involvement and involuntary winding up on the basis of insolvency. The Harmer Report stated that it was important to distinguish between the winding up of solvent and of insolvent companies. The Report considered that the current legislation created a perception that any company which was being wound up was insolvent, and that this could cause misunderstanding and be embarrassing to those associated with the many solvent companies which undergo a winding up process. The Report therefore recommended that the phrase ‘winding up in insolvency’ should be adopted in the companies legislation to ensure that distinction. The Report went on to recommend that the legislative provisions dealing with the winding up of companies in insolvency should be placed in a distinct part of the legislation to ensure less confusion between the different types of winding up.

659. The Report also noted that the existing legislative scheme for the winding up of a company in insolvency is well understood and works satisfactorily, but that some areas would benefit from reform or clarification including:

- the grounds for winding up in insolvency;
- involuntary winding up in insolvency:
  - deeming of insolvency to be replaced by rebuttable presumptions of insolvency;
  - standing to apply for a winding up order,
  - excessive technicality in the use of statutory demands;
  - the requirements for a statutory demand;
  - grounds and procedure for setting aside a demand;
  - time limits relating to statutory demands and the setting aside of statutory demands;
- matters arising after service of a statutory demand:
  - defects or irregularities in proceedings;
  - opposition to an application for winding up;
  - the winding up of joint debtors;

- duty of officers in relation to books and records and provision of information;
- special powers of arrest and seizure.

660. The new legislative provisions will therefore reflect both the restructuring of the Act to separate out as conveniently as possible those provisions which deal solely with the winding up in insolvency of a company, as well as substantive reforms to the areas listed above.

661. Of the three Parts, proposed Part 5.4 deals exclusively with winding up by the court in insolvency; proposed Part 5.4A deals with winding up by the Court in circumstances other than insolvency and proposed Part 5.4B deals with certain matters which are common to both winding up in insolvency and winding up by the Court

662. Generally unamended are Parts 5.5 (Voluntary Winding Up) and 5.6 (Winding Up Generally).

663. Clause 57 will repeal the respective headings to Part 5.4 and Division 1 of that Part and substitute the following headings:

‘Part 5.4 - Winding up in insolvency

Division 1 - When company to be wound up in insolvency’

Proposed Part 5.4 - Winding up in insolvency

664. Proposed Part 5.4 deals with the winding up of a company in insolvency, including provisions relating to the circumstances in which a company may be wound up in insolvency, the effect of non-compliance with a statutory demand, and how a statutory demand can be set aside. The principal reforms, based on recommendations of the Harmer Report, relate to the effect of a statutory demand and the way in which it may be set aside.

665. The provisions in this Part allow disputes in relation to the existence or amount of debt to be dealt with quickly and in a way that will not impede the resolution of an application for the winding up of a company in insolvency.

Proposed Division 1 - When company to be wound up in insolvency

666. The Harmer Report recommended that there should be a single provision setting out all the circumstances in which a company may be wound up in insolvency, covering not only the most common situations where a company is commenced to be wound up in insolvency. but also those cases where a company has entered a member’s voluntary winding up and is later found to be, in fact, insolvent. The complete list of relevant circumstances was said to be:

- where an order is made by the Court that the company be wound up in insolvency;

- where in consequence of a meeting of creditors convened under the proposed voluntary administration procedure, the creditors resolved that the company be wound up in insolvency;
- where a deed of company arrangement under the voluntary administration regime is made in respect of a company and the deed is later avoided or terminated by the Court and the Court has, in consequence, made an order that the company be wound up in insolvency;
- where an order has been made that the company be wound up on an application alleging grounds other than insolvency and the Court is, in those proceedings, able to declare from evidence before it that the company is unable to pay its debts and orders that the company be wound up in insolvency; and
- where a liquidator who is appointed to a seemingly solvent company whether by the Court or in a member's voluntary winding up, determines that the company is, in fact, insolvent and files the appropriate declaration.

667. The changes to be effected in this area are largely drafting changes aimed at bringing together and clarifying provisions of the existing law.

668. The Harmer Report also recommended that section 460 of the Corporations Law, which deems a company to be insolvent in certain circumstances, be repealed and replaced by a provision which specifies the circumstances from which it may be presumed that a company may be unable to pay its debts.

669. The Harmer Report considered that a presumption of insolvency, rather than a deeming, more truly reflects the appropriate policy, and overcomes the inflexibility imposed by the present law by allowing the Court to be more responsive to commercial realities.

670. The Report stated that this approach, coupled with provisions aimed at overcoming technical defects in notices of demand, namely proposed sections 459H, 459J, 459S and 467A, will more clearly permit the Court to exercise a discretion in relation to defective notices of demand and may avoid winding up Proceedings being dismissed for technical or minor defects when the company is clearly insolvent.

#### Proposed section 459A - Order that insolvent company be wound up in insolvency

671. Proposed section 459A provides that the Court may order that an insolvent company be wound up in insolvency on an application under proposed section 459P. Proposed section 459P sets out who may apply for the winding up of a company in insolvency and provides that, in the case of certain applicants, a Court may only entertain such an application if it is satisfied that there is a prima facie case of insolvency.

### Proposed section 459B - Order made on application under section 260, 462 or 464

672. Proposed section 459B provides that the Court may order the winding up of a company in insolvency on an application under section 260, 462 or 464. Section 260 provides that a Court may wind up a company where it is of the opinion that the affairs of the company are being conducted in a manner that is oppressive or unfairly prejudicial or in a manner that is contrary to the interests of a member or members of the company. Amended section 462 will provide for winding up in insolvency even where there has been an application for a winding up on other grounds. Section 464 provides for winding up in connection with an investigation under the ASC law, where the ASC concludes that the company is insolvent.

### Proposed section 459C - Presumptions to be made in certain Proceedings

673. Proposed section 459C sets out the circumstances in which a Court may presume that the company is insolvent, and replaces the provisions under the current law (section 460) which deem a company to be insolvent in certain circumstances. A Court may also find a company insolvent in other circumstances. Proposed section 459C merely lists some of the most common grounds of insolvency. (The ultimate test is, as mentioned in proposed section 95A, can the company pay its debts as and when they become due and payable.)

674. Under proposed subsection 459C(1) the presumptions apply for the purposes of an application under sections 260, 459P, 462 or 464.

675. Proposed subsection 459C(2) provides that the Court must presume that the company is insolvent if during or after the three months ending on the day on which the application was made:

- the company failed to comply with a “statutory demand” (proposed Divisions 2 and 3 deal with the requirements concerning statutory demands in some
- execution or other process issued on a judgment, decree or order of an Australian court in favour of a creditor of a company was returned wholly or partly unsatisfied;
- a receiver of property of the company was appointed under a power contained in an instrument relating to a floating charge on the property;
- an order was made for the appointment of such a receiver for the purpose of enforcing such a charge;
- a person entered into possession or assumed control of such property for such a purpose; or
- a person was appointed so to enter into possession or assume control (whether as agent for the chargee or for the company).

676. Proposed subsection 459C(3) provides that the presumptions are rebuttable by proof to the contrary.

Proposed section 459D - Contingent or prospective liability relevant to whether company solvent

677. Proposed section 459D(1) provides that, for the purposes of winding up applications mentioned in section 459C, a Court may take into account a contingent or prospective liability of the company. However, proposed subsection (1) will not limit the matters that may be taken into account in determining whether or not a company is solvent (proposed subsection (2)). This proposed section makes explicit what is implicit in a number of current provisions.

Proposed Division 2- Statutory demand

678. The Harmer Report stated that the failure to comply with a statutory demand is relied on in almost all applications for winding up on the ground of inability to pay debts. In the Report's view, no fundamental changes were needed to the procedure (section 460(2) Corporations Law) of using statutory demands to commence insolvency proceedings, though there was a need to clarify some of the formal requirements of a statutory demand. This Division sets out those requirements as recommended by the Harmer Report. These relate to when and how a statutory demand may be served and when a company is to be taken to have failed to comply with a statutory demand, a failure which can lead to a presumption of insolvency under proposed section 459C.

Proposed section 459E - Creditor may serve statutory demand on company

679. A person may serve on a company a demand relating to a debt that is due and payable (or two or more debts that are due and payable) whose total amount is at least the 'statutory minimum' (proposed subsection 459E(1)). The 'statutory minimum' is to be defined in section 9 to be \$2,000, or such other amount as is prescribed.

680. Proposed subsection 459E(2) provides that the demand:

- must specify the amount of the debt (or debts);
- must require the company to pay the amount of debt or to secure or compound for that amount to the creditor's reasonable satisfaction within 21 days after the demand is served on the company;
- must be in writing;
- must be in the prescribed form (if any); and
- must be signed by or on behalf of the creditor.

681. Proposed subsection 459E(3) provides that unless the debt is a judgment debt, the demand must be accompanied by an affidavit that is in the prescribed form and verifies that the

debt is due and payable by the company. This is appropriate, given the serious consequence (a presumption of insolvency) which can arise if a statutory demand is not met, and is currently provided for in rules of Court.

682. Proposed subsection 459E(4) provides that a person may make a demand under the proposed section even lithe debt is owed to the person as assignee.

#### Proposed section 459F - When company is taken to fail to comply with statutory demand

683. Proposed subsection 459F(1) provides that if, at the end of the period for compliance with a statutory demand, the demand is still in effect and the company has not complied with it, the company is taken to have failed to comply with the demand at the end of that period.

684. 459F(2) provides for periods within which the demand must be complied with. Generally, the period will be 21 days after the demand is served. Where, however, a company applies in accordance with proposed section 459G for an order setting aside the demand, the period is that specified in a Court order extending the period for compliance or; otherwise, the period ending 7 days after the application to set aside the statutory demand is finally determined or otherwise disposed of.

#### Division 3 - Application to set aside statutory demand

685. This Division will implement the Harmer Report's recommendations in connection with the setting aside of statutory demands. The Harmer Report considered that the existing, largely unregulated, procedure in relation to notices of demand too often produces disputes about the debt at the hearing of a winding up application. The Report further noted that companies presently often need to bring injunction proceedings where a debt claimed in a demand is disputed. The Report took the view that the legislation should specifically provide for the determination of disputed debt issues and other disputes in respect of a statutory demand.

686. The Harmer Report proposed that a demand may be set aside if the Court is satisfied that

- there is a substantial dispute as to whether the debt is owing;
- the company appears to have a counter claim which may exceed the amount of the debt; or
- the demand ought to be set aside on other grounds.

687. This last general power would enable the Court to take account of matters such as improper or invalid service and mistakes or misstatements in the notice of demand, in circumstances where this would significantly prejudice any party.

688. The provisions in relation to the setting aside of a statutory demand are intended to be a complete code for the resolution of disputes involving statutory demands, and to do so on the

basis of the commercial justice of the matter, rather than on the basis of technical deficiencies. In particular it is intended to remove the present difficulties which are experienced where difficulties in estimating the extent of the debt may lead to an invalidating of the statutory demand on the basis of a minor overstatement of the amount due. This issue has been highlighted in recent cases (Ataxtin Pty Ltd v Gordon Pacific Developments Pty Ltd (1991) 5 ACSR 10); Hassgill Investments Pty Ltd v Newman Air Charter Pty Ltd (1991) 5 ACSR 321).

689. This proposed Division, together with proposed Division 4, also provides a means of dealing with statutory demand disputes in such a way that an alleged defect in the statutory demand does not have the effect of prolonging proceedings leading to the commencement of a winding up, by requiring debtor companies to raise genuine disputes (about, for example, whether a debt is owed) at an early stage, rather than after winding up proceedings have commenced.

#### Proposed section 459G - Company may apply

690. A company may apply to the Court for an order setting aside a statutory demand served on the company (proposed subsection (1)). The application may only be made within 21 days after the demand is served (proposed subsection (2)). For the application to be effective, an affidavit supporting the application must be filed with the Court within those 21 days, and a copy of the application and the supporting affidavit served on the person who originally served the demand on the company (proposed subsection (3)).

#### Proposed section 459H - Determination of application where there is a dispute or offsetting claim

691. The section will apply where there has been an application under proposed section 459G and the Court is satisfied either that there is a genuine dispute between the company and the respondent about the existence or amount of a debt to which the demand relates, or that the company has an offsetting claim (proposed subsection 459H(1)).

692. Proposed subsection 459H(2) provides that the Court must calculate the 'substantiated amount' of the demand. The substantiated amount is in effect the value of the demand after any off-setting claims or disputed amounts have been taken into account and it must be calculated for the purposes of ascertaining whether, after taking into account any off-setting claims or disputed amounts, the statutory demand is still for an amount which exceeds the statutory minimum. If the statutory minimum is still exceeded, the demand can still appropriately form the basis for a presumption of insolvency under proposed section 459C, if, on the other hand, the statutory minimum is not reached, it is more appropriate for the parties to settle first (by litigation if necessary) what debts are owed, and for winding up proceedings to be commenced only after that threshold question has been resolved.

693. The substantiated amount is calculated in accordance with the formula:

$$\text{Substantiated amount} = \text{Admitted total} - \text{Offsetting total}$$

694. In this formula the expression 'admitted total' either means the admitted amount of the

debt or the total of the admitted amounts of any debts owing. If the Court is satisfied that there is a genuine dispute between the company and respondent about the existence of the debt, the admitted amount will be nil. If the Court is satisfied that there is a dispute about the amount of the debt, the admitted amount will be so much of the amount in the demand as the Court is satisfied is not the subject of dispute.

695. 'Off-setting total' relates to the amount of any off-setting claim or claims. The expression 'off-setting claim' is defined to mean a. genuine claim (or claims) that the company has against the respondent by way of a counter-claim, set off, or cross demand (even if it does not arise out of the same transaction or circumstances as the debt to which the demand relates).

696. If the substantiated amount calculated in accordance with the formula given in proposed subsection (2) is less than the statutory minimum, the Court must by order set aside the demand (proposed subsection (3)).

697. Proposed subsection (4) provides for orders which the Court may make where the substantiated amount is at least as great as the statutory minimum. These are:

- an order varying the demand; and
- an order declaring the demand to have the effect as varied, from when the demand was served on the company..

698. The proposed section is subject to section 459J (setting aside demand on other grounds) (proposed subsection (6)). This means that, even if the application of section 459H results in the statutory demand still exceeding the statutory minimum, the demand might still be set aside on other grounds (such as defective service).

#### Proposed section 459J - Setting aside demand on other grounds

699. Where an application is made under section 459G by the company, the Court may by order set aside the demand if the Court is satisfied that, because of a defect in the demand, substantial injustice would be caused unless the demand was set aside, or that there is some other reason why the demand should be set aside (proposed subsection (1)).

700. Except as provided in subsection (1), the Court must not set aside a statutory demand merely because of a defect (proposed subsection (2)). This subsection is aimed directly at overcoming the prolonged proceedings which can result from legal disputation in relation to the effectiveness of a statutory demand which occurs on the hearing of a case for the winding up of a company.

#### Proposed section 459K - Effect of order setting aside demand

701. A statutory demand will have no effect while an order is in force under proposed sections 459H (determination of application where there is a dispute or offsetting claim) or 459J (setting aside demand on other grounds). Such a demand cannot be used to establish a

presumption of insolvency under proposed section 459C (presumptions to be made in certain proceedings).

#### Proposed section 459L - Dismissal of application

702. Proposed section 459L provides that, unless the Court makes an order under proposed sections 459I1 (determination of application where there is a dispute or offsetting claim) or 459J (setting aside demand on other grounds), then the application under proposed section 4590 must be dismissed. This section is intended to help confine the scope of disputes about statutory demands to substantial matters, thereby minimising expense, court time and delay.

#### Proposed section 459M - Order subject to conditions

703. Proposed section 459M provides that orders under proposed sections 459H or 459I may be made subject to conditions.

#### Proposed section 459N - Costs where company successful

704. Where, on an application under proposed section 459G, the Court sets aside a statutory demand, it may order the person who has served the demand to pay the company's costs in relation to the application.

#### Proposed Division 4 - Application for order to wind up company in insolvency

705. This Division deals with the mechanics of bringing before the Court an application to wind up a company up in insolvency. It sets out who may apply, lays out rules concerning the form of the application and the notice which must be given of it, provides as far as practicable for the rapid disposition of the action and prevents the company raising issue with a statutory demand on grounds that should have been raised earlier. The Division seeks to continue the theme of narrowing the scope for disputes about technicalities, thus facilitating the efficient disposal of the substantial issues.

#### Proposed section 459P - Who may apply for order under section 459A

706. The following will be able to apply to the Court for a company to be wound up in insolvency

- the company;
- a creditor (even if the creditor is a secured creditor or is only a contingent or prospective creditor);
- a contributory;
- a director of the company;

- a liquidator or provisional liquidator of the company;
- the ASC; and
- a prescribed agency. An example of an agency which could be prescribed under this provision would be the Insurance and Superannuation Commission.

707. Proposed subsection 459P(2) provides that certain of these persons may apply for the winding up of a company only with the leave of the Court, namely:

- a person who is a creditor only because of a contingent or prospective debt;
- a contributory;
- a director and
- the ASC.

708. The Court may give leave if satisfied that there is a prima facie case that the company is insolvent but not otherwise (proposed subsection (3)).

709. The Court may give leave subject to conditions (proposed subsection (4)).

710. No person other than those provided for in the section may apply for a company to be wound up in insolvency (proposed subsection (5)).

#### Proposed section 459Q - Application relying on failure to comply with statutory demand

711. Proposed section 459Q deals with an application for a company to be wound up in insolvency relying on a failure by the company to comply with a statutory demand. The section will require the application to set out the particulars of the service of the demand on the company and of the failure to comply with the demand. It will also require the application to have attached to it a copy of the demand and, if the demand has been varied by an order under proposed subsection 459H(4) (a 'substantiated amount' that may differ from the original demand but still exceed the statutory minimum), a copy of the order. The proposed section also requires, unless the debt is a judgment debt, that the demand be accompanied by an affidavit that complies with the rules and verifies the amount of the debt.

#### Proposed section 459R - Period within which application must be determined

712. An application for a company to be wound up in insolvency is to be determined within six months after it is made (proposed subsection (1)). This is designed to ensure that decisions on a company's solvency are based on contemporaneous information. In relation to a statutory demand, for example, it would be inappropriate to order the winding up of a company on the

basis on non-compliance with a statutory demand made years ago.

713. A Court may extend the period within which an application must be determined (proposed subsection (2)). This may only be done, however, where the Court is satisfied that special circumstances exist which justify the extension and that the order is made within the prescribed period as extended. An order under proposed subsection (2) may be made subject to conditions (proposed subsection (4)).

714. Proposed subsection 459R(3) provides that where an application is not determined within the time limits set under proposed subsections (1) and (2), it is to be dismissed.

#### Proposed section 459S - Company may not oppose application on certain grounds

715. To the extent that an application for a winding up in insolvency relies on a failure by the company to comply with a statutory demand, the company may not, without the leave of the Court, oppose the application on a ground that the company relied on for the purposes of an application by it for the demand to be set aside (proposed subsection (1)).

716. Further, the company will not be able to rely on a ground, without the leave of a Court, that the company could have relied on but did not rely on in earlier proceedings, whether it made an application under proposed sections 459G or 459J or not (proposed paragraph (1)(b)). The Court will not be permitted to grant leave under subsection (1) unless it is satisfied that the ground is material to proving that the company is solvent (proposed subsection (2)).

717. The rules in this section will penalise debtor companies who do not give early notice of all the issues they have with the statutory demand, since needless delay and expense will occur if those issues are raised only at the winding up hearing.

#### Proposed section 459T - Application to wind up joint debtors in insolvency

718. A single application may be made for two or more companies to be wound up in insolvency if they are joint debtors, whether they are partners or not (proposed subsection (1)). On such an application, the Court may order that one or more of the companies be wound up in insolvency even if it dismisses the application insofar as it relates to one or more of the other companies (proposed subsection (2)).

719. This provision was recommended by the Harmer Report on the grounds that it was consistent with existing bankruptcy legislation and would avoid the present necessity in company winding up proceedings for multiple applications.

#### Proposed Part 5.4A - Winding up by the Court on other grounds

720. The purpose of clauses 58 to 62 is to amend the Corporations Law so that a new Part, proposed Part 5.4A, sets out the requirements for the winding up of a company by the Court on grounds other than insolvency. This is consequential upon the recommendations of the Harmer Report that winding up in insolvency of a company be the subject of a separate Part for the

purposes of clarity.

#### Clause 58 - Repeal of section 460

721. Clause 58 will repeal section 460 of the Corporations Law. The repealed section provided for the winding up of a company on the grounds of insolvency, a matter which will now be addressed in new Part 5.4.

#### Cause 59 - General grounds on which company may be wound un by Court

722. Clause 59 will amend section 461 of the Corporations Law by inserting in paragraph (d) of that section the expression ‘or of a recognised company’ after ‘another company’. Thus paragraph 461(d) will now provide that unless the company is a wholly-owned subsidiary of another company or of a recognised company, the Court may order the winding up of the company if the number of members falls, in the case of a proprietary company, below two, or in the case of any other company, below five. This will allow wholly-owned subsidiaries of companies to be incorporated in Australian States or Territories other than the State or Territory of incorporation of the holding company, without the subsidiary thereby being technically liable to be wound up under section 461. The amendment will facilitate the national operation of the Corporations Law.

#### Clause 60 - Standing to apply for winding up

723. Clause 60 will amend section 462 of the Corporations Law. Proposed subsection 462(1) will provide that a reference in section 462 to an order to wind a company up is a reference to an order to wind the company up on a ground provided for by section 461. Section 462 will also be amended by omitting from subsection (2) ‘on a ground provided for by subsection 460(1) or section 461’. These proposed amendments are consequential on the proposed repeal of section 460 to be effected by clause 58. Section 462 will be further amended by omitting from paragraph 462(2)(e) the reference to section 453 and by omitting paragraphs 462(f) and 462(g) (all of which make reference to the official management procedure in Part 5.3 that is to be repealed).

#### Cause 61 - Repeal of section 463

724. Clause 61 will repeal section 463 (the content of which is to be replicated at proposed section 467B).

#### Clause 62 – (Repeal of section 465 and substitution of new headings and sections)

725. Clause 62 will repeal section 465 of the Corporations Law. Section 465 presently sets out when a winding up commences where, before the filing of the application for winding up, a resolution has been passed by the company for voluntary winding up. The section also provides that, in any other case, the winding up shall be deemed to have commenced at the time of the filing of the application for the winding up. These timing provisions are to be replaced (in proposed Part 5.4B, Division 1A) by proposed section 513A.

726. Clause 62 will also insert a new Part 5.4B.

#### Proposed Part 5.4B - Winding up in insolvency or by the Court

727. Proposed Part 5.4B will contain further provisions which relate to the winding up of a company in insolvency or by the Court on grounds other than insolvency. An alternative drafting approach would have been to replicate each of the provisions which will now be included in Part 5.4B and insert them into each of Parts 5.4 and 5.4A. In the interests of economy, the provisions are to be gathered together in Part 5.4B and applied to both the other Parts.

728. Proposed Division 1 of Part 5.4B is a general Division. Proposed section 465A deals with the notice that is to be given of a winding up application. The other sections in the Division deal with such matters as the substitution of applicants, notice to the applicant of grounds for opposing the application, the powers of the Court on hearing an application, the effect of a defect or irregularity on an application, provision that the Court may order the winding up of a company that is being wound up voluntarily and the avoidance of dispositions of property and attachments,

729. Proposed Division 1A - Effect of winding up order - contains existing section 471 (which states the effect of the winding up order on creditors and contributories) together with proposed sections 471A, 471B and 471C. These proposed provisions clarify the existing law in relation to the way in which the powers of officers are suspended during the winding up and the effect of the winding up order on proceedings against the company in relation to its property.

730. Proposed Division 2 of Part 5.4B takes in existing sections 472 to 481, which deal with such matters as the power of a Court to appoint an official liquidator, the remuneration of liquidators, custody and vesting of a company's property, reports to be given either to or by a liquidator and powers of a liquidator, as well as certain other matters.

731. Proposed Division 3 of Part 5.4B is existing Division 3 of Part 5.4 (sections 482 to 489). The Division deals with general powers of the Court. Into this Division will be inserted proposed sections 486A and 486B. These provisions will deal generally with the power of a Court to make orders preventing an officer or related entity of a company from removing the property of the company from the jurisdiction, requiring an officer or related entity to surrender his or her passport and orders preventing an officer or related entity from leaving Australia. The proposed provisions also provide for the Court to issue a warrant to arrest a person who is absconding or who has dealt with the property or books of a company in order to avoid obligations in connection with the winding up.

#### Proposed Division 1 - General

##### Proposed section 465A - Notice of application

732. Proposed section 465A sets out the following notice requirements where a person applies under proposed sections 459P, 462, or 464 for the winding up of a company in

insolvency:

- the person must lodge with the ASC a notice in the prescribed form which states that the application has been made;
- the person must serve a copy of this notice on the company within 14 days after the application has been made; and
- the person must advertise the application as prescribed by the rules.

#### Proposed section 465B - Substitution of applicants

733. Proposed section 465B provides that, where the Court thinks it appropriate to do so, whether because the application is not being proceeded with diligently enough or for some other reason, the Court may by order substitute as applicant in an application under sections 459P, 462 or 464 a person or persons who might otherwise have applied for the company to be wound up (proposed subsections (1) and (2)). The substituted applicant or applicants may be or include a person who was the applicant or any of the persons who were applicants before the substitution (proposed subsection (3)). After the order is made under this section, the application may proceed as if the substituted applicant or applicants had been the original applicant or applicants (proposed subsection (4)).

734. Such a provision should assist with the speedy resolution of the key issues.

#### Proposed section 465C - Applicant to be given notice of grounds for opposing application

735. Proposed section 465C provides that, on the hearing of an application for a winding up in insolvency, a person may not without the leave of the Court oppose the application unless, within the period prescribed by the rules, the person has filed and served on the applicant a notice of the grounds upon which the person opposes the application and an affidavit verifying the matters stated in the notice. This section is intended to draw out any real issues as soon as possible, so that they can be promptly dealt with.

#### Clause 63 - Court's powers on hearing application

736. Clause 63 will amend section 467 of the Corporations Law by inserting in subsection (1) 'and section 467A' after '(2)'; omitting from paragraph 1(a) 'costs;' and substituting 'costs, even if a ground has been proved on which the Court may order the company to be wound up on the application; or'; and omitting from subsection (5) 'a person referred to in paragraph 462(2)(c)' and substituting 'a contributory'.

#### Clause 64 – (Insertion of new sections)

737. Clause 64 will insert proposed sections 467A and 467B.

#### Proposed section 467A - Effect of defect or irregularity on application under Part 5.4 or 5.4A

738. Proposed section 467A provides that an application under Parts 5.4 and 5.4A must not be dismissed merely because of a defect or irregularity in connection with the application, or a defect in a statutory demand, unless the Court is satisfied that substantial injustice has been caused which cannot otherwise be remedied by, for example, an adjournment or an order for costs.

739. This proposed section reinforces the effect of proposed sections 459H, 459J and 459S, in preventing technical disputes from prolonging the Court determination of a winding up application.

Proposed section 467B - Court may order winding up of company that is being wound up voluntarily

740. Proposed section 467B provides that the Court may make an order under sections 260, 459A, 459B or 461 even if the company is already being wound up voluntarily. This proposed section replicates existing section 463.

Clause 65 - Avoidance of dispositions of property, attachments etc.

741. Clause 65 will amend section 468 by omitting paragraph 468(2)(a) and replacing it with a provision that dispositions are exempt where made by a liquidator or provisional liquidator pursuant to the Law, the rules of the Court under which the appointment was made, or an order of the Court. This proposed amendment is intended to make it clear that dispositions made by a liquidator pursuant to the rules of the Court under which the appointment was made will be an exempt dispositions for the purposes of section 468. It will also make it clear that dispositions by provisional liquidators, as well as liquidators, fall within the category of exempt dispositions that are not void as dispositions of company properly made after the commencement of a winding up.

742. In addition, dispositions by an administrator of a company or under a deed of company arrangement will be similarly protected. The inclusion of such dispositions within the category of exempt dispositions is consequential upon the proposed inclusion of a voluntary administration procedure for companies in financial difficulties in Part 5.3A.

Clause 66 - Insertion of Division heading

743. Section 66 will insert, after section 470, the heading:

‘Division 1A - Effect of winding up order’.

744. The purpose of proposed Division 1A is to clarify the effect of a winding up order. There will be four sections in the Division. Section 471 (as amended) will provide that an order for the winding up of a company operates in favour of all of the creditors and contributories of the company as if it had been made on the joint application of all the creditors and contributories. Proposed section 471A deals with the suspension of the powers of officers of the company during the winding up. Proposed section 471B replicates existing subsection 471(2) and provides

that, during the winding up, a person cannot enforce a remedy against the property of the company. Proposed section 471C specifies that the rights of secured creditors are not affected by the Division.

#### Clause 67 - Effect on creditors and contributories

745. Clause 67 will amend section 471 by omitting subsection (2). Subsection 471(2) presently provides that, where an order has been made for the winding up of a company or a provisional liquidator has been appointed in respect of the company, no action or other civil proceedings may be commenced or proceeded with against the company except by leave of the Court and in accordance with such terms and conditions as the Court imposes. This rule is to be re-located to proposed section 471B.

#### Cause 68 – (Insertion of new sections 471A to 471C)

746. Proposed subsections 471A to 471C will be inserted to clarify the existing law with respect to the effect of the commencement of a winding up. This clarification was recommended by the Harmer Report.

#### Proposed section 471A - Powers of other officers suspended during winding up

747. Proposed subsection (1) provides that, while a company is being wound up in insolvency or by the Court, a person cannot perform or exercise, nor purport to perform or exercise, a function or power as an officer of the company, except as a liquidator, or as an administrator appointed for the purposes of an administration after the winding up order was made, or with the liquidator's written approval or the approval of the Court. Similar provision is made by proposed subsection (2) in circumstances where a provisional liquidator is acting. The proposed section will not have the effect of removing an officer of a company from his or her office (proposed subsection (3)) and will relate to senior officers only, not receivers and managers or mere employees (subsection (4)).

#### Proposed 471B - Stay of proceedings and suspension of enforcement process

748. Proposed section 471B provides that while a company is being wound up in insolvency or by the Court, or during a period beginning when a provisional liquidator of a company is acting, a proceeding in a Court against the company or in relation to any of its property, or an enforcement process in relation to such property, cannot be begun or proceeded with except with the leave of the Court and in accordance with such terms (if any) as the Court imposes. 'Enforcement process' is to be defined in section 9.

#### Proposed section 471C - Secured creditor's rights not affected

749. Proposed section 471C provides that nothing in proposed sections 471A or 471B affect a secured creditor's right to realise or otherwise deal with the security.

#### Clause 69 - Court to appoint official liquidator

750. The Corporations Law contains no clear statement of the powers of a provisional liquidator. Generally, a provisional liquidator needs a range of powers similar to those available to a (non-provisional) liquidator.

751. Clause 69 will amend section 472 (Power of Court to appoint official liquidator) by adding at the end of that section, proposed subsections (4), (5) and (6). Proposed subsections 472(4) and (5) provide that a liquidator of a company, appointed provisionally, has both the power to carry on a company's business and the specified powers that a liquidator of the company would have under paragraph 477(1)(d) and subsections 477(2) and (3) (except paragraph 477(2)(m)) if the company were being wound up in insolvency or otherwise by the Court. Section 477 sets out the full range of powers of a liquidator. The power contained in section 477(2)(m) is the power to 'do all such other things as are necessary for winding up the affairs of the company and distributing its property', a power which would not be appropriate for a provisional liquidator.

752. Proposed subsection 472(6) provides that the exercise by a company's provisional liquidator of the powers conferred by the previous subsection is subject to the control of the Court, and a creditor, contributory or the ASC may apply to the Court in relation to the exercise or proposed exercise of any of those powers.

#### Clause 70 - General provisions about liquidators

753. Clause 70 will amend subparagraph 473(3)(b)(i) by deleting the requirement that a resolution of creditors to determine the remuneration of a liquidator be passed by a majority in number and three quarters in value of creditors present and voting at the meeting. This amendment is consequential upon the implementation of the Harmer Report's recommendation that all matters requiring the decision or resolution of creditors be reduced to a single voting formula, in place of the existing variety in requirements for a valid resolution.

#### Cause 71 - Custody and vesting of company's property

754. Clause 71 will amend section 474 by omitting from subsection 474(1) all of the words before 'appointed' and substituting 'If a company is being wound up in insolvency or by the Court, or a provisional liquidator of a company has been'. Subsection 474(1) will now read 'If a company is being wound up in insolvency or by the Court, or a provisional liquidator of a company has been appointed, the liquidator or provisional liquidator shall take into his or her custody or under his or her control all of the property to which the company is or appears to be entitled and, if there is no liquidator, all the property of the company shall be in the custody of the Court'.

755. The proposed amendment to section 474 is consequential upon the restructuring of the provisions under proposed Parts 5.4, 5.4A and 5.4B

#### Clause 72 - References to liquidator in certain provisions to include references to provisional

## liquidator

756. Clause 72 will amend certain sections of the Corporations Law by providing that a reference to a liquidator in those sections includes a reference to a provisional liquidator. The sections are:

- section 475 - report as to company's affairs as to be submitted to liquidator,
- section 536 - supervision of liquidators;
- section 537 - notice of appointment and address of liquidator
- section 538 - regulations relating to money received by liquidator
- section 539 – liquidators' accounts; and
- section 540 – liquidator to remedy defaults.

757. This clause, together with clauses 88, 89 and 90, replicates the effect of the current definition of liquidator, but does so in a way that makes the legislation easier to follow.

## Clause 73 - (Powers of liquidator)

758. The Harmer Report recommended that the powers of a liquidator, except for the power to compromise debts above a prescribed amount and the power to enter into long-term commitments such as mortgages, charges or leases, be exercisable without the need for approval of the creditors or the Court. It also recommended that creditors have power to give directions to which the liquidator must have regard and that the actions of liquidators be reviewable by the Courts.

759. This expansion of the liquidator's powers to act without prior approval was recommended on the basis of the general competence and qualifications of persons who act in the capacity of liquidator. The Harmer Report was, however, of the view that the continued fetter on the liquidator's powers to compromise debts due to the company where the debt due exceeds \$20,000 was appropriate, since the compromise of debts is an action which may directly prejudice creditors and where proof of damage to them would be exceedingly difficult after the event. The second fetter recommended by the Harmer Report, namely on the power of entry into long-term commitments such as mortgages, charges or leases, was recommended on the grounds that the unfettered exercise of the power may not be conducive to an expeditious and beneficial administration.

760. The Harmer Report also recommended that a liquidator in a Court winding up have the power to make calls on shares without reference to the Court or the committee of inspection. Under current subsection 483(3), the Court has the power to make calls on contributories. Under paragraph 488(1), the Court may make rules or regulations enabling many of its powers to be exercised by the liquidator as an officer of the Court and subject to the Court's control. However,

under subsection 488(2), a liquidator appointed by the Court cannot make a call without the special leave of the Court or the sanction of the committee of inspection.

761. The Harmer Report pointed out that while a Court-appointed liquidator cannot make a call without leave, directors are not fettered in making calls and receivers appointed under an instrument creating a charge on uncalled capital have power, unless it is excluded, to make a call. A liquidator in a voluntary winding-up is also permitted to make calls.

762. Paragraph 73(a) will amend subsection 477(1) by omitting the existing requirement that the liquidator obtain the approval of the Court, the committee of inspection or the creditors to exercise the powers listed in that subsection. However, the exercise of the liquidator's powers under subsection 477(1) has been made subject to the fetters proposed by subsections (2A) and (2B), that approval be obtained to compromise a debt over \$20,000 or enter into long-term commitments on behalf of the company.

763. The proposed amendment of subsection 477(2) by paragraph 73(b) will also ensure that the exercise of the liquidator's powers under this subsection are subject to the fetters proposed by subsections (2A) and (2B).

764. Paragraph 73(c) will amend subsection 477(2) by implementing the Manner Report's recommendation that a Court-appointed liquidator be allowed to exercise the Court's powers under subsection 483(3) to make calls on contributories, except the Court's power under subsection 483(3)(b) to make an order for payment of any calls.

765. Paragraph 73(d) will amend subsection 477(2) by deleting the liquidator's power in paragraph 477(2)(j) to compromise any debt due to the company that does not exceed \$20,000. However, paragraph 73(e) will insert, inter alia, new subsection 477(2A) which provides that the liquidator may compromise a debt to the company, but where the debt due to the company exceeds \$20,000 (or any greater prescribed amount), the approval of the Court, the committee of inspection or creditors is required to the compromise.

766. Paragraph 73(e) will also insert new subsection 477(2B) which implements the Harmer Report's recommendation that the power of the liquidator to enter into long-term commitments such as mortgages, charges or leases, be exercisable only with the approval of the Court, the committee of inspection or creditors. The term 'long-term commitment' as such has not been used, but the concept is described as any agreement on the company's behalf the term of which may be greater than three months, or any agreement where the obligations of a party may be discharged by performance more than three months after the date of the agreement. An agreement will be a long-term commitment even where the term of the agreement may end, or the obligations may be discharged, within that three month period.

767. Paragraph 73(f) will omit subsection 477(4). This amendment is consequential on the amendment of subsection 477(1) that is proposed by paragraph 73(a) to remove the requirement for the approval of the Court, the committee of inspection or the creditors before the liquidator may carry on the business of the company so far as is necessary for the beneficial disposal or winding up of that business. The existing concession granted by subsection 477(4), allowing the

liquidator to carry on business without approval for the first four weeks after the date of the winding up order, will no longer be necessary.

768. Paragraph 73(g) will amend subsection 477(6) by including the ASC as a party that may apply to the Court with respect to the exercise or proposed exercise by a liquidator of powers conferred on that liquidator by section 468.

Clause 74 – (Application of property: list of contributories)

769. Since the determination that a person is a contributory makes that person liable to contribute to the assets of the company, the Corporations Law and the Corporations Regulations stipulate procedures both for the determination of the persons who should be included on a list of contributories and for making calls on contributories. Those procedures protect those who may have been wrongly included on the register of members and also provides protection in relation to calls on those who are contributories. The Harmer Report considered the procedure in settling a list of persons who should be included on a list of contributories to be lengthy and complicated. It recommended the following simpler procedure, one which it considered equally effective as the existing procedure:

- the liquidator should compile a list of contributories from whatever information is available (including the register of members and the other books and papers of the company);
- the liquidator should then notify all contributories of the contents of the list and invite them to submit any objections. The contributories should be entitled to object both to their own inclusion (which they may wish to do if it appears likely that the assets of the company will not be sufficient to cover its liabilities), to the inclusion of other contributories (which they may wish to do if it appears that there will be a surplus) or to the exclusion of others who should be identified as contributories;
- the liquidator should determine any objections and notify the relevant persons of that determination; and
- contributories who disagree with the liquidator's determination should have a right of appeal to the Court within a specified time.

770. In addition, the Harmer Report recommended that a liquidator should only be required to settle a list of contributories where it appears likely that

- there are contributories liable to contribute to the assets of the company or that there will be a surplus available for distribution; and
- it will be necessary to make calls on or adjust the rights of contributories.

771. A large part of the recommended reform will be implemented in the Corporations

## Regulations.

772. Clause 74 will amend section 478 by omitting existing subsections (1) and (2) and substituting subsections (1), (1A) and (1B). Proposed new subsection 478(1) implements the Harmer Report's recommendation that the liquidator must, as soon as practicable after the Court orders that a company be wound up, collect and apply the company's property in discharging the company's liabilities, and consider whether he or she is required to settle a list of contributories.

773. Proposed subsection 478(1A) provides when a liquidator must settle a list of contributories.

774. Proposed subsection 478(1B) restates the existing provision in paragraph 478(1)(b) that a liquidator may rectify the members' register where rectification is required.

### Clause 75 - Orders for release or dissolution

775. Clause 75 will amend section 481 by omitting from paragraph (1)(a) '557' and substituting '539'. This proposed amendment is simply to correct an inaccuracy.

### Clause 76 – (Delivery of property to liquidator)

776. The amendment of section 483 proposed by clause 76 is a necessary drafting amendment consequential on the proposed amendment of subsection 477(2) by clause 73 to allow the liquidator to exercise the Court's powers under subsection 483(3) (except paragraph 483(3)(b)) to make calls on contributories.

### Cause 77 – (Insertion of proposed sections 486A and 486B)

#### Proposed section 486A - Court may make order to prevent officer or related entity from avoiding liability to company

777. Proposed section 486A provides for the Court to make a number of orders, on the application of the liquidator or provisional liquidator of a company. The Court will be able to make the following orders:

- an order prohibiting, either absolutely or subject to conditions, an officer or related entity of the company from taking or sending out of Australia money or other property of the company or of the officer or related entity (clause 29 will insert a definition of 'related entity' in section 9);
- an order appointing a receiver or trustee or receiver and manager over property of an officer of the company or over property of a related entity of the company,
- an order requiring an officer of the company or a related entity of the company to surrender to the court his or her passport and any other specified documents; and

- art order prohibiting an officer of the company, or a related entity of the company from leaving Australia without the Court's consent.

778. The Harmer Report took the view that the failure of a company sometimes produces extraordinary and reprehensible behaviour on the part of officers or other persons who have something to hide or fear as a result of their involvement with the business, property and affairs of, or dealings with, the company. In addition to provisions imposing a duty on officers to assist a liquidator and allowing for warrants to search for and seize company property or books (proposed sections 530A, 530B, and 530C), the Harmer Report also recommended that liquidators and provisional liquidators be able to make application for an order for the arrest of persons in defined circumstances.

779. The category of persons who may be subjected to restraint are officers of the particular company and related persons. The Harmer Report noted that the power should only be exercised on application to the court and only when the court considers it necessary or desirable to do so for the purposes of protecting the interests of the company, having regard to an actual prospective civil liability to the company of the officer or related person.

780. Proposed subsection 486A(2) accordingly requires certain circumstances to exist before a Court may make an order under subsection (1). Such an order may only be made if the company is being wound up in insolvency or otherwise by the Court, or an application has been made for the company to be wound up in insolvency or otherwise by the Court. The Court must be satisfied that there is at least a prima facie case that the officer or related entity is or will become liable to pay money to the company, or to account for property of the company. The Court must also be satisfied that there is substantial evidence that the officer or related entity has concealed or removed money or other property, has tried to do so or intends to do so or has tried to leave Australia or intends to do so in order to avoid that liability or its consequences.

781. Finally, the Court must think that it is desirable and necessary to make the order in order to protect the company's rights against the officer or related entity.

782. Proposed 486A(3) requires a Court, on hearing an application under subsection (1), to have regard to any relevant application under section 1323 (power of Court to prohibit payment on transfer of money, securities, futures contracts or property).

783. Proposed subsection 486A(4) provides for the Court to be able to grant an interim order of the kind applied for until the application is determined, where in the court's opinion it is desirable to do so.

784. Proposed subsection 486A(5) provides that the Court may not require an applicant under subsection (1) or any other person as a condition for granting an interim order under subsection (4) to give an undertaking as to damages. Subsection (6) provides that the Court may make a further order discharging or varying the first mentioned order on the application of a person who has applied for or is affected by an order under proposed section 486A.

785. Subsection (7) provides that an order under subsection (1) may be expressed to operate

for a specified period or until it is discharged by a further order. Subsection (8) provides that a person must not contravene an order under this subsection. Subsection (9) provides that the section has effect subject to the Bankruptcy Act. Subsection (10) provides that nothing in section 486A affects any other powers of the Court.

Proposed section 486B - Warrant to arrest person who is absconding, or who has dealt with property or books, in order to avoid obligations in connection with winding up

786. Proposed section 486B(1) provides that a Court may issue a warrant for a person to be arrested and brought before the Court if a company is being wound up in insolvency or by the Court or an application has been made for a company to be wound up in this fashion and the Court is satisfied of one of three circumstances.

787. First, the Court is to be satisfied that the person is about to leave Australia in order to avoid paying money payable to the company, being examined about the company's affairs, or complying with an order of the Court or some other obligation under Chapter 5 in connection with the winding up.

788. Alternatively, the Court may be satisfied that the person has concealed or removed property of the company in order to prevent or delay the taking of the property into the liquidator's custody or control.

789. Finally, the Court may be satisfied that the person has destroyed, concealed or removed books of the company or is about to do so.

790. Proposed subsection 486B(2) provides that a warrant under subsection (1) may also provide for property or books of the company in the person's possession to be seized and delivered into the custody of a specified person.

791. Proposed subsection (3) provides that such a warrant may only be issued on the application of the liquidator or provisional liquidator of the company or the Australian Securities Commission.

Clause 78 - Delegation to liquidator of certain powers of Court

792. Paragraph 78(a) will amend paragraph 488(1)(c) by deleting the making of calls from the powers and duties conferred on the Court, but for which provision may be made by the rules or regulations to allow their exercise by the liquidator. This amendment is consequential upon the proposed insertion of paragraph 477(2)(ca), granting to a Court-appointed liquidator the power to make calls without leave.

793. Paragraph 78(b) will amend subsection 488(2) by deleting the existing requirement in paragraph 488(2)(a) that a liquidator making a call obtain either the special leave of the Court or the sanction of the committee of inspection.

Clause 79 – (Repeal and substitution of new section 490)

794. Clause 79 will repeal section 490 and insert a new section 490.

Proposed section 490 - When company cannot wind up voluntarily

795. Proposed section 490 will provide that except with the leave of the Court, a company cannot resolve to wind up voluntarily if an application has been made for the winding up in insolvency of the company, or an order to that effect has been made.

Clause 80 – (Repeal of section 492)

796. Clause 80 will repeal section 492 of the Corporations Law. Section 492 presently provides that a voluntary winding up commences at the time of the passing of the resolution for a voluntary winding up. Proposed Division 1A of Part 5.6 will introduce a new regime for the calculation of commencement times for different forms of winding up.

Clause 81 - Duty of liquidator where company turns out to be insolvent

797. Clause 81 will amend section 496 of the Corporations Law by omitting from subsection (1) the requirement that a liquidator, upon forming the specified view about the company's solvency, 'shall as soon as practicable convene a meeting of the creditors' and substituting a requirement that the liquidator do one of the following, as soon as practicable:

- apply under section 459P for the company to be wound up in insolvency;
- appoint an administrator of the company under section 436B; and
- convene a meeting of the company's creditors.

798. Where the liquidator does convene a meeting of the company's creditors, subsections 496(2) to 496(8) then apply.

799. At present, subsection 496(1) provides that where a declaration has been made under section 494 and the liquidator is at any time of the opinion that the company will not be able to pay, or provide for the payment, of its debts in full within the period stated in the declaration, he or she shall as soon as practicable convene a meeting of the creditors. The amendment, by providing that the liquidator may also apply under section 459P for the company to be wound up in insolvency, or may appoint an administrator of the company under section 436B, integrate the provisions relating to the duty of the liquidator to call creditors' meeting in the case of an insolvency arising from a members' voluntary winding up with the restructured provisions dealing with winding up in insolvency and the provisions providing for a new scheme for the voluntary administration of insolvent companies.

Clause 82 – (Powers and duties of the liquidator)

800. Paragraph 82(a) will amend section 506 by omitting paragraphs (1)(a) and (1)(b) and

substituting a new paragraph (1)(b). The effect of the proposed amendment is to remove the requirement, in the case of a members' voluntary winding up, for the liquidator to obtain the approval of the company, or in the case of a creditors' voluntary winding up the approval of the Court, committee of inspection or creditors, to the exercise of the powers that the Corporations Law confers on a liquidator in a winding up in insolvency or by the Court

801. This amendment is consequential upon implementation of the Harmer Reports recommendation that the powers of a liquidator, except for the power to compromise debts over \$20,000 and the power to enter into long-term commitments such as mortgages, charges or leases be exercisable without the need for approval of the creditors or the Court.

802. Paragraph 82(b) will amend paragraph 506(1)(d). The amendment is a minor technical drafting amendment consequential on the proposed insertion of paragraph 477(2)(ca) to allow the liquidator to make calls without leave.

803. Paragraph 82(c) will insert proposed subsection 506(1A) which will implement the Harmer Report's recommendation that there be a continued fetter on the liquidator's power to compromise debts over \$20,000 and to enter into long-term commitments.

#### Cause 83 – (Arrangement: when binding on creditor's)

804. Clause 83 will amend paragraph 510(1)(b) by deleting the existing requirement for a majority in number and three quarters in value of the creditors to pass a resolution in favour of an arrangement. This amendment is consequential upon implementation of the Harmer Report's recommendation that all matters requiring the decision or resolution of creditors be reduced to a single voting formula in place of the existing variety in requirements for a valid resolution.

#### Cause 84 – (Application of Part)

805. Clause 84 amends section 513 by inserting 'in insolvency' after 'whether'. This is consequential upon new terminology to be adopted in amended Part 5.4.

#### Clause 85A – (Insertion of new Division 1A)

#### Division 1A – When winding up taken to begin

806. The point at which a winding up commences is of key importance in relation to the operation of a number of provisions of the Corporations Law, either directly or because it is a reference point used for the purposes of defining other points in time which have further implications.

807. There are a number of references within the Corporations Law to dates or days which have significance in relation to a winding up. References are made in different parts of the Law to 'the commencement' of a winding up, the 'relevant date' and the 'relevant day'.

808. Speaking very generally and with reference only to compulsory winding up in

insolvency under the present law, these times are as follows:

- the commencement of a winding up is, under section 465, the time of the filing of the application for the winding up;
- the relevant date is, pursuant to section 9, the date of the winding up order, and
- the relevant day is for the purposes of section 589(5), defined to mean the day on which the winding up commenced, which in the case of the winding up in insolvency is the date when the application was filed;
- in section 565, which imports into the Corporations Law those provisions of the Bankruptcy Act which deal with unfair preferences (and similar transactions), the expression relevant date is also used to provide an equivalent point in time corresponding with the date of the presentation of the petition in bankruptcy. In subsection 565(2), the relevant date is defined, in the case of a winding up in insolvency, as the date of the filing of the application for the winding up.

809. A distinction which must be drawn here, therefore, is between the date of the order for winding up and the date of the application being filed. For the purposes of setting aside transactions under the provisions of the Bankruptcy Act, the period of time in which a transaction must be entered into is measured back from the date of the application for the winding up, and this is appropriate as that date is the point at which the solvency of the company is publicly put into question. The date of the application is also the date from which, under section 468, all transactions or dispositions of property and shares in relation to the company are void.

810. A number of difficulties arise as a consequence of the way in which these times have been defined under the Law:

- there is some confusion on reading the Law because a reference to the commencement of a winding up is in fact not a reference to the order but to the date of the application for the winding up;
- a company in relation to which an application for winding up has been filed is in a difficult position until the hearing of the application and the making of the order because a number of restrictions are placed on the company, particularly under section 468, which if the order is made, become effective, and if the order is not made, are deemed never to have been imposed;
- there is also some uncertainty as to the way in which the operation of the undue preference provisions under section 565 and the operation of the provisions of 468 relate to one another in the period between the filing of the application and the making of the order.

811. The reforms contained in Division 1A of Part 5.6 seek to overcome these difficulties:

- by collecting together the various definitions and cross-references into one part of the legislation;
- by using expressions which seem to bear the ordinary meaning of the words used within them, so that now the commencement of a winding up is in fact the time when the order is made, and 'relation back day' is the day of the making of application, which is of significance in the reviewable transactions regime under Division 2 of proposed Part 5.7B;
- by providing for as many matters as possible to be dealt with by reference to the commencement date rather than the date of the application, and in particular by providing that the reviewable transactions provisions apply to transactions entered into in the period commencing at a specified time prior to the relation back day (the specified time depending on the nature of the transaction), and ending on the commencement of the winding up. The provisions relating to void dispositions (sections 468) will now be operative from the commencement of the winding up onwards, thus avoiding the difficulty of overlap between these provisions.

812. The reforms are largely based on the recommendations of the Harmer Report.

813. The Harmer Report recommended the following commencement times for a winding up in insolvency

- for a company ordered to be wound up in insolvency - the day on which the order was made for the winding up;
- for a company where the creditors have met to consider a voluntary administration but resolve that the company be wound up - the day on which the notice is filed with the ASC following the resolution of creditors determining that the company be wound up;
- for a members' voluntary winding up which is converted to a winding up in insolvency - the day of the resolution to wind up the company.

814. Under present section 465, the winding up of a company is deemed to have 'commenced' at the time of the filing of the application for the winding up. If, however, before the filing of the application, a resolution has been passed by the company for voluntary winding up, the winding up of the company is deemed to have commenced at the time of the passing of the resolution.

815. Section 492 presently provides that a voluntary winding up 'commences' at the time of the passing of the resolution for the voluntary winding up.

816. For the purposes of the present section 565 which imports the provisions of the Bankruptcy Act relating to undue preferences and void settlements, subsection 565(3) provides

that the date that corresponds with the date on which the person becomes a bankrupt is the date on which the winding up of the company commences or is deemed to have commenced.

817. Under section 9, the expression ‘relevant date’ in relation to a winding up means:

- in a case of a company ordered to be wound up by the court that has not previously commenced to be wound up voluntarily, the date of the winding up order; or
- otherwise, the date of the commencement of the winding up.

#### Proposed section 513A - Winding up ordered by the Court

818. Proposed section 513A sets out when a winding up is taken to have begun or commenced when the court makes an order under section 260, 459A, 459B or 461 that a company be wound up.

819. If, when the order for winding up was made, a winding up of the company was already in progress, then the winding up is taken to have commenced when the first winding up is taken to have commenced on the basis of Division 1A.

820. If, immediately before the order for winding up was made, the company was under administration, the winding up is taken to have begun or commenced on the ‘section 51 3C day’ in relation to the administration. Section 513C defines this day to be the day on which the administration began or if, when the administration began, a winding up of a company was in progress, the ‘section 513C day’ is the day on which the winding up is taken to have begun on the basis of Division 1A.

821. If, when the order was made a provisional liquidator was acting, and immediately before the provisional liquidator was appointed the company was under administration, the winding up is taken to have begun or commenced on the ‘section 513C day’ in relation to the administration.

822. If, immediately before the winding up order was made, a deed of company arrangement had been executed by the company and had not yet terminated, the winding up is taken to have commenced on the ‘section 513C day’ in relation to the administration that ended when the deed was executed.

823. In every other case, the winding up is taken to have begun or commenced on the day on which the winding up order was made.

#### Proposed section 513B - Voluntary winding up

824. Proposed section 513B provides that where a company resolves by special resolution

that it be wound up voluntarily, the winding up is taken to have begun or commenced:

- in the case of a company whose winding up is already in progress when the resolution was passed - on the commencement date of the original winding up;
- in the case of a company that was under administration immediately before the resolution was passed - on the 'section 513C day' in relation to the administration;
- in relation to a company where a deed of company arrangement had been executed by the company but had not yet terminated immediately before the resolution was passed - on the 'section 51 3C day' in relation to the administration that ended when the deed was executed;
- in the case of a company where the resolution is taken to have been passed because the company's creditors have, at a meeting convened under section 445F passed a resolution terminating a deed of company arrangement and resolved that the company be wound up - on the 'section 513C day' in relation to the administration that ended when the deed was executed; or
- in any other case - on the day on which the resolution was passed.

#### Proposed section 513 'Section 513C day' in relation to an administration under Part 5.3A

825. Proposed section 513C defines a 'section 513C day' in relation to the administration of a company. A 'section 513C day' is the day on which the administration began unless, when the administration began, the winding up of the company was in progress, in which case a '513C day' is defined to be the day on which the original winding up is taken to have begun on the basis of Division 1A.

#### Proposed section 513D - Validity of proceedings in earlier winding up

826. Proposed section 513D makes provision in relation to the validity of a winding up that is already in progress when a court makes certain orders. Where at the time the court orders a company to be wound up under section 260, 459A, 459B or 461, or a company resolves by special resolution that it be wound up voluntarily and a winding up of the company is already in progress, all proceedings in that winding up are taken to have been valid except so far as the court otherwise orders because of fraud or mistake.

#### Clause 86 - Repeal of section 525

827. Section 525 deals with the priority to be accorded in a winding up to a debt due to a member. It is to be replaced by proposed section 563A This will relocate the rule in section 525 to the area of the Corporations Law which deals with other priorities on a winding up.

#### Clause 87 – (Insertion of sections 530A to 530C)

828. Clause 87 will insert proposed sections 530A, 530B and 530C into the Corporations

Law. The proposed sections provide for a liquidator to have a right of access to and possession of the books of the company and provide for a Court to issue a warrant allowing for the searching for and seizure of a company's property or books.

829. The Harmer Report took the view that directors and other persons who have control of the affairs of a company should be required to fulfil certain basic requirements such as the delivery to the liquidator of all books of the company, attending on the liquidator to give information concerning the dealings, business, property and affairs of the company, and providing assistance to the utmost of that person's power. The Report considered that a positive duty should be imposed on an officer of a company being wound up in insolvency to assist in the winding up. The Report based its recommendation on the perceived ineffectiveness of existing provisions such as section 590 Corporations Law (section 590 provides for certain matters - such as failure to disclose the existence of company property or to deliver up all books - to be offences under the Law); and on the view that there is no justification for permitting vital records of a company to be withheld from a liquidator where the company is being wound up by reason of its insolvency. The Report made the recommendation subject to the rights of secured creditors to retain such of the company's books as are required to enforce the security or such of the company's books as are covered by the security. The Report also took the view, however, that the liquidator should have access to these books and be able to make copies of them.

#### Proposed section 530A - Officers to help liquidator

830. Proposed section 530A(1) provides that as soon as practicable after a company commences to be wound up or has a provisional liquidator appointed to it, each officer of the company must deliver to the liquidator appointed for the purposes of the winding up, or the provisional liquidator, all books in the officer's possession which relate to the company, other than books the possession of which the officer is entitled, as against the company and the liquidator, to retain. The officer must also identify the location of any books which the officer does not personally have but knows the location of.

831. Proposed subsection 530A(2) provides that an officer of a company which is being wound up, or of which a provisional liquidator is acting, must:

- attend on the liquidator or provisional liquidator,
- give the liquidator or provisional liquidator such information about the company's business, property, affairs and financial circumstances; and
- attend such meetings of the company's creditors or members;
- as the liquidator or provisional liquidator reasonably requires.

832. Proposed subsection 530A(3) requires an officer of a company that is being wound up to do whatever he or she is reasonably required by the liquidator to do to assist in the winding up. Proposed subsection 530A(4) requires an officer of a company to which a provisional liquidator has been appointed to do whatever he or she is reasonably required by the provisional liquidator

to do to help the provisional liquidator in the performance of the provisional liquidator's functions.

833. Proposed subsection 530A(5) provides that a liquidator of a company that is being wound up may require an officer of the company to tell the liquidator the officer's residential address and work or business address and to keep the liquidator informed of any change in either of those addresses during the winding up.

834. Proposed subsection 530(6) provides that a person must not, without reasonable excuse, fail to comply with the section.

835. In the proposed section the expression 'officer' in relation to a company generally means a person who is, or has been but is no longer, an 'officer' of the company as defined by section 82A. However, a person is not an officer of the company for the purposes of the proposed section merely because he or she has been an employee of the company

#### Proposed section 530B - Liquidator's rights to company's books

836. Proposed subsection 530B(1) provides that a person is not entitled, as against the liquidator of a company, to retain possession of books of the company or to claim or enforce a lien on such books. This does not apply in relation to books to which a secured creditor of the company is entitled to possession (otherwise than because of a lien), although the liquidator is entitled to inspect and make copies of such books at any reasonable time (proposed subsection 530B(2)).

837. Proposed subsection 530B(3) provides that a person must not hinder or obstruct a liquidator in obtaining books of the company unless the person is entitled as against the company and the liquidator to retain the possession of the books.

838. Proposed subsection 530B(4) provides that the liquidator may give to a person a written notice requiring a person to deliver to the liquidator, as specified in the notice, books which are in the person's possession. The notice must specify a period of at least three days as the period within which the notice must be complied with (proposed subsection 530B(5)). A person must comply with a notice under proposed subsection (4) except insofar as the person is entitled as against the company and the liquidator to retain possession of the books (proposed subsection 530B(6)).

839. The proposed section complements proposed section 530A by imposing an obligation, with respect to a company's books, on persons generally, rather than just officers of the company. The term 'liquidator' includes 'provisional liquidator' for the purposes of the proposed section (proposed subsection 530B(7)).

#### Proposed section 530C - Warrant to search for, and seize, company's property or books

840. Proposed subsection 530C(1) provides for the circumstances in which a Court may issue

a warrant to search for and seize property or books of a company. The Court may issue such a warrant where a company is being wound up or a provisional liquidator is acting and the Court is satisfied that a person has concealed or removed property of the company with the result that the taking of the property into the liquidator's custody or control will be prevented or delayed or where the Court is satisfied that a person has concealed, destroyed or removed books of the company or is about to do so.

841. Proposed subsection 530C(2) provides that the warrant may authorise a specified person, with such help as is reasonably necessary, to search for and seize property or books of the company in possession of the person referred to in subsection (1) and to deliver as specified in the warrant the property or books seized under it. Under proposed subsection (3), the person specified in the warrant may break open a building, a room or receptacle where the property is or the books are or where the person reasonably believes the property or books to be, in order to seize the property or books under the warrant. Under proposed subsection (4), a person who has custody of property or a book because of the execution of the warrant must retain it until the Court makes an order for its disposal.

842. The provision is based on a recommendation of the Harmer Report. The Report took the view that the failure of a company sometimes produces reprehensible behaviour on the part of company officers or other persons, which often extends to absconding from the jurisdiction, concealment of property or books, dealing with property of the company or dealing with their own property in anticipation of civil proceedings being brought against them. The Report was concerned that existing legislation does not contain sufficient provisions to provide at least the means of minimising the adverse consequences of this behaviour upon the company and its creditors.

#### Clause 88 - Books to be kept by liquidator

843. Clause 88 will amend section 531 of the Corporations Law by inserting after the word 'liquidator', the expression 'or provisional liquidator'. This follows from a change in the way 'liquidator' is defined in the Corporations Law, and will effect no change of substance.

#### Clause 89 - Disqualification of liquidator

844. Paragraph 89(a) will amend section 532 by providing that the section also has application to a provisional liquidator in addition to a liquidator.

845. Paragraph 89(b) will amend subsection 532(5) by deleting the existing requirement for a resolution of creditors that paragraph 532(2)(c) does not apply to a creditors' voluntary winding up to be carried by a majority in number and value. This amendment is consequential upon implementation of the Harmer Report's recommendation that all matters requiring the decision or resolution of creditors be reduced to a single voting formula in place of the existing variety in requirements for a valid resolution.

#### Clause 90 - When liquidator has qualified privilege

846. Clause 90 will amend section 535 of the Corporations Law by adding at the end a subsection (2) which provides that the word ‘liquidator’ includes ‘a provisional liquidator’. No change of substance will result.

#### Clause 91 – Books of company

847. Clause 91 will amend paragraph 542(3)(c) by making it clear that the direction of the creditors is to be by resolution.

#### Division 6 - Proof and ranking of claims

848. Section 553 of the Corporations Law will be repealed and replaced and proposed sections 553, 553A to 553E and 554A through to 554J inserted into Division 6 of Part 5.6. These sections constitute three Subdivisions:

- Subdivision A - Admission to proof of debts or claims;
- Subdivision B - Computation of debts and claims; and
- Subdivision C - Special provisions relating to secured creditors of insolvent companies.

849. The reforms embodied in these provisions reflect the recommendations of the Harmer Report in relation to the making of claims in insolvency. As the reforms relate to matters which under the current law are dealt with under the Bankruptcy Act, and incorporated into the Corporations Law by reference under section 553, the implementation of these reforms has necessitated the incorporation in the Corporations Law of provisions modelled on sections in the Bankruptcy Act. This is in line with the general policy implicit in the Harmer Report that the provisions dealing with insolvency of companies should, as far as practicable, be located within the Corporations Law rather than included by reference.

850. As the result of the current application of the Bankruptcy Act provisions, demands in the nature of damages arising otherwise than by reason of contract, promise or breach of trust are not provable in the winding up of a company (Bankruptcy Act, subsection 82(2)).

851. The Harmer Report noted that this could result in a number of anomalies, not the least of which is that a set of circumstances can produce both a claim in tort and in contract. The right to make a claim under the present law may depend merely on a technical distinction between framing the claim in contract or framing it in tort. The Harmer Report made the point that there was no justification for such a distinction and noted that this could result in significant injustice where a claim could only be framed in tort. In such cases the claimant would make no recovery at all. The Harmer Report noted that the only substantial argument against permitting claims for unliquidated damages in tort was the problem of quantification. The Report noted too that this had not prevented claims for unliquidated damages arising from contract being made. The claiming of unliquidated damages in tort may presently be made in other jurisdictions (under the Insolvency Act 1967 (NZ) and under the Insolvency Act 1986 (UK)).

852. The Harmer Report recommended that claims for unliquidated damages arising from tort should be admissible. The Report also recommended that to the extent that there may be practical problems in estimating the amount of such claims, the Court be expressly empowered to direct that the quantification be determined in such manner as the Court specifies (by, for example, referring the claim to a specialist tribunal).

853. The operation of proposed sections 553 and 554A overcome the effect of subsection 82(2) of the Bankruptcy Act and thereby permit claims in tort which are unliquidated at the time of the winding up to be admissible in the winding up. Proposed section 554A provides for the determination of the value of debts and claims of uncertain value.

854. Under subsection 82(3) of the Bankruptcy Act, penalties or fines imposed by a court in respect of an offence against the law, whether the law of the Commonwealth or not, are not provable in a corporate winding up. The Harmer Report recommended that fines imposed before or after the commencement of a winding up should be admissible in a corporate insolvency. The Report also recommended that costs ordered to be paid in respect of the proceedings for the offence should also be admissible. The rationale for this recommendation was that in relation to a corporate insolvency a fine should be admissible because, after the company has been wound up, there is no-one against whom the fine may be claimed and the fine is a claim by the community as a whole. The recommendation of the Harmer Report is not implemented in the Bill on the basis that although the fine may be a claim by the community, fines are by their nature generally intended to be a deterrent. In the case of a corporate insolvency, it is difficult to justify 'penalising' creditors for a wrong committed by the company. Proposed section 553B provides that penalties or fines imposed by a court are not admissible to prove against an insolvent company.

855. The Harmer Report recommended a procedure for quantification in corporate insolvency where the amount of the claim is not certain. The procedure is based on the Bankruptcy Act, subsections 82(3) to 82(7), but with the following differences:

- that the liquidator either make an estimate or refer the claim to the Court for valuation;
- the right of appeal for an estimate made by the liquidator would then be treated as if the claim had been referred to the Court; and
- the Court would have a power to specify a mode of determining the value rather than being necessarily required to determine the value itself.

856. It would still be open to appeal to the Court from a valuation determined in the specified manner.

857. The Bankruptcy Act subsections 82(3) to 82(7), provide for a trustee in bankruptcy to make an estimate of the value of a debt or liability provable in the bankruptcy which, by reason of its being subject to a contingency, or for any other reason, does not bear a certain value. A

person aggrieved by an estimate may then appeal to the Court. If the Court finds that the value of the debt can be fairly estimated the Court can then assess the value in such manner as it thinks proper.

858. Under subsection 82(6) of the Bankruptcy Act, if the Court finds that the value of the debt or liability cannot be fairly estimated, the debt or liability is then deemed not to be provable in the bankruptcy. Subsection 82(6) is not replicated in the proposed provisions on the rounds that the new procedure set out at proposed section 554A should result in estimates being fairly arrived at

859. Section 553(2) of the Corporations Law provides (subject to sections 206RD, 279 and 556) that in a winding up of an insolvent company, the same rules prevail with regard to the respective rights of secured and unsecured creditors and debts provable and the valuation of annuities and future and contingent liabilities, as are in force for the time being under the Bankruptcy Act. All of the provisions in the Bankruptcy Act which are of particular consequence for the winding up of insolvent companies have been included in the proposed provisions. Although it would have been desirable to exclude all cross-references to the Bankruptcy Act such an exclusion has not been implemented. In order to cover every possible contingency (for example, insolvency of a partnership involving a company) the elimination of all cross-references could lead to the addition to the Corporations Law of numerous additional provisions. Rather than try to pick up all of the other relevant rules, an effort which would yield at best marginal benefit in terms of additional clarity in the Corporations Law, a residual cross-reference to the Bankruptcy Act (at proposed section 553E) is retained, subject to the provisions of the Corporations Law.

#### Clause 92 - Repeal of section 553

860. Clause 92 will repeal section 553 of the Corporations Law and substitute a new section 553 as well as proposed sections 553A to 553E. These sections will constitute Subdivision A - Admission to proof of debts and claims.

861. Proposed section 553 re-enacts those parts of existing subsection 553(1) which are not dealt with by other proposed provisions, and provides that in every winding up, all claims against the company (present or future, certain or contingent, ascertained or sounding only in damages) are admissible to proof against the company.

862. Proposed subsection 553(2) provides that amounts which a company becomes liable to pay, under section 91 of the ASC Law, after the relevant date are admissible in a winding up. The provision is consequential on the repeal of section 557 of the Corporations Law, which accorded a special priority on a winding up to the costs of an investigation by the ASC.

#### Proposed section 553A - Member cannot prove debt unless contributions paid

863. The Harmer Report recommended that a claim by a member not be admitted until all contributions payable by the member have been paid in full.

864. The section only applies in relation to a debt owed to a person in the person's capacity as a member of the company, such as a sum due to the person by way of dividends or profits. The section is not intended to apply to debts due to the person in his or her capacity as a creditor, in relation to such things as trade debts.

865. The proposed section provides that such a debt is not admissible to proof against the company unless the person has paid to the company or the liquidator all contributions that the person is liable to pay as a member of the company. An example will be unpaid contributions on partly-paid shares.

#### Proposed section 553B - Insolvent companies - penalties and fines not generally provable

866. Proposed section 553B provides that penalties or fines imposed by a court in respect of an offence against the law are not admissible to proof against an insolvent company. This provision is subject to proposed subsection 553B(2), which provides that an amount payable under a pecuniary penalty order or an inter-State pecuniary order within the meaning of the Proceeds of Crime Act 1987 is admissible to proof against an insolvent company.

#### Proposed section 553C - Insolvent companies 0 mutual credit and set-off

867. Proposed subsection 553C(1) provides that subject to subsection (2), where there have been mutual credits, mutual debts, or other mutual dealings between an insolvent company that is being wound up and a person who wants to have a debt or claim admitted against the company, account is to be taken of what is due from one party to the other in respect to those dealings and the sum due from one party is to be set off against any sum due from the other party, and only the balance of the account is admissible to proof against the company, or is payable to the company, as the case may be.

868. Proposed subsection 553C(2) provides that a person is not entitled under this section to claim the benefit of a set-off if, at the time of giving credit to the company or at the time of receiving credit from the company, the person had notice of the fact that the company was insolvent.

869. The proposed provision sets out the provisions of the Bankruptcy Act section 86 as it is applied at present to the winding up of insolvent companies by virtue of existing section 553.

#### Proposed section 553D - Debts or claims may be proved formally or informally

870. The Harmer Report recommended that the capacity of a liquidator to admit a claim without formality should be specified in the Corporations legislation.

871. Proposed subsection 553D(1) provides that a debt or claim must be proved formally if the liquidator, in accordance with the regulations, requires it to be proved formally.

872. Proposed subsection 553D(2) provides that a debt or claim that is not required to be proved formally may be proved formally or may be proved in some other way, subject to

compliance with the requirements of the regulations relating to informal proof of debts or claims.

873. Proposed subsection 553D(3) provides that a debt or claim is proved formally if it satisfies the requirements of the regulations relating to the formal proof of debts or claims.

Proposed section 553E - Application of provisions of the Bankruptcy Act to winding up of insolvent company

874. Proposed section 553E provides that subject to the Division and to sections 206RD and 279, in the winding up of an insolvent company the same rules are to prevail and be observed with regard to debts provable as are in force for the time being under the Bankruptcy Act in relation to the estate of a bankrupt person (but not including the rules in section 82 to 94 and in section 96 of the Bankruptcy Act). This provision is a narrower version of current subsection 553(2).

Subdivision B - Computation of debts and claims

Clause 93 - General rule - compute amount as at relevant date

875. Clause 93 will amend section 554 of the Corporations Law by extending subsection 554(1), which provides that the amount of a debt is to be computed at the 'relevant date', to claims as well as debts. The clause will also alter a reference to section 557 in subsection 554(2). As amended subsection 554(2) will refer to the provision equivalent to the repealed section 557, amended section 553.

Clause 94 - (insertion of sections 554A to 554J)

Proposed section 554A - Determination of value of debts and claims of uncertain value.

876. Proposed section 554A will give effect to the recommendation of the Manner Report that a mechanism be provided for the estimation of a debt or claim of uncertain value.

877. Proposed subsection 554A(1) provides that the section applies where in the winding up of the company the liquidator admits a debt or claim that does not bear a certain value.

878. Proposed subsection 554A(2) provides that the liquidator

- must make an estimate of the value of the debt or claim; or
- refer the question of the value of the debt or claim to the Court,

879. Proposed subsection 554A(3) provides that a person who is aggrieved by the liquidator's estimate of the value of the debt or claim may appeal to the Court against the liquidator's estimate. The proposed subsection requires such an application to be in accordance with the regulations.

880. Proposed subsection 554A(4) provides that, where the liquidator refers the question of the value of the debt or claim to the Court, or a person appeals to the Court against the liquidators estimate of the value of the debt or claim, the Court must make an estimate of the value of the debt or claim or determine a method to be applied by the liquidator in working out the value of the debt or claim.

881. Proposed subsection 554A(5) provides that if the Court determines a method to be applied by the liquidator in working out the value of the debt or claim, the liquidator must work out the value of the debt or claim in accordance with that method.

882. Proposed subsection 554A(6) provides that where the Court has determined the method to be applied by the liquidator in working out the value of the debt or claim and any person has been aggrieved by the way in which that method has been applied by the liquidator, then the person may, in accordance with the regulations, appeal to the Court against the way in which the method was applied.

883. Proposed subsection 554A(7) provides that where a person appeals to the Court against the way in which the liquidator applied the method referred to above and the Court is satisfied that the liquidator did not correctly apply the method, the Court itself must work out the value of the debt or claim in accordance with the method.

884. Proposed subsection 554A(8) provides that, for the purposes of the Division, the amount of the debt or claim is taken to be the value estimated or worked out under the section.

#### Proposed section 554B - Discounting of debts payable after relevant date

885. Proposed section 554B provides that the amount of debt that is admissible to proof, but as at the relevant date was not payable by the company until an ascertained or ascertainable date after the relevant date, is an amount payable reduced by an amount of discount calculated in accordance with the regulations. The ascertained or ascertainable date is referred to in the proposed section as the 'future date'.

#### Proposed section 554C - Conversion into Australian currency of foreign currency debts or claims

886. Proposed section 554C implements the recommendation of the Harmer Report that the principle which represents the law in relation to the valuation of a debt denoted in a foreign currency, as enunciated in the English Courts, be codified in the Corporations Law.

887. Where a debt is denominated in a foreign currency the rule in England appears to be that the date for conversion is the date upon which the insolvency administration actually commenced. In Australia, there is a lack of authority on the question, although there is some suggestion that the conversion date is the date when the debt became due.

888. The Harmer Report argued that the recommendation was appropriate as:

- it brings about certainty in operation of the law and

- on insolvency, the contractual right of the creditor to be paid by the debtor becomes the statutory right to share a common fund; therefore, the size of the fund must be ascertained as soon as possible to enable satisfaction of the insolvent liabilities. The date of the actual commencement of the insolvency administration is the earliest convenient date for making this conversion.

889. Although not recommended by the Harmer Report, to achieve greater commercial certainty, the provision is made subject to any contrary provision stipulated in the instrument creating the debt

890. Proposed subsection 554C(1) provides that the section applies where an admissible debt or claim is denominated in a foreign currency. If the company and the creditor had agreed on a conversion mechanism, that mechanism is allowed to operate (subsection (2)). If not, the appropriate exchange rate is “the opening carded on demand airmail buying rate in relation to the foreign currency available at the Commonwealth Bank of Australia on the relevant date” (subsection (3)). This definition is intended to define with precision the exchange rate which is appropriate to use for the conversion of the currency. The exchange rate is defined in relation to the Commonwealth Bank of Australia rather than the Reserve Bank of Australia as a greater number of currencies are listed by the Commonwealth Bank of Australia. The situation where the exchange rate fluctuates during the course of the day is met by providing that the appropriate exchange rate is the opening carded rate. This rate is usually provided by the Bank by about 9.30 am on the day on question.

#### Subdivision C - Special provisions relating to secured creditors of insolvent companies

891. This Subdivision will pick up sections 90 to 94 of the Bankruptcy Act, which deal with the rights of secured creditors. The provisions were originally intended to overcome difficulties arising within what was known as the doctrine of election, which related to the capacity of a secured creditor to both retain his or her security and also prove in the winding up. The provisions established a regime in which the secured creditor retains his or her security or proves in the winding up for the value of the debt or retains the security and proves for the value of the difference between the debt and the value of the security. The provisions were previously incorporated into the Corporations Law by reference under existing section 553.

#### Proposed section 554D - Application of Subdivision

892. Proposed subsection 554D(1) provides that Subdivision C applies in relation to the proof of a secured debt in the winding up in insolvency of a company.

893. Proposed subsection 554D(2) provides that for the purposes of the application of the Subdivision in relation to a secured debt of an insolvent company that is being wound up, the amount of the debt is taken to be the amount of the debt as at the relevant date (as worked out in accordance with Subdivision B - ‘Computation of debts and claims’).

#### Proposed section 554E - Proof of debt by secured creditor

894. Proposed section 554E provides that the secured creditor is entitled to prove the whole or the part of the secured debt in the winding up of the company only in accordance with the Subdivision (proposed sections 554E to 554J). If the secured creditor surrenders the security to the liquidator for the benefit of the creditors generally, the secured creditor may then prove for the whole of the secured debt. If the secured creditor realises the security, the secured creditor may then prove for any balance due after deducting the amount realised (unless the liquidator is not satisfied that the realisation has been effected in good faith and in a proper manner). If the secured creditor has not realised or surrendered the security, the secured creditor may estimate its value, and prove for the balance due after deducting the value so estimated.

#### Proposed section 554F - Redemption of security by liquidator

895. Proposed section 554F operates where the secured creditor has, under proposed section 554E(5), lodged a proof of debt in respect of the balance owing after deducting the creditor's estimate of the value of the security from the debt due. Under proposed subsection 554F(2), the liquidator may at any time redeem the security on payment to the creditor of the amount of the creditor's estimate of its value. Under proposed subsection 554F(3), if the liquidator satisfied with the amount of the creditor's estimate, the liquidator may require the property comprised in the security to be offered for sale on such terms and conditions as are agreed to by the creditor and the liquidator. If the property is offered for sale by public auction then under subsection 554F(4) both the creditor and the liquidator are entitled to bid for and purchase the property.

896. Under proposed subsection 554F(5), the creditor may at any time, by notice in writing, require the liquidator to elect whether to exercise the power to redeem the security or to require it to be sold. If the liquidator does not, within three months of receiving the notice, notify the creditor in writing that the liquidator elects to exercise the power, then the liquidator is not entitled to exercise it and subject to proposed subsection 554F(6), any equity of redemption or other interest in the property comprised in the security that it is vested in the liquidator then vests in the creditor. Where this occurs, the amount of the creditor's debt is, for the purpose of the Division, taken to be reduced by the amount of the creditor's estimate of the value of the security. Under proposed subsection 554F(6), the vesting of an equity of redemption or other interest in the property because of subsection (5) is subject to compliance with any law requiring the transmission of such interest in the property to be registered.

#### Proposed section 554G - Amendment of valuation

897. Proposed section 554G provides that where a secured creditor has lodged a proof of debt in respect of a balance due after deducting his estimate of the value of the security, the creditor may at any time apply to the liquidator or the Court for permission to amend the proof of debt by altering the estimated value. Under proposed subsection 554G(2), the Court may permit a creditor to amend a proof of debt if it is satisfied either that the valuation of the security was made in good faith on a mistaken basis or that the value of the security has changed since the estimate was made. Such amendment may be made on such terms as the Court thinks just and equitable.

### Proposed section 554H - Repayment of excess

898. Proposed section 554H applies where a creditor has amended a proof of debt under proposed section 554G and has in the winding up of the company received an amount in excess of the amount to which the creditor would have been entitled under the amended proof of debt. Where this occurs, the creditor must, under proposed subsection 554H(1), without delay, repay the amount of the excess to the liquidator.

899. Proposed subsection 554H(2) provides that where a creditor has amended a proof of debt under proposed section 554G and has received by way of distribution in the winding up of the company less than the amount to which the creditor would have been entitled under the amended proof, the creditor is entitled to be paid the amount of the deficiency before any remaining money is applied in the payment of future distributions. Where this occurs, the creditor is not entitled to affect any distribution made before the amendment of the proof of debt.

### Proposed section 554J - Subsequent realisation of security

900. Proposed section 554J provides that, where a secured creditor has in accordance with section 554E lodged a proof of debt in respect of the balance due after deducting the creditor's estimate of the value of the security and subsequently the creditor realised such a security, or the security is realised under section 554F, the net amount realised is to be substituted for the estimate of the value of the security and section 554H applies as if the proof of debt had been amended accordingly under section 554G.

### Subdivision D - Priorities

#### Clause 95 - Debts and claims proved to rank equally except as otherwise provided

901. Clause 95 will amend section 555 of the Corporations Law by inserting 'and claims' after 'debts'. The amendment is intended to clarify the law so that it is clear that both claims and debts rank equally if the property of a company is insufficient to meet them all in full on a winding up in insolvency. The importance of this amendment is underlined by the capacity of unliquidated claims in tort to be admissible in a winding up.

#### Clause 96 - Priority payments

902. Existing section 555 embodies the 'pari passu' rule in a winding up by providing that all debts proved in a winding up rank equally and if the property of the company is insufficient to meet them in full, they are to be paid proportionately. However, existing section 556 displaces the 'pari passu' rule by specifying the order of priority in which certain preferred unsecured debts are to be paid from the realised assets of an insolvent company.

903. Current paragraph 556(1)(a) accords first priority to administration costs, namely the costs, charges and expenses of the winding up, including the taxed costs of an applicant payable under section 466, the remuneration of the liquidator and the costs of any audit carried out under section 539. If the winding up was preceded by the appointment of a provisional liquidator, the

administration costs of the provisional winding up rank next, under current paragraph 556(1)(b).

904. As noted by the Harmer Report, the rationale for the priority of administration costs is that creditors have a community of interest in having a common agent to maximise a fund for distribution among them. The Report referred to the view of the High Court in In Re Universal Distributing Co Limited (In Liquidation) (1933) 48 CLR 171 that where persons are entitled to share in the distribution of a fund, the costs and expenses of recovering, caring for, preserving and realising assets to create the fund axe a fair charge on the fund.

905. However, the Report also noted that no priority is accorded in the Corporations Law or the Corporations Regulations among the various components of the costs, charges and expenses of a winding up. Problems arise where there are insufficient funds to meet all these administration costs. Thus the Report recommended that there should be the following priority ranking of the costs, charges and expenses of administration:

- first, fees (other than remuneration) and expenses incurred by a liquidator, ‘interim liquidator’ (viz a provisional liquidator) or administrator in protecting or realising assets or carrying on the business of the company;
- second, costs of the application for winding up;
- third, costs of the report as to the company’s affairs under current section 475;
- fourth, costs of an audit of the liquidator’s accounts under current section 539;
- fifth, other necessary disbursements and the remuneration of the liquidator, ‘interim liquidator’ or administrator (these costs to rank *par passu*); and
- sixth, out-of-pocket expenses of the committee of inspection.

906. Clause 96 will implement the Harmer Report’s recommendation on this topic.

907. Paragraph 96(a) will omit current subsection 556(1) and substitute subsections (1), (1A), (1B) and (1C).

#### Proposed paragraph 556(1)(a)

908. Proposed paragraph 556(1)(a) accords first priority to the expenses properly incurred by the ‘relevant authority’ (to be defined in subsection 556(2) as amended by paragraph 96(b) to mean a liquidator, a provisional liquidator, an official manager, an administrator of a company or an administrator of a deed of company arrangement) in preserving, realising or getting in the assets of the company or in carrying on the business of the company. Excluded from the priority to be accorded by paragraph (1)(a) will, however, be ‘deferred expenses’ (to be defined in subsection 556(2), as amended by paragraph 96(b) to mean remuneration or fees for services payable to the ‘relevant authority’; expenses incurred by the relevant authority for the services of his or her partnership, employees or painters; and expenses incurred by the relevant authority

that it is reasonable to expect that relevant authority or his or her partnership, employee or partner could have instead supplied). The effect of the exclusion will be to exclude remuneration payable directly and indirectly to a liquidator, provisional liquidator, official manager, administrator of a company or administrator of a deed of company arrangement, including the professional fees of their partners and the salary or other costs incurred by them in paying their employees or the employees of 'service' companies or other entities that may be interposed between them and the company that is being wound up.

909. However, the term 'expenses' is otherwise intended to have a wide meaning, to include all payments properly made by the liquidator, provisional liquidator, official manager, administrator of a company or administrator of a deed of company arrangement including the payment of the fees of persons such as solicitors, real estate agents and stocktaking agents who are independent of the liquidator, provisional liquidator, official manager, administrator of a company or administrator of a deed of company arrangement and who are engaged by them for the purposes of preserving, realising or getting in the assets of the company or carrying on the business of the company.

Proposed paragraph 556(1)(b)

910. If the Court ordered the winding up, priority is next accorded to the costs of the application for the winding up order, including the taxed costs of an applicant payable under section 466.

Proposed paragraph 556(1)(c)

911. Where a company that has been under administration is wound up, priority is next accorded to the debts for which proposed paragraph 443D(a) entitles the administrator to be indemnified. Excluded from the priority to be accorded by paragraph (1)(c) will, however, be expenses covered by proposed paragraph (1)(a) and 'deferred expenses' (to be defined in subsection 556(2)).

Proposed paragraph 556(1)(d)

912. If the winding up began within 2 months of official management of the company, priority is next accorded to the debts of the company properly incurred by the official manager in carrying on the business of the company. Once again, expenses covered by proposed paragraph (1)(a) and 'deferred expenses' (to be defined in subsection 556(2)) will be excluded from the priority to be accorded by paragraph (1)(d).

Proposed paragraph 556(1)(da)

913. If the Court ordered the winding up, priority is next accorded to the costs and expenses of the making of a report as to the company's affairs under current section 475.

Proposed subsection 556(1)(db)

914. Priority is next accorded to the costs of any audit of a liquidator's half yearly accounts required by the ASC under current section 539.

Proposed subsection 556(1)(dc)

915. If the winding up began within 2 months of official management of the company, priority is next accorded to the remuneration of any auditor appointed in accordance with Part 3.7.

Proposed paragraph 556(1)(dd)

916. Priority is next accorded to any other expenses (other than deferred expenses) properly incurred by the liquidator, provisional liquidator, official manager, administrator of a company or administrator of a deed of company arrangement.

Proposed paragraph 556(1)(de)

917. Priority is next accorded to 'deferred expenses', namely the remuneration excluded from priority under proposed paragraph (l)(a).

Proposed paragraph 556(1)(df)

918. Priority is next accorded to the expenses incurred by a member of a committee of inspection appointed under section 548.

Proposed paragraph 556(1)(e)

919. Priority is next accorded, subject to proposed subsection (1A), to wages and superannuation contributions, payable by the company in respect of services rendered to the company by employees before the relevant date.

920. The effect of the amendment to current paragraph 556(1)(e) is to make it clear that superannuation contributions are given the same priority as wages for the purposes of priority payments made under section 556. Thus, where an employee has foregone wage increases in exchange for enhanced superannuation contributions by his or her employer, the employee will not be disadvantaged in a winding up.

921. Proposed subsection 556(1A) provides that the total amount paid in respect of wages or superannuation contributions under paragraph 556(1)(e), to or in respect of an excluded employee, must be such that the part of that total that is attributable to days that are non-priority days does not exceed \$2,000. Proposed subsection 556(1A) implements, in part, the Harmer Report's recommendation that it be made clear in the legislation that the limits applying to the debts which may be paid in priority to excluded employees only apply in relation to the amount of the debt which arose during the period in which the person was an excluded employee. The Harmer Report's recommendations on this issue are discussed in detail in the paragraphs of this memorandum relating to proposed subsection 556(1A), (1B) and (1C).

Proposed paragraph 556(1)(f)

922. Proposed paragraph 556(1)(f) replicates existing paragraph 556(1)(f) and accords priority next to amounts due in respect of injury compensation, the liability for which arose before the relevant date (defined in section 9 as amended by proposed clause 29(g)).

Proposed paragraph 556(1)(g)

923. Proposed paragraph 556(1)(g) replicates current paragraph 556(1)(g) and accords priority next to all amounts due on or before the relevant date (defined in section 9 as amended by proposed clause 29(g)) to or in respect of any employee for leave of absence, being amounts due by virtue of an industrial instrument.

924. Proposed subsection 556(1B) provides that the total amount paid in respect of leave of absence under proposed paragraph 556(1)(g) to a person must be such that the part of the total attributable to days that are non-priority days (a definition of which is to be inserted in subsection 556(2) by clause 96(b)) does not exceed \$1,500. Proposed subsection 556(1B) implements, in part, the Harmer Report's recommendation that it be made clear in the legislation that the limits applying to the debts which may be paid in priority to excluded employees only apply in relation to the amount of the debt which arose during the period in which the person was an excluded employee. The Harmer Report's recommendations on this issue are discussed in detail in the paragraphs of this memorandum relating to proposed subsection 556(1A), (1B) and (1C).

Proposed paragraph 556(1)(h)

925. Proposed paragraph 556(1)(h) replicates current paragraph 556(1)(h) and accords priority next to retrenchment payments payable to employees of the company.

926. Proposed subsection 556(1C) provides that a payment to an excluded employee under proposed paragraph 556(1)(h) must not include an amount attributable to non-priority days (a definition of which is to be inserted in subsection 556(2) by clause 96(b)). Proposed subsection 556(1C) also implements, in part, the Harmer Report's recommendation that it be made clear in the legislation that the limits applying to the debts which may be paid in priority to excluded employees only apply in relation to the amount of the debt which arose during the period in which the person was an excluded employee. The Harmer Report's recommendations on this issue are discussed in detail in the paragraphs of this memorandum relating to proposed subsections 556(1A), (1B) and (1C).

927. Current paragraph 556(1)(j) is to be omitted. This paragraph currently gives a priority over all other unsecured debts (except those at current paragraphs 556(1)(a) - (h)) to any amount that, pursuant to an order under section 91 of the ASC Law, the company was at the relevant date under an obligation to pay. Section 91 of the ASC Law provides for the ASC to make orders requiring a person to pay the expenses of an investigation by the ASC where a person is

convicted of an offence or subject to a court order in a proceeding begun as a result of the investigation.

928. The consequence of the abolition of this priority is that, while the ASC would still be able to claim the costs or expenses owed to it by the company, the debt would not rank any higher than other unsecured debts. The abolition of this priority was recommended by the Harmer Report.

#### Proposed subsections 556(1A), (1B) and (1C)

929. Proposed subsections 556(1A), (1B), and (1C). relate to provisions which restrict the special priorities accorded to employees under section 556 where the particular employee is an 'excluded employee', (defined in current subsection 556(2) to mean a person who, within 12 months before the relevant date, was a director, a spouse of such a director or a relative of such a director).

930. The proposed insertion of subsections 556(1A), (1B), and (1C) stems from a recommendation of the Harmer Report that it be made clear in the legislation that the limits applying to the debts which may be paid in priority to excluded employees (presently listed at paragraphs 556(1)(e), (g) and (h)) only apply in relation to the amount of the debt which arose during the period in which the person was a director or spouse or relative of a director.

931. This recommendation is targeted at the injustice that could arise where, for example, an employee becomes a director the day before the relevant day. Proposed subsection 556(1A) provides that the total amount paid in respect of wages or superannuation contributions (paragraph 556(1)(e)) in respect of an excluded employee must be such that the part of that total that is attributable to days that are non-priority days does not exceed \$2,000. The expression 'non-priority day' is to be defined in subsection 556(2) (as amended by proposed paragraph 96(b)) to refer to days when the excluded employee was a director, or a spouse or a relative of a director, of the company. The amount of \$2,000 is the same as the amount presently prescribed by paragraph 556(1)(e).

932. Proposed subsection 556(1B) provides, similarly, that the total amount paid in respect of leave of absence (paragraph 556(1)(g)) to an excluded employee must be such that the part of the total attributable to days that are limited priority days does not exceed \$1,500. The amount of \$1,500 is the same as the amount presently prescribed by paragraph 556(1)(g).

933. Proposed subsection 556(1C) provides that a payment, being a retrenchment payment under paragraph 556(1)(h) to an excluded employee, must not include any amount that is attributable to non-priority days.

#### Clause 96(b)

934. Clause 96(b) will insert definitions of the terms 'deferred expenses', 'non-priority day', 'official manager', 'relevant authority', 'spouse' and 'superannuation contributions' in subsection 556(2).

‘deferred expenses’

935. ‘Deferred expenses’ will be defined to mean remuneration or fees for services payable to the ‘relevant authority’ (also to be defined in subsection 556(2)); expenses incurred by the relevant authority for the services of his or her partnership, employees or partners; and expenses incurred by the relevant authority that it is reasonable to expect that relevant authority or his or her partnership, employee or partner could have instead supplied). The effect of the definition will be to classify as ‘deferred expenses’ remuneration payable directly and indirectly to a liquidator, provisional liquidator, official manager, administrator of a company or administrator of a deed of company arrangement, including the professional fees of their partners and the salary or other costs incurred by them in paying their employees or the employees of ‘service’ companies or other entities that may be interposed between them and the company that is being wound up.

‘non-priority day’

936. ‘Non-priority day’ will be defined, in relation to an ‘excluded employee’ (already defined in current subsection 556(2)) to mean a day on which an excluded employee was a director, or a spouse or a relative of a director, of the company, even if the day was more than 12 months before the ‘relevant date’ (defined in section 9 as amended by clause 29(g)).

‘official manager’

937. The term ‘official manager’, in section 556, will include a deputy official manager.

‘relevant authority’

938. ‘Relevant authority’ will mean a liquidator, a provisional liquidator, an official manager, an administrator of a company or an administrator of a deed of company arrangement.

‘spouse’

939. The term ‘spouse’, in section 556, will include a defacto spouse. This proposed amendment implements the Harmer Report’s recommendation that a defacto spouse of a director of a company come within the definition of an excluded employee.

‘superannuation contribution’

940. The term ‘superannuation contribution’ is to be defined to mean a contribution to a fund for the purposes of making superannuation benefits for an employee or the employee’s dependants.

Clause 97 - Repeal of section 557

941. Clause 97 will repeal section 557 of the Corporations Law. This is consequential upon

the abolition of the priority over unsecured debts of a debt pursuant to an order under section 91 of the ASC Law which is to be effected by the repeal of current paragraph 556(l)(j).

#### Clause 98 - Debts of a class to rank equally

942. Clause 98 will amend section 559 of the Corporations Law to make it clear that the debts of a class referred to in each of the paragraphs of subsection 556(1) rank equally between themselves and shall be paid in full or proportionately if the company's property is insufficient to meet them. The effect of this provision, in the case of paragraph 556(l)(de), for example, is that there will be no priority as between the deferred expenses payable to each of a liquidator, provisional liquidator, official manager, administrator of a company and administrator of a deed of company arrangement. Thus, if there are two or more 'relevant authorities' and the available funds are insufficient to satisfy the claims of each, they are to be paid rateably.

#### Clause 99 - Advances for company to make priority payments in respect of employees

943. Clause 99 will amend section 560 of the Corporations Law by inserting "or of superannuation contributions (within the meaning of section 556)" after "wages".

#### Clause 100 - Application of proceeds of contracts of insurance

944. Clause 100 will amend subsection 562(1) of the Corporations Law by inserting after the word 'insurance' the expression '(not being a contract of reinsurance)'. The amendment will clarify the existing law so that section 562 does not apply to contracts of reinsurance. Instead, specific provision is made for contracts of reinsurance under proposed section 562A.

945. Section 562 of the Corporations Law presently provides that where a company has entered an insurance contract before the relevant date to provide against liability to third parties, and such liabilities are incurred by the company, the benefit of the insurance contract will be paid to the third party rather than to the creditors of the company as a whole. Section 562 also provides that this provision does not limit the rights of the third party in respect of any shortfall between the amount paid under the insurance premium and the liability of the company to the third party.

946. The Harmer Report identified a number of difficulties which arise in relation to the application of section 562 to contracts of reinsurance. Reinsurance is the process whereby an insurer transfers all or part of its risk to another insurer. The Report noted that a contract of insurance, under section 562 has been held to include a contract of reinsurance (Re Dominion Insurance Company Australia Ltd [1980] 1 NSWLR 271; Re Palmdale Insurance Limited (No.3) [1986] VR 439). The Harmer Report noted that the inclusion of contracts of reinsurance under section 562 may lead to problems if the company being wound up is an insurance company. The Report listed the difficulties as:

- identifying third party claimants who are entitled to the benefit of reinsurance;
- where third parties are both creditors and debtors, the applicability of the law of

set-off in relation to the proceeds of an insurance policy;

- the possibility that surplus money will result from the failure of the third parties to lodge claims which were reinsured; and
- the inequity of only those persons whose contracts of insurance are backed by reinsurance being able to benefit

947. The Report also noted that reinsurance should be viewed as no more than the means adopted by an insurer to satisfy itself that it can pay claims which might be made under all policies which it has issued irrespective of whether it has reinsured its risk under each of these policies.

948. The Harmer Report recommended that, unless a court orders otherwise, section 562 should not apply to a contract of reinsurance. The Report also recommended that the court should take into account, in deciding whether to make an order, the circumstances under which the contract of reinsurance was entered into, including any contract, arrangement or understanding between the insured and the company that the company would reinsure the risk, and any prejudice likely to be suffered by the insured if the order is not made.

#### Clause 101 – (Application of proceeds of contracts of reinsurance)

949. Clause 101 will insert a new section 562A into the Corporations Law to make specific provision for contracts of reinsurance,

950. The proposed provision deals with the problems identified in the Harmer Report by providing specifically for the disposition of moneys due under a contract of reinsurance and by providing for the Court to make orders in accordance with the grounds proposed by the Harmer Report where such a disposition would be inappropriate or unjust

951. Proposed subsection 562A(1) provides that the section applies where a company is insured under a contract of reinsurance entered into before the relevant date against the liability to pay amounts in respect of a relevant contract of insurance or relevant contracts of insurance and an amount in respect of that liability has been or is received by the company under the contract of reinsurance.

952. Proposed subsection 562A(2) establishes the general rule that the proceeds of contracts of reinsurance are to be applied to all relevant insurance contracts. It provides that, again subject to proposed subsection 562A(4), the amount received is to be used in the satisfaction of amounts payable under the contracts of insurance in priority to debts mentioned in section 556. Where the amount received under the contract of reinsurance is insufficient to pay such claims in full, then, again subject to proposed subsection 562A(4), the liquidator must pay out the amount received proportionately, to all the persons to whom the company is liable under such contracts of insurance. This is achieved through proposed subsection 562A(3) which sets out a formula which, when applied to the amount of money recovered by the company under a contract of reinsurance, provides for the proportionate distribution of the proceeds. The formula is the

product of the reinsurance payment and the ratio of the particular amount owed and the total amount owed. 'Particular amount owed' is defined to mean the amount payable to the person under the contract of insurance, 'total amount owed' is defined to mean the total of all the amounts payable by the company under contracts of insurance entered into by the company as insurer before the 'relevant date' and 'reinsurance payment' is defined to mean the amount received under the contract of reinsurance less any expenses of the getting in of that amount.

953. Proposed subsection 562A(4) provides that on the application of a beneficiary under the contract of insurance the Court may make an order to the effect that where proposed subsection 562A(3) applies, and only a proportion of the amount owed under the contract is to be paid, the court may order that a different amount be paid.

954. Proposed subsection 562A(5) provides for the grounds on which the court may make such an order. In deciding whether it should make an order under subsection 562A(4) in relation to an amount received under a contract of reinsurance, the matters to which the court may have regard include:

- whether it is possible to identify particular relevant contracts of insurance as being the contracts in respect of which the contracts of reinsurance were entered into;
- whether it is possible to identify persons who can be said to have particular relevant contracts of insurance protected by reinsurance;
- whether particular relevant contracts of insurance include statements to the effect that the contracts are to be protected by reinsurance; and
- whether a person to whom an amount is payable under a relevant contract of insurance would be severely prejudiced if subsections (2) and (3) applied to the amount received under the contract of reinsurance.

955. These factors are intended to bring out possible situations where a strictly proportional distribution would not be appropriate, either because some policy-holders took particular action to secure reinsurance cover while others did not, or because some policy holders might be particularly and severely prejudiced (compared with other policy-holders) if a strictly proportional distribution was implemented. Proposed subsection 562A(6) mirrors existing subsection 562(2) and provides that if receipt of payment under proposed section 562A only partially discharges a liability of a company to a person, nothing in the section affects the rights of the person in respect of the balance of the liability.

956. Proposed subsection 562A(7) provides that the section has effect despite any agreement to the contrary. This mirrors existing subsection 562(3).

#### Clause 102 - Insertion of proposed sections 563A, 563B and 563C

#### Proposed section 563A - Members' debts to be postponed until other debts and claims satisfied

957. Proposed section 563A provides that the payment of debts due to members in their capacity as members is postponed to the payment of debts to persons other than as members. Section 525 of the Corporations Law already has this effect and the Harmer Report recommended that that provision be re-located to the part of the Corporations Law dealing with priority of creditors. Proposed section 553A replaces section 525, which is proposed to be repealed by clause 86.

#### Subdivision E - Miscellaneous

##### Proposed section 563B - Interest on debts and claims from relevant date to date of payment

958. The Harmer Report recommended that

- interest should be payable prior to the commencement of the winding up at whatever rate is provided for in a particular contract
- after that date all creditors should be permitted only a statutory rate of interest on their debts after the payment in full of all admitted claims other than claims by members. A statutory rate of interest should then be payable from the commencement of the winding up to the day on which payment is made.

959. Proposed subsection 563B(1) provides that if in the winding up of a company, the liquidator pays an amount in respect of an admitted debt or claim, there is also payable to the debtor or claimant as a debt payable in the winding up, interest at the prescribed rate on the amount of the payment in respect of the period starting on the relevant date and ending on the day on which the payment is made.

960. Proposed subsection 563B(2) provides that subject to subsection (3) payment of the interest is to be postponed until all other debts and claims in the winding up have been satisfied, other than debts owed to members of the company as members of the company (whether by way of dividends, profits or otherwise).

961. Proposed subsection 563B(3) provides that if the admitted debt or claim is a debt to which proposed section 554B applied (discount applied to debts payable at a future date) subsection (2) does not apply to postpone the payment of so much of the interest as is attributable to the period starting at the relevant date and ending on the earlier of the day on which the payment is made and the future date within the meaning of proposed section 554B. This means that where the debt, payable at a future date, has been discounted at the prescribed rate for the purposes of attributing a value to it as at the relevant date, any interest accruing on that amount under this section will not be postponed where the interest relates to the period between the relevant date and the earlier of when the payment is made or the date when it was due.

##### Proposed section 563C - Debt subordination

962. The Harmer Report recommended that the operation of sections 555 and 556 (which established general rules for priority among creditors) should not prevent a creditor agreeing that the creditor's particular debt should be deferred until another creditor's debt is paid in full or in part.

963. Section 555 of the Corporations Law provides that all debts proved in a winding up rank equally, and if the property of the company is insufficient to meet them in full they should be paid proportionately. The Harmer Report noted that conflict with this provision may arise if a creditor of a company has agreed to subordinate (that is, postpone) payment of a debt due to the creditor to the claims of one or more other creditors. Such arrangements allow the latter creditors a priority in payment in the event of the winding up of a company. The subordination of debts is not an uncommon commercial device and has advantages to both borrowers and lenders. The Harmer Report noted that the issue was whether the terms of a contract providing subordination should prevail over the clear mandate of section 555, particularly as it might affect the duty of an insolvency administrator to apply that provision. The Harmer Report also noted that there was no clear Australian case law to provide guidance in relation to the operation of the section.

964. Proposed section 563C(1) provides that nothing in the Division renders a debt subordination by a creditor of the company unlawful or unenforceable except to the extent that debt subordination would disadvantage any creditor of the company who was not a party to or otherwise concerned in the debt subordination.

965. Proposed subsection 563C(2) defines 'debt subordination' to mean an agreement or declaration by a creditor of the company, however expressed, to the effect that, in specified circumstances, a specified debt owed by the company to the creditor or a specified part of such a debt will not be repaid until debts owed by the company to another creditor or creditors have been repaid in full.

#### Clause 103 – (Amendment of heading, repeal of existing sections and insertion of new section)

966. Clause 103 will replace the heading to Division 7 of Part 5.6 with:

'Division 7- Effect on certain transactions'

#### Division 7 - Effect on certain transactions

##### Clause 104 - Undue preference

967. Clause 104 will amend section 565 of the Corporations Law by

- inserting in subsection (1) 'before the commencement of Part 5.78' after 'incurred';
- by omitting paragraphs (2)(a) and (b) and substituting respectively:
  - 'if the company was under official management at any time during the 6

months ending on the relation-back day - the day on which the official management commenced; or'

- 'otherwise the relation-back day'

- by omitting from subsection (3) everything after 'bankrupt is' and substituting 'the relation back thy'; and
- by omitting from subsection (4) 'Any' and substituting 'Subject to Part 5.3A'.

#### Clause 105 - Effect of floating charge

968. Clause 105 will amend section 566 of the Corporations Law by omitting 'within 6 months before the commencement of the winding up' and substituting 'before the commencement of Part 5.7B and within 6 months before the relation-back day'.

#### Clause 106 - Liquidator's right to recover in respect of certain transactions

969. Clause 106 will amend section 567 of the Corporations Law by:

- omitting from subsections (1) and (2) the words 'within a period of 4 years before the commencement of the' and substituting 'before the commencement of Part 5.7B and within 4 years before the relation-back day in relation to a'
- by omitting from paragraph (5)(a) the words 'within the period 6 months before the commencement of the' and substituting 'before the commencement of Part 5.7B and within 6 months before the relation back day in relation to a'.

#### Clause 107 - Insertion of heading

970. Clause 107 will insert the following heading before section 568:

'Division 7A - Disclaimer of onerous property'

#### Division 7A - Disclaimer of onerous property

971. The Harmer Report considered it desirable that the provisions for disclaimer of property that is of no benefit to an insolvent estate be the same where possible in personal bankruptcy and corporate insolvency. The three issues in relation to which it considered a greater degree of uniformity could be achieved were:

- property which may be disclaimed;
- time limits for disclaiming property; and
- the time from which a disclaimer operates.

972. In relation to the issue of property which may be disclaimed, one of the main differences between personal bankruptcy and corporate insolvency identified by the Harmer Report is that, under section 133(1A) of the Bankruptcy Act, a trustee in bankruptcy can disclaim any contract (although under section 133(5A) of the Bankruptcy Act, the leave of the Court must be obtained for disclaiming a contract other than an unprofitable contract). However, under current paragraph 568(1)(d) of the Corporations Law, a liquidator can only disclaim unprofitable contracts.

973. The Harmer Report also recommended that the definition of property that may be disclaimed in both personal bankruptcy and corporate insolvency include property which is unsaleable or not readily saleable or is such that it may give rise to a liability to pay money or perform any other onerous act

974. In relation to the issue of time limits for disclaiming property, the Harmer Report recommended that the time limit of 12 months presently applying to the exercise of the power of disclaimer in the winding up of an insolvent company should be abolished. Under existing subsection 568(2), a liquidator must exercise the power of disclaimer within 12 months after the commencement of the winding up or 12 months after the existence of the property which it is desired to disclaim has come to the knowledge of the liquidator. A similar restriction was abolished in personal bankruptcy as a result of the recommendations of the Clyne Committee. The Cork Committee recommended against abolition of the time limit in the United Kingdom due to the uncertainty created in the minds of proprietors, landlords and creditors by the existence of potentially disclaimable property, even though it acknowledged that such persons can give notice to the insolvency administrator requiring the administrator to decide within a short period whether to disclaim or not. The Harmer Report considered that, despite the reservations of the Cork Committee, such a power to resolve any uncertainty (existing under current subsection 568() of the Corporations Law and to be retained) overcomes the objection to abolition of the time limit.

975. Clause 108 will implement the Harmer Report's recommendations in relation to the two issues:

- property which may be disclaimed; and
- time limits for disclaiming property.

976. The Harmer Report's recommendation in respect of the third issue, the time from which a disclaimer operates, will be implemented by proposed sections 568A, 568B and 568C.

#### Clause 108 - Disclaimer by liquidator application to Court by Darts' to contract

977. Clause 108 will omit current subsections 568(1) to (7) and substitute new subsections (1), (1A) and (1B).

978. Proposed subsection 568(1) retains the categories of property that a liquidator may

disclaim in current paragraphs 568(1)(a), (b) and (c), and adds the following categories of property that may be disclaimed:

- property that may give rise to a liability to pay money or fulfil some other onerous obligation;
- property where it is reasonable to expect that the costs of realising the property would exceed the proceeds of realising the property (this paragraph is based upon subsection 133(1AB) of the Bankruptcy Act) and
- a contract (although leave of the Court is required under proposed subsection 568(1A) to disclaim other than unprofitable contracts).

979. Proposed paragraph 568(1)(g) provides that, except in the case of a contract, the onerous property may be disclaimed, whether or not the liquidator has tried to sell the property, has taken possession of it or exercised an act of ownership in relation to it. Proposed paragraph 568(1)(h) provides that a contract may be disclaimed, whether or not the company or the liquidator has tried to assign, or has exercised rights in relation to, the contract

980. In omitting existing subsection 568(2), paragraph 108(a) will remove the 12 month time limit for exercise of the power of disclaimer.

981. Proposed subsection 568(1A) provides that a liquidator cannot disclaim a contract (other than an unprofitable contract or a lease of land) except with the leave of the Court.

982. Proposed subsection 568(1B) provides that upon an application for leave by the liquidator, the Court may grant leave subject to such conditions as it considers just and equitable and make such orders in connection with matters arising under or relating to the contract as it considers just and equitable.

983. Paragraph 108(b) will omit subsections 568(11) and 568(12). Proposed subsection 568F(1) replaces existing subsection 568(11), and proposed subsection 568D(2) replaces existing subsection 568(12).

#### Clause 109 – (Insertion of new sections 568A to 568F and heading)

##### Proposed section 568A - Liquidator must give notice of disclaimer

984. The Harmer Report recommended that provision for public notification of a disclaimer in the case of personal bankruptcy should be extended to corporate insolvency. However, the emphasis should shift from notification of a public official to the notification of persons having an interest in the relevant properties. The Harmer Report made the following recommendations for the time from which disclaimer should operate:

- notice of disclaimer should be given to persons who have an interest in the property being disclaimed and also filed with the appropriate registry as a matter

of public record;

- the persons having an interest in the property should have a right to apply to the Court objecting to the disclaimer within a limited time; and
- if no application to the Court has been made within the time allowed or, if made, the application is unsuccessful, the disclaimer should operate from the time the notice was given to the persons interested.

985. In addition to the recommendations made by the Harmer Report, the proposed amendments also address the situation where persons having an interest in the property cannot be ascertained and/or located. In those circumstances, an obligation is to be placed on the liquidator to publicly advertise his or her intention to disclaim the property.

986. Existing subsection 568(5) makes provision for the persons to whom notice of disclaimer is to be given. Existing subsection 568(5) will be omitted by paragraph 108(a) and replaced by proposed section 568A.

987. Proposed subsection 568A(1) provides that, as soon as practicable after disclaiming property, a liquidator must:

- lodge a written notice of the disclaimer (with the ASC); and
- give written notice of the disclaimer to each person who appears to the liquidator to have an interest in the property; and
- if the liquidator suspects that other persons have an interest in the property, comply with the requirements in proposed subsection 568A(2) to publish notice of the disclaimer; and
- if the transfer or transmission of the property is required to be legally registered, give written notice of the disclaimer to the registrar or other person who has the legal function of registering the transfer or transmission.

988. Proposed subsection 568A(2) requires the liquidator to publish notice of the disclaimer in a daily newspaper that circulates in a jurisdiction in which the property is situated, and in a daily newspaper that circulates generally in each jurisdiction in which the company has carried on business in the 6 months prior to the date the winding up began or after the date the winding up began. The notices may be published on the same or different days.

#### Proposed section 568B - Application to set aside disclaimer before it takes effect

989. Proposed subsection 568B(1) provides that a person who has, or claims to have, an interest in disclaimed property may apply to the Court for an order setting aside the disclaimer before it takes effect. The application must be made within 14 days after:

- notice of the disclaimer was given to the person by the liquidator; or
- notice of the disclaimer was published under proposed subsection 568A(2); or
- otherwise - the liquidator lodges notice of the disclaimer.

990. Under proposed subsection 568B(2), on an application under subsection (1), the Court may set aside the disclaimer, and if it does so, make such further orders as it thinks appropriate.

991. However, under proposed subsection 568B(3) the Court may only set aside a disclaimer if it satisfied that the prejudice to persons who have an interest in the property is grossly out of proportion to the prejudice that would be caused to the company's creditors by setting aside the disclaimer.

#### Proposed section 568C - When disclaimer takes effect

992. Under existing subsection 568(3), a disclaimer operates to terminate rights, interests and liabilities as from the date of the disclaimer. Existing subsection 568(3) is to be deleted by paragraph 108(a) and replaced by proposed section 568C.

993. Proposed subsection 568C(1) provides that a disclaimer takes effect only if:

- an application under proposed section 568B for an order setting aside the disclaimer is made within the period prescribed by that section and the application is unsuccessful; or
- no such application is made.

994. For the purposes of subsection 568C(1), an application under proposed section 568B is only successful if the result of the application and any appeals is an order setting aside the disclaimer (proposed subsection 568C(2)).

995. Under proposed subsection 568C(3), a disclaimer, having taken effect under subsection (1), is deemed to have taken effect the day after:

- the last day the liquidator gave notice of the disclaimer to a person under proposed paragraph 568A(1)(b); or
- the last day the liquidator published notice of the disclaimer under proposed subsection 568A(2); or
- otherwise - the day the liquidator lodged notice of the disclaimer with the ASC.

#### Proposed section 568D - Effect of disclaimer

996. Proposed subsection 568D(1) largely replaces that portion of current subsection 568(3)

that describes the effect of a disclaimer.

997. A disclaimer is taken to have terminated, as from the day on which the disclaimer is taken to take effect under proposed section 568C(3), the company's rights, interests, liabilities and property in or in respect of the disclaimed property, but does not affect any other person's rights or liabilities, except so far as necessary in order to release the company and its property from liability (proposed subsection 568D(1)).

998. Proposed subsection 568D(2) largely replicates current subsection 568(12), which is to be omitted by paragraph 108(b). It provides that a person aggrieved by the operation of a disclaimer is taken to be a creditor of the company to the extent of any loss suffered, and may prove such a loss as a debt in the winding up.

#### Proposed section 568E - Application to set aside disclaimer after it has taken effect

999. Proposed subsection 568E(1) provides that a person who has, or claims to have, an interest in disclaimed property may, with the leave of the Court, apply to the Court for an order setting aside the disclaimer after it has taken effect. The Court may give leave only if it is satisfied that it is unreasonable in all the circumstances to expect the person to have applied for an order setting aside the disclaimer before it took effect (proposed subsection 568E(2)) and may give leave subject to conditions (proposed subsection 568E(3)).

1000. On an application under subsection (1), the Court may set aside the disclaimer, and if it does so, make such further orders as it thinks appropriate, including orders necessary to put the company, the liquidator or anyone else in the same position, as nearly as practicable, as if the disclaimer had never taken effect (proposed subsection 568E(4)).

1001. However, under proposed subsection 568E(5), the Court may only set aside a disclaimer if it is satisfied that the disclaimer has caused or would cause prejudice to persons who have an interest in the property, that is grossly out of proportion to the prejudice that would be caused to the company's creditors and persons who have changed their position in reliance on the disclaimer taking effect, by setting aside the disclaimer.

#### Proposed section 568F - Court may dispose of disclaimed property

1002. Proposed section 568F replaces and expands existing subsection 568(11), which provides for the vesting of disclaimed property by Court order.

1003. Proposed subsection 568F(1) provides that the Court may order that disclaimed property vest in, or be delivered to:

- a person entitled to the property; or
- a person in whom or to whom it seems to the Court appropriate that the property be vested or delivered; or

- a person as trustee for a person referred to in paragraph (a) or (b).

1004. The Court may make an order vesting the property on the application of a person who claims an interest in the property or is under an undischarged liability in respect of the property and after hearing such persons as it thinks appropriate (proposed subsection 568F(2)).

1005. Where an order is made vesting property, the property vests immediately for the purposes of the order without any conveyance, transfer or assignment (proposed subsection 568F(3)). That immediate vesting is, however, subject to the provisions of proposed subsection 568F(4) where the transfer of the property is to be legally registered. In those circumstances, the property will vest in equity because of the order, but will not vest at law until the law requiring the registration of the transfer has been complied with.

#### Clause 110 – (Insertion of new headings and sections)

1006. Clause 110 will insert, before section 588A of the Corporations Law, new headings and new sections 588AA and 588AB.

#### Proposed Division 1 - Application of Part 5.3A to matters arising under corresponding laws

##### Proposed section 588AA - Application in this jurisdiction

1007. Proposed subsection 588AA(1) provides that section 588AA has effect for the purposes of the administration of a recognised company or a deed of company arrangement executed by a recognised company, in so far as those purposes concern this jurisdiction.

1008. Part 5.3A will apply in relation to the recognised company in the same way, as nearly as practicable, as that Part applies in relation to a company (proposed subsection 588AA(2)).

1009. Without limiting subsection 588AA(2), the administrator of the recognised company or of the deed may perform or exercise the same functions or powers under Part 5.3A as an administrator of a company or of a deed of company arrangement executed by a company may perform or exercise.

##### Proposed section 588AB - Enforcement of orders

1010. Proposed subsection 588AB(1) provides that section 588AA applies if

- the Federal Court makes under Part 5.3A of the Corporations Law of another jurisdiction; or
- the Supreme Court of another jurisdiction makes under Part 5.3A of the Corporations Law of any jurisdiction; or
- the Supreme Court of this jurisdiction makes under Part 5.3A of the Corporations Law of another jurisdiction;

an order in connection with the administration of, or a deed of company arrangement executed by, a company, within the meaning of that Part of the Law.

1011 The order has effect and may be enforced in this jurisdiction as if it were an order made under Part 5.3A by a Federal Court or Supreme Court of this jurisdiction (proposed subsection 588AB(2)).

#### Clause 111 – (Insertion of new Part)

#### Part 5.78 - Recovering property or compensation for the benefit of creditors of insolvent company

1012. Proposed Part 5.7B implements reforms to the provisions of the Corporations Law (sections 592 to 594) which make it an offence for a director to permit a company to incur further debt while insolvent. The reforms separate out civil and criminal liability, restructure the defences in the current provisions (which operate unsatisfactorily in certain respects), and facilitate recovery for the benefit of all creditors where a director breaches the duty to prevent insolvent trading.

1013. Proposed Part 5.7B also imposes a liability on companies which fail to prevent insolvent trading by subsidiary companies. Where a holding company should have known that its subsidiary was incurring debt while insolvent the holding company will be liable, at the suit of the liquidator, for any loss or damage suffered by unsecured creditors of the subsidiary.

1014. Proposed Part 5.7B also establishes a regime under which a liquidator may seek Court orders having the effect of avoiding certain transactions preceding the winding up of the company. The provisions replace existing provisions which are contained in the Bankruptcy Act, and which are presently incorporated into the Corporations Law through section 565. The proposed provisions set out clearly the transactions and the circumstances in which a liquidator may avoid them in the context of a corporate winding up. The transactions which may be set aside are characterised as unfair preferences, uncommercial transactions (transactions at an under-value) and unfair loans (where the rate of interest or credit charge is extortionate). The provisions set out time periods prior to the winding up in which the transactions must fall in order to be categorised as voidable. These time periods are enhanced where the transaction has been entered into between the company and a related entity. The provisions also allow a Court to make a range of orders tailored to the specific circumstances of the transaction.

#### Division 1 - Preliminary

1015. This Division will set out certain preliminary matters. In particular it will set out certain presumptions which may be used to establish that a company is insolvent at a particular time. The presumptions may be rebutted by proof to the contrary, and insolvency may also be proven directly.

1016. The presumptions do not operate in relation to criminal charges.

1017. The presumptions are:

- where a company is shown to be insolvent at a particular time within 12 months prior to the 'relation-back day', it continues to be insolvent during the intervening period; and
- where adequate accounting records are not kept - the company is presumed to be insolvent during the period to which the absence or inadequacy of accounts relates.

1018. The Harmer Report recommended an additional presumption. Under this proposal, a company would be presumed to have been insolvent during the 90 days prior to the relevant date. The Harmer Report took the view that the usual financial condition of most insolvent debtors pointed overwhelmingly to a state of insolvency existing for some time prior to the commencement of a formal insolvency administration. The Report considered that a presumption of the presence of insolvency during this short period would reduce the cost of assembling or reconstructing a picture of the financial affairs of the insolvent during this period, which is often characterised by unusual transactions and disordered records.

1019. In the Government's view, however, and even though the presumption would apply only in civil cases and would be rebuttable, the potential benefits which it offers does not justify the element of retrospective liability which it involves.

1020. In relation to the presumption of continuing insolvency within a twelve month period prior to the relation-back day, the Harmer Report noted that a liquidator, being a stranger to the past business operations of a company, is often confronted with considerable difficulty in affirmatively establishing that a company was insolvent at a time prior to the winding up, even though there may be every indication that this was the case. This presumption has the effect that, once the liquidator proves insolvency at one point in time, insolvency after that point of time is presumed. The twelve month limitation period is to prevent remote instances of insolvent trading resulting in a presumption that insolvency continued to the commencement of the winding up.

1021. In relation to the accounting records presumption, the Harmer Report stated that the presumption was necessary to counter the regrettable but quite usual state of affairs where the lack or absence of adequate books of account make it difficult or impossible to reconstruct the financial position of a company at or about a particular time.

#### Proposed section 588D - Secured debt may become unsecured

1022. Proposed section 588D provides, for the purposes of the Part, that to the extent that a secured creditor proves for his or her debt as an unsecured creditor, the debt is unsecured. This is of consequence in proposed Divisions 2, 3, 4 and 5 as unsecured debts are paid in priority to secured debts from any funds realised from directors or the avoidance of voidable transactions. The Harmer Report considered that unsecured creditors should benefit in this way as insolvent trading by directors would have its major impact on this group. The same reasoning applies to

proceeds of voidable transactions.

#### Proposed section 588E - Presumptions to be made in certain proceedings

1023. The proposed presumptions operate in relation to insolvent trading by directors and voidable transactions, and operate to facilitate the liquidator's establishing the insolvency of the company at particular times.

1024. Proposed subsection 588E(2) provides that the presumptions set out in the section apply to 'recovery proceedings'. This is defined in subsection (1) to include proceedings for a contravention of proposed section 588G (director's duty to prevent insolvent trading), proposed section 588M (recovering of compensation for loss resulting from insolvent trading) and proposed section 588W (recovering of compensation for loss where holding company allows a subsidiary to trade while insolvent), and proceedings brought in respect of voidable transactions under Division 2 of proposed Part 5.7B.

1025. The presumptions do not operate for the purposes of criminal prosecutions.

1026. Proposed subsection 588E(3) requires the presumption to be made that if a company has been proven to be insolvent on a particular date during the 12 months prior to the relation-back day (including where the company is shown to be insolvent through the operation of the presumptions in proposed subsections (4) or (8)), then the company is insolvent from that time until the relation-back day.

1027. Proposed subsection 588E(4) requires the presumption to be made that where the company has failed to keep adequate accounting records as required by section 289(1) or (2), then the company was insolvent for the period to which the inadequacy or absence of the records relates.

1028. Proposed subsection 588E(5) provides that proposed paragraph (4)(a) does not apply in relation to a contravention of subsection 289(1) that is only minor or technical.

1029. Proposed subsection 588E(6) provides that subsection (4) does not have any effect insofar as it would prejudice a right or interest of a person where that person was not in any way involved in the destruction or removal of accounting records leading to the failure to comply with section 289.

1030. Proposed subsection 588E(7) provides that where the recovery proceeding is an application under 588FF, subsection (4) does not have effect in relation to proving an unfair preference given by the company to the creditor of the company, unless the creditor is a related entity of the company.

1031. Proposed subsection 588E(8) is designed to facilitate proof in proceedings for the recovery of assets under this Part. It has the effect that where in proceedings in relation to a company, a matter is proved or a defence is made out, and that matter or defence is in issue in other proceedings in relation to the company, a presumption that the matter has been proved or

the defence made out in the other proceedings operates. The presumption operates in respect of the following matters and defences:

- if the other proceedings consist of an application by the company's liquidator that the Court make an order that a transaction is voidable as an insolvent transaction of the company - a matter of the kind referred to in a paragraph of section 588FC or of subsection 588FG(2);
- if the other proceedings consist of a recovery action by the company's liquidator against a related entity of the company in respect of a benefit resulting from an unfair preference - a matter of the kind referred to in a paragraph of section 588FC or of subsection 588FG(2) or 588FH(1), or a defence under subsection 588FH(3);
- if the later proceedings relate to a floating charge created within 6 months before the relation-back day - a matter of the kind referred to in subsection 588FJ(3);
- if the later proceedings are in respect of a contravention by a director of his or her duty to prevent insolvent trading by a company - a matter of the kind referred to in a paragraph of section 588G, or a defence under section 588H; and
- if the later proceedings are for the recovery by the company's liquidator of compensation for loans resulting from insolvent trading - a matter of the kind referred to in a paragraph of subsection 588V(1), or a defence under section 588X.

1032. Proposed subsection 588E(9) provides that the presumptions in proposed section 588E may be rebutted by proof to the contrary.

#### Proposed Division 2 - Voidable transactions

1033. Proposed Division 2 establishes a new regime under which a liquidator may seek court orders having the effect of avoiding certain transactions preceding the winding up of a company. The provisions of the present law which enable liquidators to avoid certain antecedent transactions have their effect by importing into the Corporations Law by reference the provisions of the Bankruptcy Act which enable a trustee in bankruptcy to avoid certain transactions in the case of a bankrupt. The Harmer Report recommended that there should be separate (although similar) provisions regulating antecedent transactions in both the relevant bankruptcy and companies legislation.

1034. The Harmer Report made the observation that insolvency law has long adopted the policy of avoiding transactions by which an insolvent individual or company disposed of property within a relevant period prior to the commencement of formal insolvency in circumstances where to allow the transaction would be unfair to the general body of unsecured creditors. The Harmer Report noted in particular that this area of insolvency law is, consequentially, retrospective in nature. Because it operates in a retrospective fashion, it is necessary to balance the interests of unsecured creditors of the insolvent and persons who have engaged in fair transactions with the insolvent. The proposed provisions seek to set out clearly

the transactions and the circumstances in which a liquidator may avoid them in the context of a corporate winding up. The new provisions set out comprehensively matters which may be taken into account by a court and also provide the Court with a broad range of options for the orders which may be most appropriately made. Additionally, the new provisions enable a broad range of transactions to be examined by a liquidator with a view to having them set aside or modified by a court. The new provisions also make certain modifications to the time limits within which a transaction must have occurred in order for it to be reviewed, particularly in the case where the parties to a transaction are entities related to the company.

1035. The purpose of the provisions in this proposed Division is to ensure that unsecured creditors are not prejudiced by the disposition of assets or the incurring of liabilities by a company in a period shortly before the winding up which would have the effect of favouring certain creditors or other persons, and especially related entities. This might occur where a creditor (whether or not that creditor has some connection with the company) was paid out in full rather than having to prove for a proportion of the debt in the winding up. The provisions also seek to avoid transactions where the body of unsecured creditors might be prejudiced by the company's having given away assets or incurred liabilities without adequate consideration passing to the company. This is particularly so where such a disposition might have the effect of benefiting persons or entities associated with the company such as directors, their relatives or associated companies. The provisions are also aimed at ensuring that unsecured creditors as a body are not prejudiced by the company's having entered into wholly unrealistic loans or other agreements on which the interest rate or other charges are excessive to the point of being 'extortionate'.

1036. Proposed sections 588FA, 588FB, 588FC and 588FD define a number of types of transaction (unfair preferences, uncommercial transactions, insolvent transactions and unfair loans). Proposed section 588FE then provides rules concerning when these transactions are voidable. The application of these rules will depend on the type of transaction involved, the relationship between the parties to the transaction, the time which has elapsed between the entering into the transaction and the winding up of the company and the nature of the benefit to the company from the transaction.

1037. The Court under proposed section 588FF is given a number of options for the making of orders, including orders which would effect compensation to the company, transfer of assets to the company, indemnification of the company or variation of an agreement.

1038. Proposed section 588FG provides certain defences to a party to these transactions, particularly where the party from whom the benefit of a transaction is sought to be recovered by the liquidator had entered into the transaction in good faith, had no knowledge of the impending insolvency, gave adequate consideration for the transaction or has changed his or her position in reliance on the transaction.

#### Proposed section 588FA - Unfair preferences

1039. Proposed section 588FA defines an 'unfair preference' to be a transaction to which a company and the creditors are parties and which results in the creditor receiving in respect of the

debt that the company owes to the creditor more than the creditor would receive in respect of that debt if the transaction had been set aside and the creditor had to prove for the debt in the winding up of the company.

1040. At present such transactions may be attacked by a liquidator under section 122 of the Bankruptcy Act as it is applied by section 565 of the Corporations Law. Section 122 refers at present to a transaction which has the effect of giving to the creditor a 'preference, priority or advantage' over other creditors of the company, whereas the new provision specifies quite clearly what that expression means in the context of a corporate winding up.

1041. Under proposed subsection 588FA(1), it makes no difference to the characterisation of the transaction that it was the result of a court order. This was recommended by the Harmer Report

1042. Subsection 588FA(2) provides that where a transaction is, for a commercial purpose, an integral part of a continuing business relationship such as a running account between a creditor and the company (including such a relationship to which other persons are parties), it should not be attacked as a preference, but rather the effect of all the transactions which form the relationship between that creditor and the company should be taken into account as though they constituted a single transaction. This provision is aimed at embodying in legislation the principles reflected in the cases of Queensland Bacon Pty Ltd v Rees (1967) 115 CLR 266 and Petagna Nominees Pty Ltd & Anor v A E Ledger 1 ACSR 547. The effect of these principles is that it is implicit in the circumstances in which payments are made to reduce the outstanding balance in a running account between purchaser and supplier that there is a mutual assumption that the relationship of purchaser and supplier would continue as would the relationship of debtor and creditor. The net effect, therefore, is such that payments 'in' are so integrally connected with payments 'out' that the ultimate effect of the course of dealings should be considered to determine whether the payments are preferences.

#### Proposed section 588FB - Uncommercial transactions

1043. Proposed section 588FB defines an uncommercial transaction to be a transaction which a reasonable person in the company's circumstances would not have entered into, having regard to the benefits to the company and the detriments to the company of entering the transaction and the respective benefits to other parties and any other relevant matter. The transaction does not have to be between the company and one of its creditors but can be with any other party. At present, a liquidator may attempt to have a transaction set aside under section 120(1) of the Bankruptcy Act where a 'settlement' has been made without good faith and not for valuable consideration. The way in which this section has been phrased for the purposes of dealing with bankrupt estates involves the use of language which has not been clear in its application to companies. In particular, the element of undervalue is expressed more clearly in proposed section 588FB.

1044. The tests under proposed section 588FB for whether a transaction is uncommercial relies on the phrase 'if... it may be expected that a reasonable person in the company's circumstances would not have entered into the transaction'. The provision is specifically aimed

at preventing companies disposing of assets or other resources through transactions which resulted in the recipient receiving a gift or obtaining a bargain of such magnitude that it could not be explained by normal commercial practice. Where consideration is given by the other party to the transaction but the consideration is nominal or trivial or lacks 'a commercial quality' then, provided it occurs within the time period set out in proposed section 588FE, the liquidator may apply to a court to have the transaction set aside or another order made under proposed section 588FF so that the body of unsecured creditors is not prejudiced by this transaction.

1045. Under proposed subsection 588FB, it makes no difference to the characterisation of the transaction that it was given effect to as the result of a court order.

#### Proposed section 588FC - Insolvent transactions

1046. This section defines the term 'insolvent transaction' for the purposes of the proposed Division. An insolvent transaction is either an unfair preference (588FA) or an uncommercial transaction (588FB) where the transaction is entered into or an act is done for the purpose of giving effect to the transaction at a time when the company is insolvent or where the company becomes insolvent as a result of such a transaction or act. Because different time periods apply to, and different consequences result from, the characterisation of a transaction, section 588FC is used as a drafting device, to 'build up' to the definition of a voidable transaction.

#### Proposed section 588FD - Unfair loans to a company

1047. This provision defines an 'unfair loan' to be a loan upon which the interest or in relation to which the charges were extortionate at the time the loan was entered into, or has since become so as the result of a variation. Factors which may be taken into account in assessing whether the interest rate or charge is extortionate include the risk assumed by the lender, the value of any security, the term, the schedule for payments of interest and charges and repayments of principle, and the amount of the loan.

1048. This provision is quite different from anything contained in the present law and is directed to the situation where the rights of unsecured creditors as a class are prejudiced by the company's having entered into a loan agreement for which the consideration is excessive. The section is not directed to loans which in hindsight may be judged as bad bargains but at transactions which are grossly unfair, so that in normal circumstances no reasonable company is likely to have entered into such a contract unless there were some further rationale such as where the agreement is a sham agreement intended to operate in circumstances of insolvency to confer an undue benefit on the lender.

#### Proposed section 588FE - Voidable transactions

1049. This section defines the term 'voidable transaction' (being a transaction entered into after the commencement of Part 5.7B) for the purposes of the Division. Where a transaction is voidable a court may make a number of orders under proposed section 588FF. Proposed section 588FE also sets out the time scale within which transactions must fall in order to be voidable.

1050. Proposed subsection 588FE(2) provides that a transaction is voidable if it is an insolvent transaction (section 588FC) (either a unfair preference (section 588FA) or an uncommercial transaction (section 588FB)) and has been entered into in the period six months prior to the relation-back day (usually the date of application in the case of a court-ordered winding up) up to the commencement of the winding up.

1051. Proposed subsection 588FE(3) provides that a transaction is voidable where it is an insolvent transaction of the company which is an uncommercial transaction entered into within two years prior to the relation-back day.

1052. Proposed subsection 588FE(4) provides that an insolvent transaction entered into with a related entity of the company within the four years prior to the relation back day is voidable.

1053. Proposed subsection 588FE(5) provides that a transaction is voidable if it is an insolvent transaction, the company entered into the transaction for the purpose of defeating, delaying or interfering with the rights of any or all of its creditors on a winding up and the transaction was entered into during the period ten years prior to the relation-back day.

1054. Proposed subsection 588FE(6) provides that a transaction is voidable if it is an unfair loan to the company (section 588FD) whenever made.

#### Proposed section 588FF - Court may make orders about voidable transactions

1055. Proposed section 588FF is an 'enabling provision', giving the Court very wide powers to make appropriate orders in respect of voidable transactions to fit the particular circumstances.

1056. Under the Bankruptcy Act, the characterisation of the transaction as being one to which sections 120 to 122 apply renders the transaction void against a trustee in bankruptcy and, by virtue of Corporations Law section 565, void against a liquidator. Consequently, the Court is not involved and therefore there is less flexibility to do justice between the parties, when one or more may be innocent of any 'wrong doing'.

1057. Proposed subsection 588FF(1) provides that where a court is satisfied that a transaction is voidable under 588FE, the Court may make a number of orders. The provision lists 10 such orders including:

- the payment to the company of an amount equal to some or all of the money that the company has paid under the transaction;
- the transfer to the company of property that the company has transferred;
- the payment to the company of an amount that fairly represents the benefits received by the other party;
- the release or discharge, wholly or in part, of a debt incurred or security given by the company;

- an order declaring an agreement to be void at and after the time the agreement was made;
- an order varying an agreement; and
- an order declaring an agreement or the provisions of an agreement to be unenforceable.

1058. Proposed subsection 588FF(3) provides that an application may only be made for an order under proposed section 588FF(1) within three years after the relation-back day or within such longer period as the Court orders providing the application for extension is made within those three years.

Proposed section 588FG - Transaction not voidable as against certain persons

1059. Proposed subsection 588FG(1) provides that a court may not make an order under section 588FF materially prejudicing a right or interest of a person other than a party to the transaction where the person received no benefit under the transaction or where:

- the person received the benefit in good faith; and
- at the time when the person received the benefit, the person had no reasonable grounds for suspecting that the company was insolvent at that time or would become insolvent through entering into the transaction and a reasonable person in the person's circumstances would have had no such grounds for so suspecting.

1060. Proposed subsection 588FG(2) provides that the Court must not make under section 588FF an order materially prejudicing a right or interest of a person if the transaction is not an unfair loan to the company and it is proved that:

- the person became a party to the transaction in good faith;
- at the time when the person became such a party, the person had no reasonable grounds for suspecting that the company was insolvent at the time or would become insolvent through entering into the transaction and a reasonable person in the person's circumstances would have had no such grounds for so suspecting; and
- the person has provided valuable consideration under the transaction or has changed his or her or its position in reliance on the transaction.

1061. The defences provided under 588FG are similar to defence provisions currently provided under section 122 of the Bankruptcy Act. The requirement of good faith is supplemented by requiring that on an objective test, the person had no reasonable grounds for suspecting that the company was insolvent at the time or would become insolvent. The

requirement of the Bankruptcy Act that a person seeking to rely on the defence must show that the transaction was in the ordinary course of business has been dispensed with as there has been some judicial uncertainty as to its interpretation.

Proposed section 588FH - Liquidator may recover from related entity benefit resulting from unfair preference

1062. The purpose of proposed section 588FH is to replace subsections 567(5) and (6), which presently allow a liquidator to recover directly from an officer of the company where, as a result of an insolvent transaction, that officer benefits through a reduction in liability in relation to a guarantee given by that officer.

1063. Under proposed section 588FH, where a transaction is an insolvent transaction and is voidable under proposed section 588FE and has had the effect of discharging a liability (whether under a guarantee or otherwise and whether contingent or otherwise) of a related entity of the company, the company's liquidator may by proceedings in a court, recover from the related entity as a debt due to the company, the amount by which the liability has been discharged.

1064. Proposed section 588FH requires the Court in deciding what order to make against the other party to the transaction to take into account any amount recovered from the related party. Upon the making of a payment by a related entity, the related entity will have the same rights (whether by way of contribution, subrogation, indemnity or otherwise) that it would have had, had it discharged the relevant liability.

1065. By comparison with existing subsection 567(5) and (6), proposed section 588FH will:

- extend to a related person rather than merely to an officer of the company; and
- extend the ambit of recovery from the related person by permitting recovery of the amount by which the liability of the related person under a guarantee is reduced by the transaction (the existing provision would seem only to apply if the effect of the preference is to discharge the guarantee in full).

Proposed section 588FI - Creditor who gives up benefit of unfair preference may prove for preferred debt

1066. This provision provides for a creditor who has had the advantage of an unfair preference to prove in the winding up where the creditor has put the company in the same position as if the transaction had not been entered into. Where the creditor puts a company in that position, proposed subsection 588FI(2) provides that the Court may not make an order under proposed section 588FF which would have the effect of prejudicing a right or interest of the creditor.

1067. The provision is intended to encourage creditors to give up the benefit of unfair preferences, and also protect the interests of creditors who are obliged to give up such benefits through court order.

Proposed section 588FJ - Floating charge created within 6 months before relation-back day

1068. Proposed section 588FJ is intended to have the same effect as existing section 566, but with improvements to the drafting, as recommended in the Harmer Report.

1069. Section 566 of the Corporations Law presently provides that a floating charge on the undertaking or property of the company, created within six months before the commencement of the winding up is, unless it is proved that the company, immediately after the creation of the charge, was solvent, invalid. An exception relates to any monies paid to the company at the time of or subsequently to the creation of the charge and in consideration for the charge (together with interest on that amount at the rate of 8% or such other amount as is prescribed).

1070. The Harmer Report considered that minor amendments would be appropriate. Reforms implemented by the provision reflect the Report's view that:

- A charge should be exempt from invalidity, not only if it secures money paid to the company, but also if it secures money paid at the direction of the company. This preserves commercial flexibility without disturbing the intention of the section.
- In two additional situations, commercial considerations suggest that a charge should not be invalidated:
  - where the charge secures payment of the amount of any liability under a guarantee or other obligation undertaken by the company at the time of or after the creation of the charge; and
  - where the charge secures payment of the amount of the market value of goods or services supplied to the company at the time of or after the creation of the charge, together with interest

1071. Proposed section 588FJ applies where a company is being wound up in insolvency and the company created a floating charge on the property of the company in the period between the six months prior to the relation-back day and the commencement of the winding up.

1072. Proposed subsection 588FJ(2) renders such a charge void as against the company's liquidator with certain exceptions. The charge is not void insofar as it secures:

- an advance paid to the company or at its direction as consideration for the charge;
- interest on such an advance;
- the amount of a liability under a guarantee or other obligation undertaken at or after that time on behalf of or for the benefit of the company;

- an amount payable for property or services supplied to the company at or after that time; or
- interest on an amount so payable.

1073. Proposed section 588FJ(3) provides that the provision does not apply if it is proved that the company was solvent immediately after entering into the floating charge.

1074. Proposed subsections 588FJ(4) and (5) limit the extent of the exceptions set out in proposed subsection 588FJ(2). Proposed paragraphs 588FJ(2)(a) and (b) do not apply in relation to an advance so far as it was applied to discharge an unsecured debt that the company owed to the chargee or a related entity of the chargee. Proposed paragraphs 588FJ(2)(d) and (e) do not apply in relation to an amount payable for property or services supplied to the company after the transaction insofar as that amount exceeds the market value of the property or services when supplied to the company.

1075. If, during the six months ending on the relation-back day or between that time and the commencement of the winding up, a debt secured by a charge is discharged out of the company's own money or property to the extent of a particular amount (realised amount) the liquidator may take proceedings to recover from the chargee as a debt due an amount equal to an amount set out in a formula in proposed subsection 588FJ(6).

#### Proposed Division 3 - Director's duty to prevent insolvent trading

1076. The provisions of this Division will provide for the director of a company to be under a duty to prevent the company from incurring debt while insolvent, and will provide for defences. Breach of the duty may result in the director being ordered to compensate the company and may also result in a civil penalty or criminal sanction being imposed under proposed Part 9.4B.

1077. Under existing section 592 there is an offence by each director and participant in management if the company incurs a debt, and immediately before the time when the debt is incurred there are reasonable grounds to expect that the company will not be able to pay all its debts as and when they become due or the incurring of the debt will produce that result. Under subsection 592(2), such persons have an opportunity to show a defence by proving either that the debt was incurred without their express or implied authority or that when the debt was incurred they did not have reasonable cause to expect that the company would not be able to pay all of its debts as and when they became due.

1078. Section 592(6) creates an offence of being knowingly concerned in fraudulent trading and provides that where a company has done an act with the intent to defraud creditors of the company or any other person or for any other fraudulent purpose, any person who is knowingly concerned in the doing of the act with that intent or for that purpose contravenes the section.

1079. Section 593 provides that where a person has been convicted of an offence under subsection 592(1) the Court may by order declare that that person should be personally liable without any limitation for the payment to the person to whom the debt is payable of an amount

equal to the debt Under subsection 593(2), a person who has been convicted of fraudulent conduct under subsection 592(6) may be made personally liable for the payment to the company of an amount required to satisfy so much of the debts of the company as the Court thinks proper.

1080. Although a creditor may bring proceedings against the director under section 592 for the recovery of the debt, whether or not the person against whom the proceedings are brought has been convicted of an offence under subsection 592(1), the company itself only has standing to bring an action where a director has been convicted of fraudulent conduct against section 592(6) (pursuant to subsection 593(2)).

1081. The operation of these sections has been criticised, in the Harmer Report which stated that the present provisions:

- combine civil and criminal sanctions which operate so that criminal prosecution is a prerequisite for a civil action by the liquidator on behalf of unsecured creditors;
- allow individual creditors to sue directors for insolvent trading independently of criminal prosecution - causing inequity among unsecured creditors as a class (and giving rise to a multiplicity of actions);
- give to the director a defence where the director can show that the impugned transaction was entered into without his or her express or implied authority. The defence has been used by directors in circumstances where through lack of diligence the director has failed to take a sufficient role in the management of the company, thereby technically depriving any transaction of his or her implied authority; and
- involve difficulties in proving that the company was insolvent at a particular time, such as, for example, where company records have not been properly kept

1082. The proposed provisions address these criticisms in a number of ways:

- criminal and civil sanctions will be separate, with criminal liability being retained for cases where actual dishonesty or fraud is involved;
- directors will be under a positive duty to ensure that the company does not incur debt while insolvent. Breach of this duty will render the director liable to civil action and will also constitute a breach of duty to which a civil penalty will apply;
- the liquidator will have a primary right to sue a director for the benefit of all unsecured creditors, with other unsecured creditors being permitted a separate right of action only where the liquidator fails to take action;
- the duty is expressed in such a way that the director will not be able to use lack of involvement in the company's affairs as a basis for asserting that a particular transaction was entered into without his or her implied authority; and

- a series of rebuttable presumptions (set out in Division I) will assist the liquidator in establishing that the company was insolvent at a particular time.

Proposed section 5880 - Director's duty to prevent insolvent trading by company

1083. Proposed section 588G replaces section 592 of the Corporations Law. A person will contravene section 588G if:

- he or she is a director of the company at the time (after the commencement of proposed Part 5.7B) when the company incurs a debt;
- the company is insolvent at the time of incurring the debt or becomes insolvent by incurring the debt (or debts including that debt) at that time (after the commencement of the Part);
- there are reasonable grounds for suspecting the company was insolvent or would become insolvent as a result of the transaction;
- the person is aware of such grounds or a reasonable person in a like position in a company in the circumstances of that company would have been so aware,
- the person fails to prevent the company from incurring the debt.

1084. There are a number of differences between proposed section 588G and existing section 592.

1085. Under section 592, for a director to be liable there must be reasonable grounds to expect that a company would not be able to pay its debts. Under proposed section 588G it will be sufficient if there are reasonable grounds to suspect insolvency. This is based on a recommendation of the Harmer Report.

1086. Under section 592, a director has a defence where he or she could show that the debt was incurred without his or her express or implied authority or consent. This defence has been successfully invoked in circumstances where a director failed to take an active role in the management of the company and could therefore claim that debts incurred while the company was insolvent were incurred without his or her authority. Such a situation does not accord with modern expectations about the role of company directors. In particular, most persons would nowadays expect all the directors of a company to acquaint themselves with the general financial position of the company, and to take positive steps where necessary to protect the interests of members and creditors. Accordingly, the very broad defence in the current provision, which applied where the debt 'was incurred without the person's express or implied authority or consent' is to be replaced by more specific defences, which are carefully tailored to meet situations where a director has acted diligently and has actively participated in management, but has nevertheless been unable to prevent the incurring of the crucial debt. These defences are as follows:

- proposed subsection 588H(2) provides a defence where at the time when the debt was incurred the person had reasonable grounds to expect and did expect that the company was solvent at that time and would remain solvent even if it incurred that debt;
- proposed subsection 588H(3) provides a defence where the director believed on reasonable grounds that a competent and reliable person was monitoring the company's solvency and keeping the director informed;
- proposed subsection 588H(4) provides a defence to a director of a company who at the time that the debt was incurred, because of illness or for some other good reason, did not take part in the management of the company; and
- proposed subsection 588H(5) provides a defence where a director took all reasonable steps to prevent the company incurring the debt

1087. Under section 592, a director could be held criminally liable for allowing a company to trade while insolvent. The Harmer report recommended that there be no criminal sanction for insolvent trading. The report based this recommendation on the view that, among other things:

- criminal sanctions are not appropriate for something which can occur as a result of mere negligence;
- civil liability provides a sufficient sanction and incentive for directors to avoid insolvent trading; and
- civil liability consequences are more directly capable of benefiting unsecured creditors of a company.

1088. Proposed subsection 588G(3) makes the section a civil penalty' provision for the purposes of proposed section 1317DA. The effect of this is to allow a liquidator to sue on behalf of all unsecured creditors and, also, separately to allow for the imposition of a civil penalty under proposed section 1317DA and to allow for the imposition of criminal sanctions under proposed Part 9.4B where the director has permitted insolvent trading knowingly and with a dishonest intention.

1089. Section 592 applies to all those who took part in management of the company, whereas the proposed provision 5880 applies to directors only. The Harmer Report took the view that the duty to prevent insolvent trading focuses on preventing the company from engaging in a course of insolvent trading rather than the incurring of the particular debt and that therefore it is appropriate to look to those who are entrusted with the overall management of the company rather than all those who may have the authority to take any part in its management. The Harmer Report stated that it is the directors who have a duty to oversee the whole management of the company and that only they should owe the duty to prevent insolvent trading by the company. The Report noted that the definition of director is wide enough to encompass those who act in a

defacto capacity as directors (who should accordingly have the same duty as a validly appointed director). Finally the Report pointed out that senior managers of a company are in most circumstances included among its 'officers' as that term is defined, with the result that they are required to observe the duties imposed by section 232.

#### Proposed section 588H - Defences

1090. As mentioned above, proposed section 588H provides defences for directors in proceedings under proposed sections 588G and 588M (recovery of compensation for loss resulting from insolvent trading).

1091. Proposed subsection 588H(2) provides a defence where the director expected on reasonable grounds that the company was solvent and would remain solvent even if it incurred debt at the same time. It should be noted that the defence requires an expectation of solvency while the liability only requires a suspicion of insolvency. This provision draws on a defence presently available under paragraph 592(2)(b), where the absence of an expectation that the company would not be able to pay its debts is a defence.

1092. Proposed subsection 588H(3) provides that it is a defence if the director expected that the company was solvent and would remain solvent, on the basis of reliance on information supplied by a person, where the director believed on reasonable grounds that the person was competent, reliable and responsible for providing adequate information about the solvency of the company.

1093. Proposed subsection 588H(4) provides a defence to a director who through illness or for some other good reason did not take part in the management of the company at that time.

1094. Proposed subsection 588H(5) provides a defence where the director took all reasonable steps to prevent the company from incurring debt.

1095. Proposed subsection 588(6) provides that in determining whether a defence under

588(5) exists, the Court may have regard to any action the person took in appointing an administrator under proposed Part 5.3A.

#### Proposed Division 4 - Director liable to compensate company

1096. Proposed Division 4 establishes a regime where the liquidator of the company may seek compensation from a director who has been in breach of section 588G by permitting the company to trade while insolvent. Where the liquidator takes such action, any amounts paid are paid as compensation to the company for the benefit of any unsecured creditors. Secured creditors only receive money through this route to the extent that they prove as outstanding unsecured creditors, or where there are no unsecured debts. The Harmer Report recommended that amounts recovered from directors be available to unsecured creditors, as it is they who normally suffer greatest loss as a consequence of a company's insolvent trading.

1097. Under proposed Division 4, creditors may only sue for compensation individually with the liquidator's consent, or after having given the liquidator a notice of intention to sue for compensation.

#### Proposed Subdivision A - Proceedings against director

1098. This proposed subdivision provides for the liquidator's right of action and the application of the amounts paid as compensation.

#### Proposed Section 5883 - On application for civil penalty order, Court may order compensation

1099. Proposed section 588J provides for the Court to make an order for the payment to the company of compensation, equal to the amount of loss or damage suffered by an unsecured creditor, where there has been an application for a civil penalty order against the person in relation to proposed section 588G. The section also provides that a liquidator may intervene in an application for a civil penalty order under proposed section 588G, unless the application was made under proposed Division 4 of Part 9.4B. The liquidator would only be entitled to be heard on the question of compensation where the Court is satisfied that the person has committed the contravention.

#### Proposed section 588K - Criminal court may order compensation

1100. Proposed section 588K provides that a court may order a person convicted under proposed section 1317FA of Part 9.4B of an offence for a contravention of proposed section 5880 to pay to the company compensation. The Court may do so where it has convicted a person of such an offence and it is satisfied that the debt is unsecured and that the person to whom the debt is owed has suffered loss or damage. The Court may make such orders whether or not it also imposes a penalty.

1101. The purpose of the provision is similar to proposed section 588J in it allows a liquidator to get the benefit of compensation from a director without bringing an action in the liquidator's own right.

#### Proposed section 588L - Enforcement of order under section 588J or 588K

1102. Proposed section 588L provides that an order to pay compensation under sections 588BJ or 588K may be enforced as though it was a judgement of the Court. This facilitates the collection of the debt

#### Proposed section 588M - Recovery of compensation for loss resulting from insolvent trading

1103. Proposed section 588M provides that where a person has contravened proposed section 588G by allowing the company to incur a debt while insolvent, the debt is unsecured, and the person to whom the debt is owed suffers loss or damage as a result, the liquidator of the company may recover from the director as a debt due to the company an amount equal to the amount of loss or damage.

1104. Such an action may be proceeded with irrespective of whether the director has been convicted of an offence in relation to contravention or whether there has been a civil penalty order made against the director for the contravention. Proposed section 588M complements proposed section 5883, which provides for a company to intervene and seek compensation in proceedings connected with a civil penalty action.

1105. Proposed section 588M is subject to the limitation period of six years.

1106. The Harmer Report recommended that only the liquidator be able to bring proceedings against directors for insolvent trading. This was on the basis that the duties are owed to the company and therefore it is the company which should bring the action against the director for the breach of duty. Since the provisions only apply to a company on a winding up it is a liquidator who has the primary responsibility to determine if an action is to be brought. The Report concluded that the principle of equal sharing is crucial and therefore rejected the possibility that creditors have a right to bring an individual action against the director. Proposed provisions 588R to 588U do, however, allow a creditor an individual right of action in limited circumstances where a liquidator refuses to take action against the director on behalf of the company.

#### Proposed section 588N - Avoiding double recovery

1107. Proposed section 588N provides that an amount recovered in proceedings under section 588M in relation to the incurring of a debt by a company is to be taken into account in working out the amount (if any) recoverable in any other proceedings under that section in relation to the incurring of a debt

1108. This provides for a situation where a director may be sued by the liquidator in addition to individual creditors who may take action under proposed Subdivision B.

#### Proposed section 588P - Effect of sections 588J, 588K and 588M

1109. Proposed section 588P provides that proposed sections 588J, 588K and 588M have effect in addition to any rule of law about the duty or liability of a person because of the person's office or employment in relation to the company. They do not prevent proceedings from being instituted in respect of the breach of such a duty or in respect of such a liability.

#### Proposed section 5880 - Certificates evidencing contravention

1110. Proposed section 588Q provides that certificates purporting to be signed by the Registrar or other proper officer of an Australian court are to be conclusive evidence of certain matters.

1111. Such a certificate stating that a court found that it was satisfied that the person had committed a contravention of the civil penalty provision at section 5880 is, unless it is proved that the finding was set aside or reversed, conclusive evidence that the Court so found and that

the person so committed the contravention. This is so whether or not the Court made the civil penalty order on the application.

1112. In relation to a conviction for an offence constituted by a contravention of proposed section 588G such a certificate is, unless it is proved that the conviction was quashed or set aside or that the finding was set aside or reversed, conclusive evidence that the person was convicted and committed the contravention.

1113. The provision will enable a liquidator or other creditors to rely on previous proceedings to establish a contravention, thereby leaving only the issue of damages.

#### Proposed Subdivision B - Proceedings by creditor

1114. This subdivision provides for a creditor to sue a director for allowing the company to trade while insolvent where the liquidator does not commence an action under proposed section 588M.

#### Proposed section 588R - Creditor may sue for compensation with liquidator's consent

1115. Section 588R provides that a creditor of a company that is being wound up may with the written consent of the company's liquidator begin proceedings under proposed section 588M in relation to the debt owed to that creditor.

1116. Proposed subsection 588R(2) has the effect that such an action by a creditor may take place at any time from the commencement of the winding up unless the liquidator has already commenced proceedings under proposed Division 2 (Voidable transactions) or section 588M (Insolvent trading by director) or where the company has intervened in an application for a civil penalty order against the person in relation to a contravention of proposed section 588O.

#### Proposed section 588S - Creditor may give liquidator notice of intention to sue for compensation.

1117. Proposed section 588S together with proposed sections 588T and 588U set out a procedure for a creditor to follow where the liquidator does not commence an action, and does not consent to an action by the creditor under proposed section 588R(1).

1118. Section 588S provides that a creditor may, after six months after the commencement of winding up, give to the liquidator a written notice stating that the creditor intends to begin proceedings under section 588M and asking the liquidator to give to the creditor within three months of receiving the notice, either written consent or a statement of reasons why the liquidator believes proceedings under proposed section 588M should not be started.

#### Proposed section 588T - When creditor may sue for compensation without liquidator's consent

1119. Proposed section 588T provides that where a notice has been given to a liquidator under proposed section 588S and the liquidator has not consented to the proceedings within 3 months

of the notice, the creditor may bring proceedings under 588M with the leave of the Court.

1120. Proposed subsection 588T(3) provides that if during the three month period the liquidator gives to the creditor a written statement of the reasons opposing the proceedings then the creditor must file the statement with the Court when seeking leave to commence the action. The Court must have regard to those reasons in determining the application.

#### Proposed section 588U - Events preventing creditor from suing

1121. Under proposed section 588U a creditor may not commence proceedings under proposed section 588M where the company's liquidator has either commenced proceedings under proposed Division 2 (Voidable transactions) or proposed section 588M (Director liability for insolvent trading) in relation to that particular debt or where the company has intervened in an application for a civil penalty order against the person in relation to a contravention of proposed section 588G. Proposed subsection 588U(2) provides that the section applies notwithstanding proposed sections 588R and 588T.

#### Proposed Division 5 - Liability of holding company for insolvent trading by subsidiary

1122. Proposed Division 5 establishes a regime for making holding companies liable for the debts of their subsidiaries. The provisions of this Division provide that where a holding company permits one of its subsidiaries to trade while insolvent, then the subsidiary's liquidator may recover from the holding company amounts equal to the amount of loss or damage suffered by the unsecured creditors of the subsidiary. The Division as far as practicable mirrors the operation of proposed section 588G, as though the holding company were a director of the subsidiary. Similar defences are also provided.

1123. Under the existing law, the separate personality of each company generally prevents access to funds of a related company for the payment of the debts or liabilities of a debtor company. The Harmer Report concluded that this may operate unfairly where the business activity of the company has been directed or controlled by the related company. The Report noted that it is as though the related company was acting as a director of the other company and causing it to incur debts and liabilities.

1124. The Harmer Report recommendation was in fairly broad terms, so that the Court would have a wide discretion to order that a company that is or has been a related company pay to the liquidator all or part of the amount which is an admissible claim in the winding up if it is satisfied that it is just. The Harmer Report set out three criteria to which it was proposed that the Court have regard:

- the extent to which the related company took part in the management of the company;
- the conduct of the related company towards the creditors of the company; and

- the extent to which the circumstances that gave rise to the winding up of the company were attributable to the actions of the related company.

1125. Proposed section 588V sets out a test which is directly comparable to the test imposed on directors under proposed section 588G. The provision deals only with the holding company-sub subsidiary company relationship rather than speaking generally of related companies, and there is a specific test to which the directors of a parent company may address their minds.

#### Proposed section 588V - When holding company liable

1126. Proposed section 588V provides that a corporation which is a holding company contravenes the section if the subsidiary of the holding company incurs a debt when the subsidiary is insolvent or the subsidiary becomes insolvent by incurring a debt, and:

- there are reasonable grounds at the time for suspecting that the subsidiary is insolvent or would become insolvent; and
- that either the holding company or one or more of its directors were aware of these grounds or, having regard to the nature and extent of the corporation's control over the subsidiary's affairs, it is reasonable to expect that a corporation in the holding company's circumstances would have been aware of those grounds or that one or more of the holding company's directors would have been aware of those grounds.

1127. Proposed subsection 588V(2) provides that a corporation that contravenes the section is not guilty of an offence. The section provides civil remedies only.

#### Proposed section 588W - Recovery of compensation for loss resulting from insolvent trading

1128. Proposed section 588W provides that the liquidator of a subsidiary may take proceedings against the holding company to recover, for the benefit of unsecured creditors, loss or damage suffered by unsecured creditors as a result of the holding company's contravention of 588V. The recovery action is subject to a limitation period of six years.

#### Proposed section 588X - Defences

1129. Proposed section 588X sets out a number of defences to an action under 588W. It is a defence if it is proved that when the debt was incurred the holding company and each relevant director believed, on reasonable grounds, that the company was solvent at the time and would remain so. This expectation may, inter alia, be based on a belief by the directors of the holding company, on reasonable grounds, that a competent and reliable person was responsible for providing to the holding company adequate information about whether the subsidiary was solvent, and that that person was fulfilling the responsibility.

1130. In assessing the liability of the holding company, the fact that a particular director was

aware that reasonable grounds existed for suspecting the subsidiary was insolvent must be disregarded where because of illness or some other good reason that director did not take part in the management of the corporation at the time when the subsidiary incurred the debt.

1131. Proposed subsection 588X(5) provides a defence where the holding company took all reasonable steps to prevent the subsidiary from incurring the debt.

#### Proposed Division 6- Application of compensation under Division 4 or 5

##### Proposed section 588Y - Application of amount paid as compensation

1132. Proposed section 588Y provides that the amount paid to a company under proposed sections 588J, 588K, 588M or 588W not be available to pay a secured debt of the company unless all the company's unsecured debts have been paid in full. The Harmer Report recommended any amount recovered be available for distribution only among unsecured creditors because insolvent trading will generally have its major impact upon that class, secured creditors having access to their security for any money owed to them.

1133. Proposed subsection 588Y(2) enables a court to order that compensation paid to the company not be available to pay a particular unsecured debt (until after the payment of all other unsecured debts), where the Court is satisfied that at the time when the company incurred that particular debt the creditor knew that the company was, or would become insolvent.

1134. Proposed subsection 588Y(3) provides that 588Y(2) has no application where a creditor brings an action under proposed Division 4.

#### Proposed Division 7 - Person managing company while disqualified may become liable for company's debts

##### Proposed section 588Z - Court may make order imposing liability

1135. The Harmer Report recommended that directors have unlimited personal liability where they have acted as directors or managers while disqualified or have permitted others to act as directors or managers while disqualified.

1136. Proposed section 588Z provides that where a company is being wound up and within four years before the relation-back day (but after the commencement of the Part) a person has contravened certain provisions by managing the company (as defined by section 91A), the Court may on the application of the company's liquidator, order that the person is personally liable for so much of the company's debts and liabilities as does not exceed an amount specified in the order. The provisions listed for the purposes of proposed section 588Z are:

- section 229 - Certain persons not to manage certain bodies corporate;

- section 230 - Court may order persons not to manage certain bodies corporate;
- section 599 - Court may order persons not to manage certain corporations;
- section 600 - Commission may order persons not to manage corporations; and
- section 1317EF - person must comply with order not to manage corporation.

1137. Proposed section 588Z also applies by reference to provisions of a previous law which correspond to the sections listed above.

#### Clause 112 - Interpretation and application

1138. Paragraph 112(a) will amend section 589 of the Corporations Law by omitting paragraph (1)(c), that refers to a company that has been or is under official management. (consequential on the proposed repeal of Part 5.3) and substituting references to a company to which a provisional liquidator has been appointed (proposed paragraph 589(1)(ba)); that is or has been under administration (proposed paragraph 589(1)(c)); and that has executed a deed of company arrangement (proposed paragraph 589(1)(ca)).

1139. Paragraph 112(b) will correct a typographical error in current paragraph 589(2)(a).

1140. Paragraph 112(c) will amend the definition of ‘appropriate officer’ in subsection 589(5) by omitting the existing reference to an official manager (consequential on the proposed repeal of Part 5.3 that provides for the official management procedure) and substituting references to a provisional liquidator (proposed paragraph (aa)), an administrator (proposed paragraph (b)) and an administrator of a deed of company arrangement (proposed paragraph (ba)).

1141. Paragraph 112(d) will amend section 589 by omitting paragraph(a) of the definition of relevant day in subsection (5) and substituting new paragraphs (a) and (aa). This amendment is consequential upon the insertion of proposed Division 1A of Part 5.6 which sets out comprehensively the relationship between the various provisions relating to timing in a winding up. Proposed paragraph (a) of the definition provides that the ‘relevant day’ is, in relation to a company that has been wound up, has been in the course of being wound up or is being wound up:

- if because of Division 1A of Part 5.6, the winding up is taken to have begun on the day when the order that the company be wound up was made - the day on which the application for the order was filed; or
- otherwise, the day the winding up is taken because of Division 1A of Part 5.6 to have begun.

1142. Proposed paragraph (aa) of the definition provides that the ‘relevant day’ is, in relation to a company to which a provisional liquidator has been appointed, the day on which the provisional liquidator was appointed.

1143. Paragraph 112(e) will also amend the definition of relevant day in subsection (5) by omitting paragraph (b) (which makes provision for the situation where a company is under official management), and substituting new paragraphs (b) and (ba) (which make provision for the situations where a company is under administration or has executed a deed of company arrangement). These amendments are consequential upon the proposed repeal of the official management procedure in Part 5.3 and the proposed insertion of a new voluntary administration procedure in Part 5.3A.

1144. The definition of ‘relevant day’ is of consequence in relation to the operation of the offences provisions in section 590 and section 591.

#### Clause 113 - Offences by officers of certain companies

1145. Clause 113 will amend section 590 of the Corporations Law by inserting in subparagraph (1)(b)(ii) ‘except books of which the person is entitled as against the company or appropriate officer, to retain possession’ after ‘company’.

1146. The effect of this is that it is not an offence for an officer of the company to retain books of the company, as against the liquidator, if the officer is, for example, a receiver of the company under a security which includes the books, or where the officer is also a creditor of the company, with a security over the books.

1147. Section 590 will also be amended by omitting ‘5 years’ from each of paragraphs (1)(a), (c), (g) and (h) and substituting ‘10 years’.

#### Clause 114 - Incurring of certain debts: fraudulent conduct

1148. Clause 114 will amend section 592 of the Corporations Law by providing that section 592 only applies to debts incurred before the commencement of Part 5.7B of the Act.

#### Clause 115 - Inducement to be appointed liquidator etc of company

1149. Clause 115 will amend section 595 of the Corporations Law by omitting everything after ‘some other person’ and substituting:

- ‘as
  - (a) a liquidator or provisional liquidator of the company; or
  - (b) an administrator of the company; or
  - (c) an administrator of a deed of company arrangement executed, or to be executed, by the company; or
  - (d) a receiver, or a receiver and manager, of the property of the company; or

- (e) a trustee or other person to administer a compromise or arrangement made between the company and any other person or persons.’.

Clause 116 – (Insertion of heading and new sections 596A to 596F)

1150. Clause 116 inserts the following heading and proposed sections 596A, 596B, 596C, 596D, 596E and 596F before section 597:

‘Division 1 - Examining a person about a corporation’.

Proposed Division 1 (of Part 5.9) - Examining a person about a corporation

1151. Persons who may be able to provide information or assistance in an insolvency administration can be the subject of an examination before the Court under existing section 597.

Proposed section 596A - Mandatory examination

1152. A significant difference between the personal bankruptcy and company insolvency examination provisions is that, in bankruptcy, the trustee is entitled to examine the bankrupt without first having to obtain a court order. By contrast, in the winding up of an insolvent company, the liquidator must obtain a court order for an examination under subsection 597(2) of the Corporation Law.

1153. The Harmer Report suggested that the formalities and expense involved in obtaining a court order may be a deterrent to the use of the procedure, and was of the view it would be consistent with the duty on directors of an insolvent company to assist the liquidator in the winding up if the right to examine such a person could be exercised as conveniently and inexpensively as in bankruptcy. It thus recommended that:

- There be provision for the examination without court order of any person who is acting or who has within 2 years immediately before the commencement of the winding up acted in the capacity of a director, secretary, executive officer, administrator, receiver or liquidator of a company that is being wound up in insolvency. (The term used to describe such persons in the proposed amendments is ‘examinable officers’, which is to be defined in section 9.)
- A liquidator should have express power to require production of documents either from the examinee (the documents might in that case be required in the summons for examination) or by way of an order for production of documents directed to third parties who may have possession of documents relevant to the examination at the time of issue of the summons for such an examination.

1154. Proposed section 596A will provide that the Court is to summon a person for examination about a corporation’s examinable affairs where application for the summons is made by an ‘eligible applicant’ (to be defined in section 9 to mean the ASC, a liquidator or

provisional liquidator, an administrator of a corporation, an administrator of deed of company arrangement, or a person authorised by the ASC) and the person is or was, within the previous 2 years, an ‘examinable officer’ (also to be defined in section 9) of the corporation.

1155. The intention is that the Court will issue the summons where it is satisfied that the person’s connection with the company is such that the person is an examinable officer, without the need to inquire further into such matters as whether that person has taken part or been concerned in the examinable affairs of the corporation, been guilty of misconduct in relation to the corporation or is able to give information about examinable affairs of the corporation. It is envisaged that the issue of a summons in such circumstances will be a formality, and that the respective Court rules may provide for execution of the function by a Registrar or equivalent official, where appropriate.

#### Proposed section 596B - Discretionary examination

1156. This section will implement the Harmer Report’s recommendation that where a person is not within the category of ‘examinable office’ but may, nonetheless, be able to provide information relating to the affairs of the company, the requirement for an order for examination should be retained.

1157. Proposed subsection (1) will provide for the issue of a summons to a person (other than an ‘examinable officer’), at the discretion of the Court, in circumstances where the application for a summons is made by an ‘eligible applicant’ (to be defined in section 9) and the Court is satisfied that the person has taken part in, or may be able to give information about the ‘examinable affairs’ (also to be defined in section 9) of the corporation. These requirements will largely replicate existing paragraphs 597(2)(a) and (b), which will be omitted by paragraph 117(a).

1158. Proposed subsection (2) provides that this section will have effect subject to proposed section 596A.

#### Proposed section 596C - Affidavit in support of application under section 596B

1159. The Harmer Report recommended that applications for the examination of persons other than ‘examinable officers’ of the company should continue to be supported by evidence on affidavit. It further recommended that supporting affidavits should not be available for inspection unless the Court orders otherwise. It referred to two cases, *Re Abrahams: ex parte Thomas* (1985) 9 FCR 232 and *Re Suncoast Tile Merchants Pty Ltd (in Liquidation)* (1986) 4 ACLC 663, as accepting that the efficacy of the examination procedure may depend upon keeping secret the material in support of the application. However, the view was also expressed that, where appropriate, the Court should enable the examinee to have access to that material.

1160. Existing section 597 says nothing about the nature of the material to be presented in order to persuade the Court to exercise its discretion to order an examination.

1161. Subsection (1) will provide that an applicant for the summons of a person under

proposed section 596B must file an affidavit in support of that application that complies with the requirements of the rules.

1162. The affidavit will not be available for inspection unless the Court orders otherwise (proposed subsection (2)).

#### Proposed section 596D - Content of summons

1163. A summons is to require the person being examined to attend before the Court at a specified place, time and day that are reasonable in the circumstances, to be examined on oath about the corporation's 'examinable affairs' (to be defined in section 9).

1164. Proposed subsections (2) and (3) will implement the Harmer Report's recommendation that an 'eligible applicant' have express power to require production of documents from an examinee and that those documents be required in the summons for examination.

#### Proposed subsection 596E - Notice of examination

1165. This section will require the person who applied for the summons to give written notice of the examination to as many of the corporation's creditors as reasonably practicable (proposed paragraph (a)), and to each person that falls within the definition of 'eligible applicant' (to be inserted in section 9), subject to the exceptions detailed in proposed paragraph (b).

#### Proposed section 596F - Court may give directions about examination

1166. Proposed subsection (1) will prescribe the directions that a Court may give about an examination.

1167. Subject to section 597, the Court will be able to give a direction under proposed paragraphs (1)(e), (f) or (g) in relation to an examination, even if the examination is held in public (proposed subsection (2)).

1168. A person must not contravene a direction given by the Court under proposed subsection (1) (proposed subsection (3)).

#### Clause 117 - Conduct of examination

1169. This clause will make a number of amendments to existing section 597, consequent on the implementation of many of the recommendations made by the Harmer Report in relation to the examination of persons concerned with corporations.

1170. Paragraph 117(a) will omit subsections 597 (1), (2) and (3), as the content of those subsections, as amended, is to be included in proposed new sections 596A, 596B, 596D and 597(5B).

1171. Paragraph 117(c) will omit subsection 597(5) and substitute proposed new subsections

(5A) and (5B). Proposed subsection (5A) will provide that the ASC and any other ‘eligible applicant’ (to be defined in section 9) may take part in an examination and for that purpose may be represented by a lawyer or an agent.

1172. Proposed subsection (5B) will set out the matters in relation to which a person may be examined. It will provide that the questions that may be put to an examinee are those that relate to the corporation or any of its ‘examinable affairs’, a term that is to be defined widely (as set out below) in line with the definition of the ‘examinable affairs’ of a bankrupt under subsection 5(1) of the Bankruptcy Act. Existing subsection 597(3) of the Corporations Law (that is to be omitted by paragraph 117(a)), presently describes the issues on which a person may currently be examined as follows:

‘.....any matters relating to the promotion, formation, management, administration or winding up, or otherwise relating to affairs of, the corporation concerned’.

1173. The aim of the proposal to omit this existing requirement and replace it with proposed subsection 597(5B) is to cast a very broad net in defining the matters on which a person may be examined under section 597, in order to allow eligible applicants to ascertain, inter alia, not only whether any monies or property are missing from the assets of the company being administered or wound up in insolvency, but also where those monies or property have gone to.

1174. ‘Examinable affairs’ is to be defined in section 9, in relation to a corporation, to mean:

- the promotion, formation, management, administration or winding up of the corporation; or
- any other affairs of the corporation (including anything that is included in the corporation’s affairs because of section 53 as proposed to be amended); or
- the business affairs of a connected entity of the corporation, in so far as they are relevant to the corporation or its examinable affairs because of the above provisions of the definition.

1175. For the purposes of the definition of ‘examinable affairs’, the term ‘affairs’ is to be defined in section 9 to have a meaning affected by section 53. The term ‘business affairs’ is itself to be defined in section 9 to have a meaning affected by sections 53AA, 53AB, 53AC and 53AD which define respectively the business affairs of a body corporate, a natural person, a partnership and a trust. The term ‘connected entity’ is also to be defined in section 9 to mean a body corporate related to the corporation or an entity connected (as defined by proposed section 64B) with the corporation. Existing section 50 sets out the circumstances in which a body corporate is to be taken to be related to a corporation. Proposed subsections 64B(1), (2), (3) and (4) will define the circumstances in which each of a body corporate, a natural person, a partnership or a trust will be taken to be connected with a corporation.

1176. Paragraphs 117(d) and (e) propose minor drafting changes to existing subsection 597(6) to substitute references to a ‘summons’ for existing references to an ‘order’, consequential upon

the proposal to replace the existing requirement in subsection (3) for an order for examination with a requirement in each of proposed subsections 596A and 596B for a summons for examination.

1177. Paragraph 117(f) will omit existing subsections 597(7), (8) and (9) and substitute proposed subsections 597(7), (9) and (9A).

1178. Proposed subsection 597(7) will expand the existing prohibition in subsection 597(7) of the refusal or failure to take an oath by also prohibiting: the refusal or failure to make an affirmation or answer a question the Court directs the examinee to answer; the making of a false or misleading statement (currently covered by subsection 597(11)); and the refusal or failure to produce books that the summons has required the examinee to produce.

1179. Proposed subsection 597(9) will implement the Harmer Report's recommendation that a liquidator have express power to require the production of documents by way of an order for production of documents directed to third parties who may have possession of documents relevant to the examination. Proposed subsection 597(9) will provide that the Court may direct a person to produce (at his or her examination or an examination of any other person), books in the examinee's possession that are relevant to the examination.

1180. It will not be necessary for persons who are not in fact required for examination to attend personally to produce the books, and such persons will simply be required to cause the books to be produced at the examination (proposed subsection 597(9A) for example by producing the books to the clerk of the Court at a reasonable time prior to the examination.

1181. Paragraph 117(g) will omit subsection 597(11) and substitute proposed subsection 597(10A). Proposed subsection (10A) will provide that a person directed to produce books at an examination must not, without reasonable excuse, refuse or fail to comply.

1182. Paragraph 117(h) will amend existing subsections 597(12) and (12A) by omitting from each subsection the words 'held under an order under subsection (3)'. This proposed amendment is consequential upon the proposal to replace the existing requirement in subsection (3) for an order for examination with a requirement in each of proposed subsections 596A and 596B for a summons for examination.

1183. Paragraph 117(i) will make a minor technical amendment to existing subsection 597(13) by omitting the words "under this section". This amendment is consequential on the proposed insertion of new sections 596A to 596F and 597A and 597B, with the result that examinations will no longer be governed only by section 597.

1184. Paragraph 117(j) will insert proposed subsection 597(14A) after existing subsection 597(14). Proposed paragraph (14A)(a) will set out the persons to whom a written record of the examination made under subsection (13) will be available, for inspection, without fee, Other persons will be entitled to inspect the written record upon paying the prescribed fee (proposed paragraph (14A)(b)). This subsection will relate specifically to a written record made under subsection (13) and will not affect existing arrangements for the payment of fees for transcripts

of evidence.

1185. Paragraph 117(k) will omit the word 'section' wherever it appears in existing subsections 597(15), (16) and (17) and substitute the word 'Division' This technical amendment will be consequential on the incorporation of existing section 597 in new Division 1 of Part 5.9.

1186. Paragraph 117(1) will omit existing subsection 597(18). The issue of costs of examinations presently dealt with in subsection (18) will be dealt with in proposed section 597B.

Clause 118 – (Insertion of new sections 597A and 597B and heading)

1187. Clause 118 will insert, after section 597, new sections 597A and 597B and the following heading:

‘Division 2- Orders against a person in relation to a corporation’

Proposed section 597A - When Court is to require affidavit about corporation’s examinable affairs

1188. It is likely that on some occasions the cost of the examination procedure could be avoided if a liquidator (or other persons falling within the proposed definition of ‘eligible applicant’) could gather the information that would otherwise be obtained at an examination by some other, less expensive, means. This section thus proposes that an ‘eligible applicant’ (to be defined in section 9) may require persons within the category of ‘examinable officer’ (also to be defined in section 9) to supply affidavit evidence in lieu of, or in addition to, attending an examination.

1189. Proposed subsection (1) will provide that the Court is to require a person to file an affidavit on the application of an eligible applicant if it is satisfied that the person is, or was within the period defined by proposed paragraph 597A(1)(b), an examinable officer.

1190. Proposed subsection (2) will set out the information that is to be specified in the requirement.

1191. Proposed subsection (3) will prohibit the refusal or failure to comply with a requirement made under subsection 597A( 1).

1192. Under proposed subsection (4), the Court may excuse a person from answering a question at an examination if the question has been answered by information set out in an affidavit already filed.

Proposed section 597B - Costs of unnecessary examination or affidavit

1193. Existing subsection 597(18), which addresses the issue of costs of an examinee where the Court is satisfied the order for examination was obtained without reasonable cause, is to be omitted by paragraph 117(1). Proposed section 597B will replace existing subsection 597(18)

and will also address the issue of costs in a situation where a person was required to file an affidavit under proposed section 597A without reasonable cause, in addition to the situation where a summons for examination was obtained without reasonable cause. In both situations, this section will provide that the Court may order that some or all of the costs incurred by the person summonsed to appear for examination or required to file an affidavit be paid by the applicant or any person who took part in the examination.

#### Clause 119 - Order against person concerned with corporation

1194. The amendments proposed by this clause are consequential on the proposed amendments to existing section 597 and the insertion of proposed sections 596A to 596F, which replace former references to the term ‘prescribed person’ with references to the term ‘eligible applicant’. Clause 119 will delete existing subsection 598(1) (which defines the term ‘prescribed person’) and will replace the existing reference to ‘the Commission or a prescribed person’ in subsection 598(2) with a reference to ‘an eligible applicant’.

#### Cause 120 – (Insertion of new Division and heading)

1195. Clause 120 will insert the following Division (to consist of proposed sections 600A to 600F) and heading after existing section 600:

‘Division 3 - Provisions applying to various kinds of external administration’

#### Proposed section 600A - Powers of Court where outcome of voting at creditors’ meeting determined by related entity

1196. The Harmer Report recognised that any system of voting by creditors is vulnerable to the influence of insider or related person creditors. To prevent such creditors from exercising an unfair influence over a meeting of creditors, the Harmer Report recommended that, where there is a fair inference that the votes of insider or related person creditors have significantly influenced the result of voting at a meeting of creditors, and non-related creditors have been prejudiced as a result, then:

- creditors be permitted to apply to the Court to set aside a resolution on the basis that the resolution was carried by the votes of related entities, and favours those persons to the prejudice of other creditors;
- the Court should have a specific power to order that a meeting be reconvened and that the related entities be excluded;
- the Court should be able to make consequential orders; and
- actions or things done in good faith pursuant to an invalidated resolution should not be void.

1197. Proposed section 600A will implement that recommendation in connection with

companies and Part 5.1 bodies. The circumstances in respect of which a Court must be satisfied before it will make one or more of the orders prescribed by proposed subsection (2) are set out in proposed subsection (1).

1198. A 'related creditor' is to be defined in proposed subsection (3) to mean a person who, when the vote was cast, was a related entity and a creditor of the company. The term 'related entity' is to be defined in section 9.

Proposed section 600B - Review by Court of resolution of creditors passed on casting vote of chairperson of meeting

1199. The insertion of proposed section 600B is consequential upon the proposed implementation of the Harmer Report's recommendation that all matters requiring the decision or resolution of creditors be reduced to a single voting formula in place of the existing variety in requirements for a valid resolution by creditors. The voting formula recommended by the Harmer Report was that:

- voting be by simple majority in number of all creditors present and voting either in person, by proxy, by attorney or by such other means as may be permitted (for example by 'absentee vote');
- if two or more creditors so request, voting be by majority in number and value;
- if a vote according to majority in number and value results in a deadlock, there be provision for an application to the Court by the relevant insolvency administrator for a resolution of the conflict.

1200. The Harmer Report further recommended that there should be provision for an appeal to the Court by a dissatisfied creditor. However, the right of appeal to the Court in the first instance to resolve a deadlock would erode funds available to creditors. It is thus proposed that the Harmer Report's recommendation be amended to provide that the chairperson of the meeting resolve the deadlock in the first instance. It is also proposed that where a resolution has been passed by a meeting of creditors by the casting vote of the chairperson, a creditor may apply to the Court for the variation or cancellation of the resolution.

1201. A large part of these reforms are to be implemented by amendment of the Corporations Regulations, with the exception of the proposed review by the Court of a resolution of creditors passed on the casting vote of the chairperson of the meeting. That aspect of the reforms is to be implemented by proposed section 600B.

1202. Proposed section 600B will apply where at a meeting of creditors held under proposed Part 5.3A or a deed of company arrangement executed by the company, or in connection with winding up the company, a resolution is passed by the casting vote of the chairperson (proposed subsection (1)). Application may be made to the Court, by a person who voted against the resolution, for an order setting aside or varying the resolution (proposed subsection (2)). The Court may set aside or vary the resolution and, if it does so, make such further orders and give

such directions as it thinks necessary (proposed subsection (3)). Where an order is made varying a resolution, the resolution will have effect as varied by the order (proposed subsection (4)).

Proposed section 600C - Court's powers where proposed resolution of creditors lost on casting vote of chairperson of meeting.

1203. Proposed section 600C will have a similar operation to proposed section 600B, except that section 600C will apply where, at a meeting of creditors, a resolution is not passed by the casting vote of the chairperson, or the chairperson refuses or fails to exercise his or her casting vote.

Proposed section 600D - Interim order on application under section 600A, 600B or 600C

1204. This section will provide that the Court may make an interim order to preserve the status quo pending the outcome of an application under proposed subsections 600A(1), 600B(2) or 600C(2).

Proposed section 600E - Order under section 600A or 600B does not affect act already done pursuant to resolution

1205. Proposed section 600E provides that an act pursuant to a resolution by a meeting of creditors, before the making of an order by the Court under section 600A or 600B setting aside or varying the resolution, is valid and binding notwithstanding the making of the order.

Proposed section 600F - Limitation on right of suppliers of essential services to insist on payment as condition of supply

1206. The purpose of proposed section 600F is to prevent the suppliers of essential services from refusing to continue to supply the service to an insolvency administrator (relevant authority - defined to include, inter alia, liquidator, receiver, administrator of a deed of arrangement) until past debts are paid.

1207. The Harmer Report recommended that, if a request is made by an insolvency administrator for the supply of gas, electricity, water or a telecommunications service (including supply of the same telephone number), the supplier should not be able to make it a condition of supply that outstanding charges are paid, although the supplier may demand personal guarantees for payments of the charges for subsequent supply.

1208. The Harmer Report took the view that a creditor who supplies goods or services which are essential for the carrying on of a business may be in a powerful position if the proprietor of the business becomes insolvent. The Report observed that a creditor may often be able to insist that past debts are paid to ensure the continued supply of the goods or services, thus giving the creditor a defacto priority.

1209. Proposed subsection 600F(1) provides that if a 'relevant authority' of an 'eligible company' requests, or authorises someone else to request, a person or authority (the supplier) to

supply an ‘essential service’ to a company, and the company owes an amount to the supplier in respect of the supply of the essential service supplied before the ‘effective day’, then the supplier must not refuse to comply with the request for the reason only that that amount is owing. Nor may the supplier make it a condition of the supply of the essential service that the amount is to be paid.

1210. Proposed subsection 600F(2) defines terms used in the proposed subsection 600F(1):

- ‘effective day’ is defined to mean the day when the relevant authority became a relevant authority, even if that day began before the commencement of this section;
- ‘eligible company’ is defined to mean a company (or a recognised company -see clause 29(a) which will amend the definition of ‘company’ in section 9) that is being wound up, to which a provisional liquidator has been appointed, that is under administration, that has executed a deed of company arrangement that has not yet terminated or to which a receiver or receiver and manager has been appointed;
- ‘essential service’ is defined to mean electricity, gas, water, or a telecommunications service within the meaning of the Telecommunications Act 1991; and
- ‘relevant authority’ is defined to mean a liquidator, a provisional liquidator, an administrator of a company, an administrator of a deed of company arrangement or a receiver or receiver and manager.

Clause 121 – (Insertion of new section 1091A)

Proposed Section 1091A - Rights of trustee of estate of bankrupt shareholder

1211. The Harmer Report noted that shares held by a bankrupt vest in the trustee upon the commencement of the bankruptcy, but only in equity. Until the formalities of registration of the shares into the name of the trustee are complete, only the bankrupt is recognised by the company as being entitled to the benefit of the rights attached to the shares. In some cases, there could be a significant delay in obtaining registration. The frustrations which this can lead to in the administration of the bankrupt’s estate can be exacerbated by restrictive provisions in the articles of association of the company which constrain the trustee in realising the value of the shares. The articles may even provide that rights attached to the shares are lost where a member ceases to be entitled to that share through bankruptcy. The Commission made a series of recommendations to deal with these problems and proposed section 1091A implements those recommendations.

1212. Proposed subsection (1) delimits the application of the section. It will apply wherever a person who holds shares in a company becomes bankrupt and the shares vest (in equity) in the trustee of the bankrupt’s estate, but the bankrupt is still the registered holder of the shares.

1213. Proposed subsection (2) provides that the trustee has the same rights in relation to the shares as the bankrupt would have enjoyed if he or she had not been bankrupted.

1214. Proposed subsections (3) to (5) spell out the trustee's rights of transfer. Often, a company's articles may make registration of a share transfer subject to approval of, for example, the board. A shareholder seeking to transfer his or her shares is entitled to require the directors to exercise such a power for a proper purpose. Subsection (3) will put the trustee in the same position as the bankrupt shareholder for the purpose of enforcing such rights. Subsection (4) will affirm this by providing that a transfer by the trustee is as valid as if the trustee had been a registered shareholder. Subsection (5) will specifically require a person whose consent or approval is required for the transfer to refrain from unreasonably withholding consent or approval.

1215. Some companies' articles are such that shares may only be transferred to other members or must be offered to those other members before they can be offered to 'outsiders'. Subsection (7) will provide a further safeguard of the trustee's rights by allowing the trustee to disregard such requirements if the relevant members fail to offer a reasonable price within a reasonable period.

1216. Proposed subsections (8) to (10) will close off any avenues of avoidance of the earlier subsections. In particular, they will provide that the section has effect despite anything in the company's memorandum or articles of association.

#### Clause 122- Schedule 3- Penalties

1217. Clause 122 will omit the penalties presently provided for breach of existing provisions relating to official management, (consequential upon the proposed repeal of Part 5.3 by clause 56), and substitute penalties for offences that are to be inserted by the amendments proposed by Part 4 of this Bill relating to the external administration of companies and Part 5.7 bodies.

#### Clause 123 - Consequential amendments of the Corporations Law

1218. Clause 123 will provide that the Corporations Law is to be amended, consequential on the amendments proposed by Part 4 of this Bill relating to the external administration of companies and Part 5.7 bodies, as set out in Schedule 1.

1219. Many of the amendments will be consequential on the proposal by clause 56 to delete Part 5.3 relating to the official management of companies and to insert a new Part 5.3A to provide for the administration of a company's affairs with a view to executing a deed of company arrangement. In line with these proposed amendments, it will be necessary to delete existing references to official management in those sections of the Corporations Law that contain such references, (except where transitional arrangements require the continued reference to official management in those sections), and to substitute references to the new administration procedure to be inserted by Part 5.3A.

#### Division 2-Consequential amendments of the Australian Securities Commission Act 1989

### Clause 124 - Interpretation

1220. Section 5 of the Australian Securities Commission Act 1989 is to be amended, consequential upon the insertion of a new Part 5.3A in the Corporations Law, to provide for the administration of a company's affairs with a view to executing a deed of company arrangement, by including an administrator of the body and an administrator of a deed of company arrangement executed by the body in the definition of 'officer' in subsection (1).

### Division 3 – Consequential amendments of other Acts

#### Clause 125 - Schedule 2

1221. Clause 125 provides that the Acts specified in Schedule 2 will be amended as set out in that Schedule. These amendments will be consequential on the proposal by clause 56 to delete Part 5.3 relating to the official management of companies and to insert a new Part 5.3A to provide for the administration of a company's affairs with a view to executing a deed of company arrangement. In line with these proposed amendments, it will be necessary to delete existing references to official management in the Acts specified in Schedule 2 (except in circumstances where transitional arrangements require the continued reference to official management in those Acts), and to substitute references to the new administration procedure to be inserted by Part 5.3A.

## Part 5 - IMPLEMENTING THE CLEARING HOUSE SUBREGISTER SYSTEM (CHESS')

1222. In 1989 The Group of 30 (a private international organisation concerned with major international economic and financial issues) issued a report which made a number of recommendations aimed at reducing settlement risk in securities markets worldwide. In particular, the report specifically recommended a standard settlement regime of T+3 (third business day after trade) and the introduction of delivery versus payment settlement of securities transactions by 1992. This regime cannot be achieved in the Australian equities market without substantial changes to existing settlement procedures which are based on paper documents.

1223. The CHESS concept resulted from the work of a high level Clearing and Settlement Steering Committee, comprising representatives from the banking, accountancy, business community and the Australian Securities Commission.

1224. CHESS will be the third stage of a strategy for reforming equities settlement in Australia:

- Stage 1: was the introduction of uncertificated holdings through the flexible Accelerated Security Transfer system (FAST) which eliminated the necessity for share certificates as evidence of title for eligible securities;
- Stage 2: was the introduction of a trade plus five (T + 5) business days fixed settlement regime which enabled settlement of sale of securities to take place on the 5th business day after trade. (The Corporations Legislation Amendment Act (No. 2') 1991 facilitated implementation of this regime);
- Stage 3: achievement of the Group of 30's risk containment goals of a T + 3 settlement and delivery versus payment regime which will be facilitated by the CHESS system.

1225. The combination of FAST (Flexible Accelerated Securities Transfer System.) and the amendments facilitating a mandatory T+5 settlement of Australian Stock exchange (ASX) transactions introduced in the Corporations Legislation Amendment Act (No. 2') have paved the way for the introduction of CHESS, the final stage in bringing Australian equities settlement up to the world standard set by the Group of 30.

1226. FAST rendered the certificate of title optional, but retained the paper document of transfer. It is supported by ASC declarations modifying the Corporations Law and is regarded as a transitional scheme. CHESS will provide for purely electronic transfer.

1227. The Chess Clearing House will substantially reduce risks connected with settlement of ASX transactions between clearing house participants by bringing forward the point in time at which the legal title (as opposed to the equitable title) to securities is transferred to the purchaser. Technically, this will be achieved by the clearing house sub-register which will have the legal status of a company register and the authority to maintain balances of holdings held in an uncertificated form.

1228. The objectives of CHESS are:

- to increase efficiency and reduce risk in relation to the settlement of ASX transactions;
- to attract trading to the Australian equities markets;
- to reduce the risk for private investors and simplify the process for change in share ownership;
- to reduce settlement costs for all market participants; and
- to make it possible to achieve a T+3 settlement regime.

1229. The purpose of the amendments in Part 5 is to provide a basic legislative framework to facilitate CHESS. While the above policy objectives will be achieved by these amendments, the technical details of the system will, for the sake of commercial flexibility, substantially be left to the provisions of the Listing and Business Rules of the ASX and the business rules of the proposed securities clearing house for CHESS.

### **Stamp duty**

1230. Under existing State and Territory stamp duty legislation a company must not register a share transfer unless a stamped proper instrument of transfer has been delivered to the company. Section 100A of the Corporations Law preserves the operation of these stamp duty provisions by providing that nothing in the Corporations Law affects the operation of any provisions of any law prohibiting the registration by a company of a transfer of securities if any duty applicable in respect of the transfer has not been paid,.

1231. One of the key features of the CHESS proposal is that it will remove the paper document of transfer and provide for the purely electronic transfer of securities on market. For these transfers there will not be a form of instrument of transfer as envisaged by State and Territory stamp duty legislation.

1232. In order to ensure that a company is not prevented from registering a transfer of securities under the CHESS system, the ASX has made representations to State and Territory Governments seeking changes to their stamp duty legislation to ensure that appropriate mechanisms are in place for levying of stamp duty (if any) on share transfers notwithstanding the introduction of electronic transfer under the CHESS system. The Attorney-General supports those submissions.

### **Clause 126 - Dictionary**

1233. This clause will modify existing definitions and insert additional ones in section 9 (the general definitions section) to facilitate CHESS.

1234. The following definitions will be modified by adding cross-referencing notes:

- “document” - the note refers to proposed subsection 1097(1);
- “prospectus” - the note refers to proposed subsection 779J(1);
- “relevant interest” - the note refers to proposed subsection 779J(2);
- “securities business” - the note refers to proposed subsection 779J(1).

1235. Other amendments to section 9 insert the following additional definitions:

- “proper SCH transfer” - which will be defined as an SCH-regulated transfer of a quoted right or security which is in accordance with the SCH business rules or which is taken to be a proper SCH transfer by proposed section 1097D because it substantially complies with the SCH business rules;
- “quoted right” - which will be defined in section 1097A;
- “quoted security” - which will be defined in section 1097A;
- “SCH” - which is defined as an abbreviation of securities clearing house;
- “SCH business rules” - which will be defined as the business rules of the securities clearing house within the meaning of chapter 7. The proposed amendments dealing with CHESSE are centred on the business rules of the approved clearing house. It is considered that the detailed procedural rules for the clearing house are better placed in the business rules of the clearing house rather than in the legislation. This is similar to the approach taken in relation to the stock exchange;
- “SCH participant” - which will mean a person or partnership which is able to participate in the facilities provided by the securities clearing house.
- Entitlement to participate in the facilities will be determined by the SCH business rules;
- “SCH-regulated transfer” - which will mean a transfer of a quoted security or quoted right which is an SCH-regulated transfer under the business rules of the SCH;
- “securities clearing house” or “SCH” - which will be defined as a body corporate in relation to which an approval under section 779B is in force.

Clause 127 - Application not to be granted unless applications also made under corresponding laws

1236. Section 102A requires certain applications under the Corporations Law to be made under each jurisdiction in order to facilitate the national administration of the Law.

1237. Clause 127 will amend subsection 102A(3) by adding a reference to section 779A relating to the approval of the securities clearing house under proposed Part 7.2A. Consequently, a securities clearing house seeking approval under section 779B from the Minister will need to seek approval under the corresponding laws of each jurisdiction.

Clause 128 - Insertion of new Part

Background

1238. Clause 128 will insert Part 7.2A which will deal with the approval and regulation of the securities clearing house. The provisions in this Part have been closely modelled on those for futures clearing houses.

Proposed section 779A - Interpretation

1239. Proposed section 779A will insert the following new definitions:

- “disciplinary proceeding” - which will be defined as a proceeding under the SCH business rules that may result in the disciplining of an SCH participant or an appeal from such a proceeding;
- “disciplining” - which will be defined as including an action that has the effect of revoking or suspending a person’s status as an SCH participant

Proposed section 779B - Approval of securities clearing house

1240. A body corporate proposing to provide clearing house facilities for a stock market will be able to apply to the ASC for approval by the Minister.

1241. The Minister will be able to approve the body as a clearing house for a securities exchange if:

- its business rules include satisfactory provisions about the facilities it proposes to provide for the settlement of transactions and the registration of transfers (proposed subparagraph 779B(2)(a)(i));
- its business rules make suitable provision for the disciplining of participants for contraventions of the business rules or Chapter 7 of the Corporations Law (proposed subparagraph 779B(2)(a)(ii));

- its business rules are otherwise satisfactory (proposed subparagraph 779B(2)(a)(iii); and
- the public interest will be served by granting approval (proposed paragraph 779B(2)(b))

1242. The approval comes into force on the date specified in the approval instrument (proposed subsection 779B(3)) which date has to be the same as, or later than, the approval date. The approval is to be published in the Gazette (proposed subsection 779B(5)).

1243. At the present time, the proposed provisions only allow for the approval of one securities clearing house at a time (subsection 779B(4)). Whilst the approval process will be restricted to one clearing house this will not, as a matter of law, prevent other clearing houses from operating.

#### Proposed section 779C - Commission to be notified of amendments of business rules

1244. Under proposed section 779C, the approved securities clearing house will be required to notify the ASC of any amendments of its business rules. (A definition of ‘SCG business rules’ is to be included in section 9).

1245. A brief outline of this provision is as follows:

- an amendment will cease to have effect if it is not notified to the ASC within 21 days of the amendment (proposed subsection 779C(3));
- the ASC will be required to send a copy of the notice to the Minister (proposed subsection 779C(4)). The Minister will be able to disallow all or part of an amendment within 28 days (proposed subsection 779C(5));
- The ASC will be required to give notice to the securities clearing house of any disallowance, and the amendment ceases, to the extent of the disallowance, to have effect on receipt of that notice (proposed subsection 779C(6)).

#### Proposed section 779D - Securities clearing house to assist Commission

1246. Proposed section 779D will provide that the securities clearing house will be required to assist the ASC in the performance of its functions.

#### Proposed section 779E - Securities clearing house to notify Commission of disciplinary action

1247. Under proposed section 779E where the securities clearing house decides to discipline an SCH participant it must lodge written particulars of the participant’s name and the reason for, and nature of, the disciplinary action with the Commission.

Proposed section 779F - Issuers of quoted securities and quoted rights to comply with SCH business rules

1248. Proposed section 779F will provide that issuers of quoted securities and quoted rights must comply with the business rules of the securities clearing house insofar as those rules purport to apply to such issuers.

Proposed section 779G - Power of court to order compliance with SCH business rules

1249. Proposed section 779G will provide that the ASC, the securities clearing house or any aggrieved person will be able to apply to the Court (defined in section 9) to make an order to enforce the provisions of the business rules of the securities clearing house (proposed subsection 779G(1)).

1250. However, the Court must provide affected persons with an opportunity to be heard before making such an order (proposed subsection 779G(2)).

Proposed section 779H - Qualified privilege in respect of disciplinary proceedings

1251. Proposed section 779H will provide the securities clearing house, a member, officer or employee of the clearing house, or an SCH participant, qualified privilege in proceedings for defamation in respect of statements made by them arising out disciplinary proceedings of the securities clearing house (subsection 779H(1)). Publication of such statement is similarly protected (subsection 779H(2)). This protection recognises the possibility of publication of the results of disciplinary proceedings as a deterrent, in addition to, or instead of, a fine or other penalty.

1252. Proposed subsection 779A will define “disciplinary proceeding” as a proceeding or an appeal under the business rules of the securities clearing house.

Proposed section 779J - Provision of settlement facilities not a securities business etc

1253. Proposed paragraph 779J(1)(a) will provide that the settlement facilities provided by the securities clearing house will not be taken to constitute a securities business.

1254. The amendment is necessary because the securities clearing house might otherwise be obliged to obtain a securities dealers licence under section 782.

1255. Proposed paragraph 779J(1)(b) will provide that the provision of settlement facilities will not be taken to constitute an offer of securities for subscription or purchase or an invitation to subscribe for or buy securities.

1256. The provision is necessary to make it clear that the activities of the clearing house are not subject to the fundraising provisions of the Corporations Law.

1257. Proposed subsection 779J(2) will provide that the clearing house approved under

section 779A will not be taken to have acquired a relevant interest in a security by virtue of providing settlement facilities.

1258. The provision is necessary because it could be argued that the clearing house, by having a degree of control over disposal of shares, could be deemed to have a relevant interest in the shares. This could lead to a potential breach of section 615, which prohibits acquisitions of relevant interests beyond the prescribed limits.

#### PART 7.10- THE NATIONAL GUARANTEE FUND

1259. Part 7.10 deals with the establishment, maintenance of, and claims against the National Guarantee Fund (NGF).

1260. A number of provisions in Part 7.10 will be amended to ensure that the National Guarantee Fund extends to CHESST transactions.

#### Clause 129 - Interpretation

1261. A number of amendments are to be made to the definitions in section 920 to ensure that the National Guarantee Fund is available to support settlement of ASX transactions in the clearing house environment. The following definitions in particular are amended:

- the definition of “clearing nominee” is amended by changing references to “participating exchange” in that definition to references to ‘settlement authority’;
- the definition of “obligations” is amended to include obligations arising under the SCH business rules;
- the definition of “reportable transaction” is amended by incorporating the present definition of “quoted securities” into the definition of ‘reportable transaction’. This amendment does not change the meaning of the definition of “reportable transaction”;
- the definition of “TDS nominee” is amended by omitting references to “participating exchange” and substituting references to “settlement authority”;
- the definition of “transfer delivery service provisions” is amended by changing references to “participating exchange” to references to “settlement authority”.

1262. A definition of “settlement authority” is to be inserted. This term will mean a participating exchange or the securities clearing house.

#### Clause 130- Transfer of securities etc. and payment of money

1263. Section 924 is to be amended by inserting a new subsection (2) which will provide that in the case of an SCH-regulated transfer of securities a person will be taken to have transferred

the securities if that person does all things that the SCH business rules require to be done to effect the transfer. In any other case a person will be taken to have transferred securities to another person if that person delivers transfer documents to the transferee that are sufficient for the transferee to become registered as the holder of the securities or, in the case of marketable rights within the meaning of Division 3 of Part 7.13, to obtain the issue to the transferee of the securities to which the marketable rights relate.

#### Clause 131 - Novation of agreements

1264. Section 924A is to be amended by substituting a reference to settlement authority for a reference to participating exchange.

#### Clause 132 - Definitions

1265. A definition of Exchange body is to be inserted in section 948. An Exchange body is defined as meaning the Exchange or an Exchange subsidiary.

#### Clause 133 - Effect of using a transfer delivery service

1266. Section 948A is to be amended by omitting the reference to “participating exchange” and substituting a reference to “settlement authority”.

#### Clause 134 - Claim by selling dealer in respect of default by buying dealer

1267. Section 949 of the Corporations Law is to be amended to take account of transactions that will take place using the CHES system. Where a transaction is an SCH-regulated transfer, a selling dealer must have done or be willing and able to do all things required under the SCH business rules to effect the transfer before that dealer will be able to make a claim under section 949 in respect of a default by a buying dealer.

1268. The section will also be amended to allow the securities clearing house to make a claim on behalf of a dealer under this section where the SCH business rules purport to authorise the securities clearing house to do so. Where the clearing house is able to make claims under the section in respect of 2 or more dealers, it may make a single claim on behalf of all those dealers.

1269. A new paragraph 5(aa) is to be inserted which will provide that, in the case of an SCH-regulated transfer, before the SEGC Board may satisfy a claim under section 949, the claimant must have done all things required to be done under the SCH business rules to effect a transfer or the dealer must have transferred to the SEGC or to an Exchange body for the purposes of the claim, in accordance with the SCH business rules, securities of the same kind and number as the securities the subject of the sale from which the claim arises.

#### Clause 135 - Claim by buying dealer in respect of default by selling dealer

1270. Section 950 is to be amended to provide that in the case of a purchase involving an SCM-regulated transfer, a buying dealer may make a claim in respect of a default by a selling

dealer, if the selling dealer has not done all things that the selling dealer is required to do under the SCH business rules to effect a transfer of the securities pursuant to the purchase.

1271. Where the SEGC allows such a claim the SEGC must, subject to section 953, transfer to the claimant securities of the same kind and number as the securities which were the subject of the purchase.

Clause 136 - Effect of novation, under business rules, of agreement for purchase

1272. Section 950A is to be amended by substituting a reference to “settlement authority” for the reference to “participating exchange”.

Clause 137 - Claim by selling client in respect of default by selling dealer

1273. Section 951 is to be amended to provide that in the case of a sale of securities which would be an SCH-regulated transfer, a selling client may make a claim if the selling dealer’s obligations to the client have not been discharged and

- the selling client has done all things necessary to enable the selling dealer to do all things that the dealer is required to do under the SCH business rules to effect a transfer of the securities; or
- if the dealer has been suspended the selling client has done or is ready, willing and able to do all things that the dealer is required to do under the SCH business rules to effect a transfer of securities pursuant to the sale.

1274. In the case of an SCH-regulated transfer, the Board of the SEGC must be satisfied either:

- that the claimant has done everything to enable the selling dealer to do all things required of the selling dealer under the SCH business rules to effect a transfer, or
- that the claimant has transferred securities of the same kind and number as the securities the subject of the sale to the SEGC or an Exchange body, for the purposes of the claim and in accordance with the SCH business rules.

Clause 138 - Claim by buying client in respect of default by buying dealer

1275. Section 952 is to be amended to provide that a buying client may make a claim under this section in respect of a transfer of securities pursuant to a purchase that would be an SCH-regulated transfer. Where the SEGC allows such a claim it must transfer to the claimant securities of the same kind and number as the securities the subject of the purchase.

Clause 139- Insertion of new section

Proposed Section 952A - Cash settlement of claims - SCH-regulated transfers

1276. A new section is to be inserted to apply where the SEOC allows a claim under section 950 or section 952 in respect of the purchase and the transfer of securities pursuant to the purchase if the transfer would be an SCH-regulated transfer. If it is not reasonably practicable for the SEGC to obtain securities of the same kind and number as those the subject of the purchase in respect of which the claim relates the SEOC must satisfy the claim by paying to the claimant an amount equal to the claimant's actual pecuniary loss suffered in respect of the purchase. This section is similar to section 953.

Clause 140 - Cash settlement of claims -transfers other than SCH regulated transfers

1277. Section 953 is to be amended to make it clear that it applies only to claims which are not in respect of SCH-regulated transfers.

Clause 141 - Effect of using a transfer delivery service

1278. Section 954C of the Corporations Law is amended by substituting "settlement authority" for the reference to "participating exchange".

Clause 142 - Effect of novation, under business rules, of guaranteed securities loan

1279. The reference to "participating exchange" in section 954E is to be changed to a reference to "settlement authority".

Clause 143 - Effect of using a transfer delivery service

1280. Section 954M is to be amended by changing the reference to "participating exchange" to "settlement authority".

Clause 144 - Claim in respect of failure to pay net amount in respect of transactions

1281. A number of consequential amendments are to be made to section 954N. In particular, references to "participating exchange" are to be changed to references to "settlement authority". A reference to a "dealer" is to become a reference to a person and "person" will be defined as including a partnership.

Clause 145 - Claim in respect of failure to transfer net number of securities in respect of transactions

1282. A number of consequential amendments are to be made to section 954P. In particular, references to "participating exchange" are to be changed to references to "settlement authority". A reference to a "dealer" is to become a reference to a person and "person" will be defined as including a partnership.

Cause 146 - How claim under subsection 954P(2) is to be satisfied

1283. Section 954S is to be amended by changing the reference in paragraph 954S(5)(a) to “participating exchange” to “settlement authority”.

Clause 147 - How claim under subsection 954P(3) is to be satisfied.

1284. References in section 954T to “participating exchange” are to become references to “settlement authority”.

Clause 148 - Claim in respect of default by TDS nominee

1285. References in section 954X to “participating exchange” are to be changed to references to “settlement authority”.

Clause 149 - How claim under subsection 954X(2) is to be satisfied

1286. The definition of “pie-cash settlement period” in subsection 954Z(5) is to be amended by changing the reference to “participating exchange” to a reference to “settlement authority”.

Clause 150 - Nexus with this jurisdiction

1287. Section 954ZB is amended by changing a reference to “participating exchange” to a reference to “settlement authority”.

Clause 151 - Interpretation

1288. Section 955 is to be amended by inserting the following definitions:

- “transferor” - which is defined in paragraph 956(3)(b);
- “transferred securities” - which is defined in paragraph 956(3)(c);
- “unauthorised execution” - which is defined in paragraph 956(3)(a).

Clause 152 - Repeal of section 956 and substitution of new section; - Situations to which this Division applies

1289. Division 7 of Part 7.10 provides for claims against the National Guarantee Fund in respect of unauthorised transfers. The proposed section 956 makes it clear that the Division applies to both SCH-regulated transfers and transfers that are not SCH-regulated.

Clause 153 - Claim by transferee or sub-transferee

1290. Consequential amendments are to be made to section 958 to incorporate appropriate

references to SCH-regulated transfers.

Clause 154 - Discretion to pay amounts not received etc, because of failure to transfer securities

1291. Section 972A is to be amended by replacing references to a “participating exchange” with references to a “settlement authority”.

Clause 155 - Application of Fund in respect of certain claims

1292. Consequential amendments are to be made to section 973.

Clause 156 - Arbitration of amount of cash settlement of certain claims

1293. Consequential amendments are to be made to section 977 to take account of proposed section 952A.

Clause 157 – Subrogation of SEGC to claimant’s rights etc

1294. Consequential amendments are to be made to section 980.

Clause 158 - Nature of shares and other interests

1295. Section 1085 defines the nature of shares and other interests of a company as being personal property which can be transferred or transmitted under the articles and laws.

1296. Clause 158 will amend section 1085 so that it is clear that in relation to SCH transfers the business rules of the clearing house override the articles of a company. This is necessary to ensure that there is no obstacle in the articles to the electronic system of settlement and transfer.

Clause 159 - Numbering of shares

1297. Section 1086 provides that each share in a company must be distinguished by an appropriate number unless all shares in the company or a relevant class are fully paid up and rank equally.

1298. Clause 159 will amend section 1086 to provide that a share need not have a distinguishing number if the SCH business rules provide that the share need not have a number. This amendment is necessary in order to facilitate the issue and transfer of uncertificated securities under CHES.

Clause 160 - Instrument of transfer

1299. Subsection 1091(1) provides that a company must not register a transfer of shares, debentures or interests unless a proper instrument of transfer has been delivered to the company.

1300. Proposed subsection 1091(1AA) will provide that section 1091 does not apply to SCH-

regulated transfers as defined in section 9.

1301. Subsection 1091(1A) sets out the requirements for a proper instrument of transfer. Clause 160 will remove from paragraph 1091(1A)(b) the word “other” which has been erroneously inserted during the passage of the Corporations Law. The presence of the word “other” in subsection 1091(1A) raises a doubt as to whether off-market transfers of marketable securities and marketable rights can take place. Although the courts would be unlikely to uphold such an interpretation, it was thought proper to clarify the matter and to make the amendment operate retrospectively from 1 January 1991.

#### Clause 161 - Duties of company with respect to issue of certificates

1302. Section 1096 provides that within 2 months after the allotment of any shares etc. and within 1 month after the date on, on which a valid transfer of shares etc. is lodged with it, a company is required to complete and have ready for delivery all the appropriate certificates, debentures or other documents in connection with the allotment or transfer.

1303. Clause 161 will insert new subsection 1096(1A) which will give effect to any SCH business rule which specifies that only a particular document is required or that no document is required for the purposes of subsection 1096(1).

#### Clause 162 - Insertion of heading

1304. Clause 162 will insert before section 1097 a new heading “Subdivision A - Interpretation”.

#### Clause 163 - Interpretation

1305. Clause 164 will amend section 1097 by inserting the following new definitions:

- “Division 3 transfer” which will be defined as either a sufficient transfer or a proper SCH transfer;
- “document” which will be defined as including, in relation to an SCH-regulated transfer, an electronic message or electronic communication;
- “identification code” which will be defined as a member organisation’s code for the purposes of the SCH business rules;
- “member organisation” which will be defined as a member organisation of a securities exchange;
- “transfer” which will be defined, in relation to a marketable security or marketable right as including, in the case of a quoted security or a quoted right any change in the ownership of the security or right, and in the case of a marketable right, as including the renunciation and transfer of the right; and

- “transfer document” which will be defined, in relation to a proper SCH transfer, as the document that is taken under the SCH business rules to effect the transfer.

1306. A new subsection (4) will also be added which gives effect, for the purposes of Division 3 of Part 7.13, to a provision of the SCH business rules which determines which member organisation effected a proper SCH transfer or when a proper SCH transfer takes effect.

#### Clause 164 - Insertion of new section

1307. Clause 164 will insert new provisions after section 1097.

#### Proposed section 1097A - Quoted securities and rights

1308. Proposed subsection 1097A(1) will define a quoted security as a marketable security in a class of marketable securities listed for quotation on a stock market of a securities exchange.

1309. Proposed subsection 1097A(2) will define a quoted right as a marketable right in a class of marketable rights listed for quotation on a stock market of a securities exchange.

1310. Proposed subsection 1097A(3) will ensure that a security or right will be taken to be quoted despite a temporary suspension of quotation.

1311. Proposed subsection 1097A(4) will provide that marketable securities or marketable rights are taken to stop being listed for quotation when the issuing body ceases to be included in the official list of the securities exchange during a suspension of the quotation of the marketable rights or marketable securities.

1312. Proposed subsection 1097A(5) will clarify that there can be other circumstances when a security or right is taken to have stopped being listed for quotation and that subsection 1097A(4) does not limit those circumstances.

#### Proposed section 1097B - SCH business rules may provide that securities or rights continue to be quoted securities or rights

1313. Proposed section 1097B will give effect to a provision of the SCH business rules which provides that marketable securities or marketable rights that stop being quoted are to be taken to continue to be quoted for a specified period.

#### Proposed section 1097C - Commission may declare Law applies to securities as if they were quoted securities or quoted rights

1314. Proposed section 1097C will allow the Australian Securities Commission to declare in writing that provisions of the Corporations Law and Regulations have effect in relation to particular securities or rights that are not quoted securities or rights as if they were quoted securities or rights. Such declarations are to be published in the Gazette.

Proposed section 1097D - Transfer that substantially complies with SCH business rules

1315. Proposed section 1097D provides that if the securities clearing house determines that an SCH-regulated transfer substantially complies with the SCH business rules, the transfer is taken to be and to have always been a proper SCH transfer.

Clause 165 - Insertion of new heading and section

1316. Clause 165 will insert after section 1099 a new section 1099A preceded by the following heading:

Subdivision B - Sufficient transfers (other than SCH-regulated transfers)

Proposed Section 1099A - Subdivision does not apply to SCH regulated transfers

1317. Proposed section 1099A will provide that proposed Subdivision B of Division 3 of Part 7.13 does not apply to SCH-regulated transfers.

Clause 166

1318. Clause 166 will insert after section 1109 the following heading and sections:

Subdivision C – SCH-regulated transfers

Proposed Section 1109A - Member organisation's authority to enter into transaction continues despite client's death

1319. Proposed section 1109A will provide that if a client authorises a member organisation to enter into a transaction to dispose of quoted securities or quoted rights and the client dies before the member organisation has entered into the transaction, the authority will continue as if the client was still alive. The authority may, however, be revoked by the person's legal representative in the same manner as the client could revoke it if he or she were still alive. This provision is needed to protect the integrity of CHESSE against uncertainty as to the legal effect of a transaction entered into on behalf of a client after his or her death.

Proposed section 1109B - Authority to enter into transaction gives authority to transfer

1320. Proposed section 1109B will provide that if a client authorises a broker to enter into a transaction involving the disposal of quoted securities or rights the client will be taken to have authorised the broker to effect any proper SCH transfer of those securities or rights. This provision is necessary because of the doubt as to whether authority to sell securities or rights includes authority to transfer. It has been modelled on the provisions of paragraph 1105(3)(a).

#### Proposed section 1109C - Effect of proper SCH transfer

1321. Proposed section 1109C will provide that a proper SCH transfer of quoted securities or quoted rights is valid and effective for the purposes of any law or instrument governing or relating to the securities or to the rights.

#### Proposed section 1109D - Effect of proper SCH transfer on transferee

1322. Proposed section 1109D will provide that when a proper SCH transfer of quoted securities or rights takes place, the transferee is taken at that time to have agreed to the terms and conditions on which the transferor held the securities or rights immediately before the transfer. In relation to shares and rights to shares the transferee will also be taken to have agreed to become a member of, and to be bound by the constitution of, the issuing body. It has been modelled on the provisions of sections 1103 and 1104.

#### Proposed section 1109E - Warranties by member organisation whose identification code is included in transfer document

1323. Proposed section 1109E will provide for warranties that will attach to every proper SCH transfer that includes the identification code (irrespective of whether or not its use was authorised) of the member organisation effecting the transfer (subsection 1109E(1)).

1324. The extent of the warranty depends on whether it relates to an on-market transfer or an off-market one. In relation to on-market transfers the member organisation (subsection 1109E(3)) will be taken to have warranted that:

- the transfer was effected by the member organisation;
- the transferor was legally entitled to transfer the securities or rights; and
- the member organisation (if not being the transferor) was authorised by the transferor to effect the transfer.

1325. In relation to off-market transfers, however, the member organisation will not be taken to have warranted (except where the member organisation is the transferor) that the transferor was legally entitled to transfer the securities or rights (Subsection 1109(4)).

1326. Proposed section 1109E has been modelled on the provisions of subsection 1105(2), but differing in one important aspect. Whereas subsection 1105(2) applies only to on-market transfers, proposed section 1109E also covers some off-market transfers. This difference stems from the nature of CHESSE broker-sponsored holdings of securities by private clients. Transfer of such securities, even when sold off-market (e.g. through the acceptance of a takeover offer), will require the cooperation of the sponsoring member organisation (i.e. inclusion of the member organisation's identification code in the relevant proper SCH transfer).

#### Proposed section 1109F - Indemnities in respect of warranted matters

1327. Proposed section 1109F will provide that member organisations will be liable to indemnify the following persons from any losses resulting from breaches of section 1109C warranties:

- the issuing body;
- the transferor (if other than the broking organisation effecting the transfer);
- the transferee;
- the member organisation acting as the transferee's agent (if not being the transferee); and
- the securities clearing house.

1328. Proposed section 1109F has been modelled on the provisions of paragraph 1105(3)(b).

#### Proposed section 1109G - Joint and several warranties and liabilities

1329. Proposed section 1109G has been modelled on the provisions of section 1108.

1330. Proposed subsection 1109G(1) will provide that if two or more persons are taken to have warranted as mentioned in subsection 1109E, they are taken to have so warranted jointly and severally.

1331. Proposed subsection 1109G(2) will provide that if 2 or more persons are liable as mentioned in section 1109F, they are so liable jointly and severally.

#### Proposed section 1109H - Quoted securities and rights from other jurisdictions: effect of sections 1109E, 1109F and 1109G

1332. Proposed section 1109H has been modelled on the provisions of section 1108A.

1333. Proposed subsection 1109H(1) will provide that sections 1109E, 1109F and 1109G have cross-jurisdictional effect.

1334. Proposed subsection 1109H(2) will provide that the effect a provision has because of subsection 1109H(1) is additional and does not prejudice the effect the provision otherwise has.

#### Proposed section 1109J - Securities clearing house entitled to assume its business rules complied with

1335. Proposed section 1109J is the CHESSE equivalent of section 1109 and it is (needed to protect the integrity of the system.

1336. Subsection 1109J(1) will provide that the securities clearing house is entitled to assume without inquiry, in the absence any knowledge to the contrary, that anything purporting to be done under the SCH business rules in connection with a transfer of a quoted security or right has been done in accordance with those rules.

1337. Subsection 1109J(2) will provide that if the securities clearing house assumes something under subsection 1109J(1), the thing will be taken to have been done in accordance with the SCH business rules.

#### Proposed section 1109K - SCH-regulated transfer not to be registered unless proper SCH transfer

1338. Proposed subsection 1109K(1) is the CHESSE equivalent of subsection 1091(1). It will provide that the issuing body (and therefore also the SCH clearing house when acting on behalf of the issuing body) must not register an SCH-regulated transfer of a quoted security or quoted right unless the transfer is a proper SCH transfer.

1339. Proposed subsection 1109K(2) will provide that subsection 1109K(1) over-rides the effect of the constitution and instruments of the issuing body.

#### Proposed section 1109L - Issuing body not to refuse to register a proper SCH transfer

1340. Proposed section 1109L will provide that the issuing body in relation to a quoted security or right must not refuse to register a proper SCH transfer of the security or the right. This provision is necessary to protect the integrity of the (CHESSE) system from company articles restricting transfers etc.

#### Proposed section 1109M - Trustees and legal representatives may be SCH participants

1341. Proposed section 1109M will provide that unless expressly prohibited by the terms of their appointment or of any law (proposed subsection 1109M(2)), a trustee or a legal representative who holds quoted marketable securities or rights in that capacity may participate in the securities clearing house and hold securities in an uncertificated form (subsection 1109M(1)).

1342. The provision is aimed at protecting trustees and legal representatives who may be concerned that their holdings of uncertificated securities could be construed as a breach of the implied terms of their trust/appointment deeds where it is possible for them to hold the same securities in a certificated form.

#### Clause 167 - Operation of Division

1343. Clause 167 will insert a new heading "Subdivision D - Miscellaneous" and make technical consequential amendments to section 1110. Section 1110 deals with the operation of Division 3 of Part 7.13 and the amendments ensure that new sections to be inserted in the Division are accommodated.

Clause 168 - Occupation need not appear in transfer document, register etc.

1344. Clause 168 amends subsection 1111(1) so as to clarify the provision in the CHES context. Section 1111 provides that the transfer document does not need to contain the occupation of the transferor and transferee and that the signature (if the transfer document is signed by the transferor or transferee) does not need to be witnessed.

Clause 169 - Proposed section 1112A - Offences: inclusion of identification codes in proper SCH transfers

1345. Clause 169 will insert a new section, proposed section 1112A, which will provide that it is an offence to use a member organisation's identification code without an authority to do so. A proposed amendment to Schedule 3 will provide for the applicable penalty for the offence (\$2500 fine or 6 months imprisonment or both).

PART 7.14 - MISCELLANEOUS

Clause 170 - Power of Court to make certain orders

1346. Section 1114 deals with the powers of a Court to make orders in respect of matters covered by the provisions of Chapter 7.

1347. Clause 170 will amend section 1114 to:

- allow the ASC to seek orders in respect of breaches of the securities clearing house business rules; and
- enable the securities clearing house to seek orders in respect of breaches of its business rules.

PART 9.3 BOOKS

Background

1348. Under CHES, holding balances of uncertificated securities controlled by clearing house participants will be recorded in the electronic subregister maintained by (the securities clearing house. The securities clearing house will regularly transmit details of participant controlled holding balances of uncertificated securities to the issuer's main registry. The main registry and clearing house systems will be loosely coupled electronically.

1349. With CHES, the register of members of a company will comprise the principal register maintained by the company or a registry services provider on the company's behalf, and the electronic subregister maintained by the clearing house. A fully up-to-date record of uncertificated holding balances for participant controlled holdings will be maintained only in the electronic sub-register.

1350. Sections 209 and 210, which require a company to keep a register of members and to allow inspection of the register, in their present form are consistent with proposed arrangements for CHESSE. However, minor adjustments are needed to Part 9.3 dealing with books to facilitate the keeping of a part of a company's register by the securities clearing house.

Clause 171 - Repeal of section 1301 and substitution of new section-Proposed Section 1301 - Location of books on computers

1351. Section 1301 will be replaced with a new section which both clarifies the previous provisions and also accommodates the proposed CHESSE subregister by providing that where a corporation records electronically, matters required to be kept in a book, it will be deemed to have complied with the requirements of the Corporations Law relating to the location of books despite the fact that the matters (or some of them) are stored electronically at a place other than where the book is required to be kept.

1352. For the purposes of the Law the expression "books" include a register, accounts or accounting records and any other record of information, (see definition in section 9).

1353. The provision will only apply if:

- the matters are available for inspection in written form at the place where the books are required to be kept (subsections 1301(1) and (3));
- the ASC is notified of the location where the records are kept; and
- changes in location are notified within 14 days (subsection 1301(4)).

1354. Proposed subsection 1301(3) will make it clear that for the purposes of section 1300, in relation to the corporation and the book, the book will be deemed to be kept at the place of inspection.

Clause 172 - Form and evidentiary value of books

1355. Existing section 1306 provides that a book that is required to be kept or prepared under the Corporations Law will be able to be kept:

- by making entries in a bound or loose-leaf book;
- by recording or storing the matters concerned by means of a mechanical, electronic or other device; or
- in any other manner approved by the ASC.

1356. However, a book is not permitted to be kept or prepared by a mechanical, electronic or other device unless:

- the matters recorded or stored will be capable of being reproduced in a written form; or
- a reproduction of those matters is kept in a written form approved by the ASC.

1357. Clause 172 will insert a new subsection 1306(4A) which will enable the regulations to make provision specifying how up-to-date the information contained in the written document, prepared for the purposes of subsection 1306(4) must be.

1358. This provision takes into account the fact that company registries may well not be closely coupled electronically in CHES.

1359. It is envisaged that regulations made under subsection 1306(4A) will specify a time period. The length of the period is still subject to negotiations with the ASX. This will have the effect that the person inspecting a company's register of members etc, will be guaranteed that the hard copy representing the register as far as CHES is concerned is no more than than five business days out of date.

1360. Clause 172 will also substitute existing subsection 1306(5) with a new subsection which will provide that where a book or a part of the book, required by the Law to be kept or prepared is prima facie evidence of a matter, any writing reproducing matters from storage on a mechanical or electronic device will be prima facie evidence of those matters. This new provision makes it clear that any information in writing reproduced from the CHES sub-register will be prima facie evidence of the matters in the sub-register.

1361. Amendments to sub-section (6) change the references to 'matters' so that they are read in the singular. These changes also accommodate CHES by recognising that the sub-register only contains part of the matters required to be kept in a book (i.e. the register of members).

### Clause 173 - Schedule 3

1362. Schedule 3, which sets out the penalties for breach of provisions of the Corporations Law, is amended by inserting that a breach of proposed section 11 12A has a penalty of \$2,500 or imprisonment for 6 months, or both.

### PART 6- MISCELLANEOUS

1363. The provisions in this Part will:

- amend the Corporations Law to:
  - simplify procedural requirements in notifying the ASC of the address of a company's registered office (section 100);
  - replace the existing requirement for production of an original stamped

- contract in lodging a return of allotment of shares with a requirement to lodge a certificate of compliance with stamp duty obligations (section 187);
- allow partly completed annual returns to be served on a company's agent (section 335A);
- allow the Minister to delegate to an officer in the Department prescribed powers and functions under the Corporations Law (proposed section 1345A);
- amend the Australian Securities Commission Act 1989 (ASC Act) to:
  - require the Australian Accounting Standards Board to consult its New Zealand counterpart in formulating accounting standards (section 226); and
  - protect the Minister from liability for damages arising from any action taken in good faith under a national scheme law (section 246).

#### Division 1 - Amendments of the Corporations Law

##### Clause 174 – (Amendment to section 9 - definition of ‘Department’)

1364. A definition of ‘Department’ will be inserted in section 9 of the Corporations Law as a consequence of proposed new section 1345A (to be inserted by clause 179), which will enable the Minister to delegate prescribed functions and powers under the Corporations Law to a Departmental officer. The ‘Department’ will be taken to be the Commonwealth Department which is administered by the Minister administering the Corporations Law. Provision is also to be made for the Corporations Regulations to prescribe the relevant Department, in circumstances where there are two or more Departments administered by the Minister administering the Corporations Law.

##### Clause 175 – (Amendment to section 100- Address of registered office)

1365. Clause 175 will amend section 100 of the Corporations Law by omitting from paragraph 100(1)(d) ‘shall be accompanied by a written statement, signed by an officer of the body’ and substituting ‘must include a written statement’. The clause also inserts after ‘lodged a’ in subsection (2), the phrase ‘notice that includes a’.

1366. Section 100 applies where a body corporate is obliged to lodge a notice specifying the address of its registered office. It provides that, if the body corporate does not occupy the premises at which the registered office is located, the notice must be accompanied by a written statement, signed by an officer of the body corporate and indicating that the person who does occupy the premises has consented to the specification of those premises as the registered office of the company.

1367. Paragraph 100(1)(d) has raised two problems. First, the requirement that the consent ‘accompany’ the notice means that the body corporate must lodge two documents. The

substitution of the word 'include' for 'accompany' will allow the consent to be included on the form which notifies the address. Second, the consent must currently be signed by an officer of the body corporate. This may not always be convenient for the body corporate. For example, in the case of a foreign company, it may have no officers in Australia, being represented in Australia by a local agent which may itself be a corporation.

1368. With deletion of the requirement that the notice be signed by an officer of the body corporate, it will be a matter for the Corporations Regulations to address who should sign forms lodged by a body corporate. Regulation 1.08, for example, addresses who must sign a document lodged by a corporation.

#### Clause 176 – (Amendment to section 187 - Return of allotment)

1369. Under section 187 of the Corporations Law, where a company makes an allotment of shares it must lodge a return of the allotment with the ASC within one month of the allotment. Where the shares are allotted as fully or partly paid up, otherwise than in cash, and the allotment is made under written contract, the company must also lodge the contract (or a certified copy of it) with the return (subsection 187(3)). If a certified copy of the contract is lodged, the company must produce to the ASC, at the same time, the duly stamped original contract (subsection 187(4)).

1370. By contrast, subsection 265(4) requires that a notice in respect of a charge on property of a company must be accompanied by a certificate to the effect that all documents accompanying the notice have been duly stamped as required by any applicable law relating to stamp duty. If the certificate does not accompany the notice, the notice can only be provisionally registered. If the certificate is produced to the ASC within 30 days after the notice is lodged or such longer period as is prescribed, or within such further period as the ASC allows, the ASC must delete the word 'provisional' from the entry in the register relating to that charge. If, however, the certificate is not produced within the permitted period, the ASC must delete from the register all the particulars entered in relation to the charge.

1371. The proposed amendments to section 187 provide that where a company is required to lodge with the return as to allotment the contract evidencing the entitlement of the allottee, or a certified copy of the contract, the company must also lodge with the ASC a certificate to the effect that the contract has been duly stamped as required by any applicable law relating to stamp duty.

1372. This certificate is to be lodged:

- at the same time as the return as to allotment is lodged (proposed subparagraph 187(3)(b)(ii)); or
- within such further period as is prescribed by the Corporations Regulations after the return as to allotment is lodged (proposed I 87(3)(b)(i)); or
- within such further period as the ASC allows (proposed subsection 187(4)).

1373. No specific penalty will be imposed for failure to comply with the proposed new requirements. The additional fees payable for late lodgment of a document, prescribed by Item 62 of the Schedule to the Corporations (Fees) Regulations, will apply to the late lodgement of the certificate. In addition, the general penalty provisions of section 1311 of the Corporations Law will continue to apply to contraventions of the provisions of section 187.

Clause 177 – (Insertion of proposed section 335A)

Proposed section 335A - Company's address for service for the purposes of section 335

1374. Subsection 220(1) of the Corporations Law provides for service of documents on a company at its registered office. Subsection 220(2) deems a company's registered office to be situated in accordance with a relevant notice lodged by the company under section 218(1). Subsections 220(4) - (7) respectively enable service of documents on a company by service on directors of the company, on a liquidator or official manager, or as authorised by a Court.

1375. Proposed subsection 335A(1) is intended to facilitate the service by the ASC of a partly completed annual return on a company by allowing it to notify the ASC of an address for service other than its registered office (eg. the mailing address of its professional agent).

1376. Proposed subsection 335(2) allows a company to notify the ASC that it no longer wishes to nominate an alternative mailing address for service of documents (in which case the general provisions in section 220 for service of documents on a company would apply).

1377. Proposed subsection 335(3) provides that notices under subsections 335(1) or (2) take effect 8 days after lodgment, or on such later day after lodgment as is specified in the notice. Proposed subsection 335(4) ensures that a later notice supersedes an earlier notice lodged under proposed subsection 335(1).

1378. Proposed subsection 335(5) makes it clear that the address specified in a notice under subsection 335(1) may be a post office box number or other postal address.

1379. Proposed subsection 335(6) is intended to ensure that the general provisions in section 220, as well as any other relevant provisions under Commonwealth or State law, continue to apply to the service of documents on a company for the purposes of the Corporations Law.

Clause 178 – (Amendment to section 337- Exemption of certain companies)

1380. Clause 178 is a formal amendment of section 337 which omits from subsection (1) 'Division' (twice occurring) and substitutes 'Part'.

Clause 179 – (Proposed section 1345A - Minister may delegate prescribed functions and powers under this Law)

1381. There are no provisions in the Corporations Law which empower the Minister to delegate to an officer of the Department powers or functions of the Minister under the

Corporations Law. Sections 109ZD – 109ZF clarify the scope of powers delegated under the Corporations Law, but these currently only have relevance to powers of the ASC delegated under section 102 of the ASC Act.

1382. Proposed subsection 1345A(2) empowers the Minister to issue directions to a delegate in relation to the performance or exercise of a delegated function or power.

1383. The power of the Minister under the Corporations Law which is presently envisaged that may be suitable for delegation is the power under subsection 367(4) to consent to company names which would otherwise be unavailable for reservation or registration by virtue of subsection 367(1). For example, proposed subsection 1345A would allow the Minister to delegate to an officer in the Department the power to consent to company names appearing in Schedule 6 to the Corporations Regulations, on the basis that the power is exercised in accordance with published Ministerial guidelines.

Division 2 - Amendments of the Australian Securities Commission Act 1989 Clause 180 (- Amendment to section 226 - Functions and powers of Australian Accounting Standards Board)

1384. The proposed amendment to section 226 will require the Australian Accounting Standards Board to consult its New Zealand counterpart when developing or reviewing accounting standards.

1385. This provision reciprocates a clause in proposed New Zealand legislation. The proposed amendment is in accordance with agreements reached between the Commonwealth Attorney-General and the New Zealand Minister of Justice in relation to fostering the harmonisation of business law between Australia and New Zealand.

Clause 181 – (Amendment to section 246- Liability for damages)

1386. A reference to ‘the Minister’ is to be inserted in section 246 to ensure that the Minister is among the persons or bodies who are protected from liability for damages in relation to any act performed in good faith in pursuance of any function conferred under a national scheme law or other prescribed law.

1387. The amendment will enable the Minister to publish a report of the ASC submitted pursuant to section 18 of the ASC Act, without the risk of incurring liability for defamation.

## PART 7- COMMENCEMENT AND APPLICATION OF CHANGES TO THE CORPORATIONS LAW RESULTING FROM THIS ACT

### Cause 182 - Effect of this Part

1388. Clause 182 will amend section 6 of the Corporations Law by adding a new subsection 6(4), which provides that where, because of Part 9.11, provisions of the Corporations Law, as in force at a particular time, continue to apply in relation to someone or something, or for particular purposes, then for the purposes of those provisions, Part 1.2 as in force at that time continues to have effect, and Part 1.2 as in force at a later time does not have effect. The purpose of proposed new subsection 6(4) is to ensure that the interpretation of those provisions which have a continuing application because of Part 9.11 is the same as that which applied before the amendments to those provisions were made.

### Clause 183- General penalty provisions

1389. Clause 183 will amend section 1311 by inserting a new subsection 1311(3A). This proposed subsection provides that where, because of Part 9.11, provisions of the Corporations Law, as in force at a particular time, continue to apply in relation to someone or something, or for particular purposes, then for the purposes of those provisions Schedule 3 as in force at that time continues to have effect, and Schedule 3 as in force at a later time does not have effect. The proposed subsection has effect except insofar as a contrary intention appears in the Law. The purpose of proposed new subsection 1311(3A) is to ensure that the penalties which apply to those provisions which have a continuing application because of Part 9.11 are the same as those which applied before the amendments to those provisions were made.

### Clause 184 - Changes to section 597

1390. Clause 184 will amend section 1370 of the Corporations Law:

- by inserting in subsection (1) the words ‘and before the commencement of ( section 117 of the Corporate Law Reform Act 1992’ after ‘1992’; and
- by omitting from subsection (1) the word ‘that’ (twice occurring) and substituting the first mentioned’.

1391. The purpose of the proposed amendments of subsection 1370(A) is to ensure that the transitional amendments to section 597 of the Corporations Law, which were made as a consequence of the Corporations Legislation (Evidence) Amendment Act 1992, do not apply to the amendments of that section to be made by the Corporate Law Reform Act

### Clause 185 – (Addition of new Division)

1392. Clause 185 will add a new Division 5 to Part 9.11 of the Corporations Law. The new Division will include the application and transitional provisions relating to the Bill.

## Division 5 - Changes resulting from the Corporate Law Reform Act 1992

### Proposed section 1372 - Commencement of subsection 6(4)

1393. Proposed section 1372 provides that subsection 6(4) is taken to have commenced on 27 June 1991.

### Proposed section 1373- Application of changes to section 187

1394. Proposed section 1373 provides that subsections 187(3), (4), and (4A) as in force after the commencement of clause 176 apply in relation to an allotment made, or taken to have been made, at or after that commencement, and that subsections 187(3) and (4) as in force before the commencement of clause 176 continue to apply in relation to an allotment made, or taken to have been made, before that commencement.

### Proposed section 1374 - Application of change to paragraph 230(1)(d')

1395. Proposed subsection 1374 provides that paragraph 230(1)(d), as in force after the commencement of clause 10, applies to an act done, or omission made, at or after the commencement.

1396. Proposed subsection 1374 provides that paragraph 230(1)(d), as in force before the commencement of clause 10, continues to apply in relation to an act done, or omission made, by a person before that commencement. However, proposed subsection 1374(2) will not apply if the act or omission constituted a contravention of subsection 232(3) or (4), the person consents to proposed Part 9.4B applying in relation to the contravention (see in this regard proposed section 1389, and no application has been made under subsection 230(1) in relation to the contravention.

### Proposed section 1375 - Application of certain changes to section 232

1397. This section preserves the effect of Corporations Law section 232 in relation to contraventions of that section which occur before the commencement of the Bill. These contraventions may therefore be prosecuted as if the Bill had not been enacted.

1398. However, proposed section 1389 will allow a civil penalty application to be made in relation to a contravention of section 232 committed before the commencement of proposed Part 9.4B, provided the defendant consents in writing to the making of the application.

### Proposed section 1376 - Application of sections 243H and 243ZE

1399. The effect of proposed section 1376 is that proposed Part 3.2A will not apply to public companies generally until 1 February 1994. However, the company's board is given the opportunity of electing that the proposed part will apply to the company at an earlier date.

### Proposed section 1377 - Application of subsection 307(2)

1400. Clause 13 inserts a new subsection 307(2) requiring the directors of a public company that is not a wholly-owned subsidiary of another company or of a recognised company to include in their annual report to the company's members a statement indicating the number of meetings of directors (including meetings of committees of the board) convened that year and the number of meetings attended by each person who was a director at any time during the year.

1401. Proposed section 1377 provides that the obligation to comply with proposed subsection 307(2) will arise in relation to a financial year of a company that ends at or after the commencement of proposed subsection 307(2).

#### Proposed section 1378 - Application of change to section 318

1402. Clause 14 omits the present subsection 318(2), which specifies the sanction which currently applies in relation to a contravention of subsection 318(1). Subsection 318(1) obliges a director of a company to take all reasonable steps to comply with, or secure compliance with, certain provisions of Corporations Law Part 3.6, concerning the preparation of company financial statements. Subsection 318(1) will be a civil penalty provision for the purposes of proposed Corporations Law Part 9.4B. The sanctions available in relation to a contravention of subsection 318(1) will therefore be determined in accordance with proposed Divisions 2 and 3 of Part 9.4B.

1403. Proposed section 1378 provides that subsection 318(2) will continue to apply in relation to a contravention of subsection 318(1) committed before the commencement of clause 14.

#### Proposed section 1379 - Application of certain changes to Part 5.2

1404. Proposed section 1379 sets out the transitional provision; relating to the operation of proposed provisions relating to controllers and managing controllers.

1405. Proposed subsection 1379(1) sets out the provisions which will apply to a controller where the control day begins at or after the commencement of clause 40 as:

- proposed sections 419A, 420A, 420B and 421A, subsection 428(2) and sections 434A, 434B and 434C;
- sections 423, 424, 426, 429, 430, 431, 432, and 434, as in force after that commencement.

1406. Proposed subsection 1379(2) sets out the sections which continue to apply to a receiver or a receiver and manager of property of a corporation. if the control day began before the commencement of clause 40, as:

- sections 423, 424, 426, 429, 430, 431, 432, and 434.

1407. Proposed subsection 1379(3) provides that proposed section 420C applies in relation to

a receiver or a receiver and manager of property of a corporation, only if the control day begins at or after the commencement of clause 41.

1408. Proposed subsection 1379(4) provides that section 421, as in force after the commencement of clause 42:

- applies to a receiver or a receiver and manager of property of a corporation even if the control day began before the commencement of clause 42; and
- applies in relation to any other controller of the property of a corporation only if the control day began after the commencement of clause 42.

#### Proposed section 1380 - Continued application of Part 5.3 and related provisions

1409. Part 5.3 of the Corporations Law is concerned with official management. Clause 56 of the Bill will repeal Part 5.3 and insert a new Part 5.3A entitled 'Administration of a Company's Affairs with a View to Executing a Deed of Company Arrangement'.

1410. Proposed subsection 1380(1) provides that where before the commencement of clause 56 and paragraphs 462(2)(e), (f) and (g), a company was placed under official management in accordance with Part 5.3, then that Part, as in force before that commencement, continues to apply to the company, but the company cannot again be placed under official management after that commencement. While a company is under official management, an administrator of the company cannot be appointed under section 436A, 436B or 436C (proposed subsection 1380(2)).

#### Proposed section 1381 - Certain provisions continue to apply in relation to official management

1411. Proposed section 1381 sets out transitional provisions in connection with the continued operation of provisions regulating official management. Proposed section 1381 provides that, except insofar as the contrary intention appears in the Law (other than in Part 5.3A, Division 1A of Part 5.6 and section 556), then even if the body or entity ceased to be under official management before the commencement of clause 56:

- a reference to an administrator of a body corporate or a relevant body being appointed under section 436A, 436B or 436C includes a reference to the body being placed under official management;
- a reference to a body corporate or a relevant body being under administration includes a reference to the body being under official management;
- a reference to a body corporate or a relevant body that is or has been under administration includes a reference to the body that is or has been under official management; and
- a reference to an administrator of a body corporate or a relevant body or of an entity within the meaning of Parts 3.6 and 3.7, includes a reference to an official

manager or deputy official manager of the body or entity.

Proposed section 1382 - Application of new provisions relating to winding up

1412. Proposed section 1382 relates to transitional provisions affecting proposed Parts 5.4, 5.4A, 5.4B, 5.5 and 5.6, and sections 1383, 1384 and 1385. Proposed section 1382 provides that, subject to proposed sections 1383, 1384 and 1386, proposed Parts 5.4, 5.4A, 5.4B, 5.5 and 5.6, sections 589, 590 and 592, Division 1 of Part 5.9 and section 598 (as in force after the commencement of clause 57), apply to acts done, omissions made, events occurring and matters and things arising whether before, at or after that commencement

Proposed section 1383 - Continued application of old Parts 5.4, 5.5, and 5.6

1413. Proposed section 1383 also relates to transitional provisions affecting proposed Parts 5.4, 5.4A, 5.4B, 5.5 and 5.6.

1414. Proposed subsection 1383(1) defines two terms for the purposes of the proposed section.:

- 'old winding up law' means Parts 5.4, 5.5 and 5.6 as in force before the relevant commencement; and
- 'relevant commencement' means the commencement of clause 1383.

1415. Proposed subsection 1383(2) provides that if, before the relevant commencement, the Court orders the winding up of a company, the old winding up law applies for the purposes of the winding up.

1416. Proposed subsection 1383(3) provides that if, before the relevant commencement, an application was made to the Court to order the winding up of the company, the old winding up law applies for the purposes of determining or otherwise disposing of the application, and winding up the company under an order of the Court made on the application.

1417. Proposed subsection 1383(4) provides that if, before the relevant commencement, a demand was served on a company under paragraph 460(2)(a), the old winding up law continues to apply for the purposes of:

- making after that commencement, in reliance on the demand, an application for the Court to order the winding up of the company on a ground provided for by subsection 460(1);
- determining or otherwise disposing of an application of that kind so made;
- winding up the company under an order of the Court so made on an application of that kind.

1418. Proposed subsection 1383(5) provides that if, before the relevant commencement, a company passed a special resolution under section 491 that the company be wound up voluntarily, the old winding up law continues to apply for the purposes of:

- the voluntary winding up;
- making, after that commencement, an application to the Court for an order winding up the company; and
- determining or otherwise disposing of, an application of that kind made after that commencement; and
- winding up the company under an order of the Court made, after that commencement, on an application of that kind.

1419. Proposed subsection 1383(6) provides that even if the old winding up law continues to apply, because of the proposed section, for particular purposes relating to the company, an administrator of the company may still be appointed under section 436A, 436B or 436C.

1420. Proposed subsection 1383(7) provides that the old winding up law continues to apply, subject to the qualifications listed therein.

1421. Proposed subsection 1383(8) provides that subsection 565(4), as continuing to apply because of the proposed section, has effect subject to proposed Part 5.3A.

#### Proposed section 1384 - Continued application of old sections 589, 590 and 592

1422. Proposed section 1384 relates to transitional provisions affecting sections 589, 590, and 592. Proposed subsection 1384(1) provides that if, immediately before the commencement of clause 112, a company or Part 5.7 body to which sections 590 to 593 of the Law (inclusive) apply, then paragraph (a) of the definition of ‘relevant thy’ in subsection 589(5) and sections 590 and 592, as in force before that commencement, continue to apply in relation to that company or body.

1423. Proposed subsection 1384(2) provides that if, because of proposed section 1383, provisions continue to apply for particular purposes ‘elating to a company, paragraph (a) of the definition of ‘relevant day’ in subsection 589(5) and sections 590 and 592, as in force before the commencement of clause 112, also apply in relation to that company.

1424. Proposed subsection 1384(3) provides that provisions of the proposed section apply or continue to apply as if paragraph 112(d) and clauses 113 and 114 had not been enacted.

#### Proposed section 1385 – Continued effect of authorisations under subsections 597(1) and 598(1)

1425. Proposed section 1385 provides that an authorisation that, immediately before the commencement of clause 117 or 119, was in force under subsection 597(1) or 598(1), has effect

after that commencement as if a reference to section 597 or 598 included a reference to Division 1 or Division 2, as the case may be, of Part 5.9 of the Law.

Proposed section 1386 - Continued application of old section 597

1426. Proposed subsection 1386(1) provides that if, before the commencement of clause 117, the Court made an order under subsection 597(3), then section 597, as in force before that commencement, continues to apply for the purposes of holding an examination under the order.

1427. Proposed subsection 1386(2) provides that if, before the commencement of clause 117, an application was made under subsection 597(2), then section 597, as in force before that commencement, continues to apply for the purposes of determining or otherwise disposing of the application; and holding an examination under an order made under subsection 597(3) on the application.

Proposed section 1387 - Application of change to paragraph 1091(1A)(b)

1428. Proposed section 1387 provides that paragraph 1091(1A)(b), as in force immediately after the commencement of clause 160, is taken to have commenced on 1 January 1991.

Proposed section 1388 - Application of change to section 1301

1429. Proposed section 1388 provides that if, immediately before the commencement of clause 171, there was in force a notice lodged by a corporation for the purposes of paragraph 301(3)(a), section 1301 as in force after that commencement applies as if the notice were a notice lodged for the purposes of paragraph 1301 (1)(d) as in force after that commencement.

Proposed section 1389 - Application of Part 9.4B to contravention committed before that Part commenced.

1430. The Bill will decriminalise, and render subject to civil penalties, certain conduct that otherwise constitutes a criminal offence. Proposed section 1389 will allow persons who have allegedly committed an offence against existing subsections 232(2), (4), (5) or (6), subsection 234(5) or subsection 318(1) to take advantage of the decriminalisation proposed by the Bill.

1431. This section provides that an application may be made for a civil penalty order in relation to a contravention of subsections 232(2), (4), (5), or (6), subsection 234(5) or subsection 318(1) undertaken before the commencement of the Bill, providing the defendant consents in writing to the making of the application.

1432. Proposed subsection 1389(1) provides that the section applies where it is alleged or suspected that a person has contravened subsection 232(2), (4), (5) or (6), subsection 234(5) or subsection 318(1), and the person has consented in writing to the application of proposed Part 9.4B to the conduct or omission that constitutes the alleged contravention.

1433. Proposed subsection 1389(2) provides that, in the case of a contravention of subsection

232(2), (4), (5), or (6), proposed Part 9.4b (except sections 1317FA, 1317HA, 1317HB, 1317HD and 1317HF) has effect as if it had commenced before the contravention. The person may therefore be subject to an application for a civil penalty order made pursuant to proposed subsection 1317EA(1) in relation to the alleged contravention.

1434. The exception made in relation to sections 1317FA, 1317HA, 1317HB, 1317HD and 1317HF means that those provisions will not be deemed to be in force at the time of the contravention. These five provisions are concerned with the criminal consequences of a contravention of a civil penalty provision. Their exclusion means that a person who consents to the application of proposed Part 9.48 to a pre-commencement conduct or omission may not be prosecuted under proposed subsection 1317FA(1).

1435. Proposed paragraph 1389(3)(a) provides that in the case of a contravention of subsection 232(2), (4), (5) or (6), existing subsection 232(8) does not apply in relation to the conduct. Subsection 232(8) allows the Court to make a compensation order where a person has contravened section 232.

1436. Proposed paragraph 1389(3)(b) provides that in the case of a contravention of subsection 232(2), (4), (5) or (6), proposed sections 1317HA and 1317HD and subsection 1317HF(10) apply as if they were in force at the time of the contravention. These three provisions are based on existing subsection 232(8), and allow a Court to make a compensation order where a person has contravened a civil penalty provision.

1437. Proposed subsection 1389(4) provides that sections 1317DB, 1317DC and 1317DD have effect for the purposes of proposed section 1317DA as if the section were in proposed Part 9.4B. The effect of this section is that proposed sections 1317DB, 1317DC and 1317DD have effect in relation to the alleged contravention as if they were in force at the time of the alleged contravention. This means, for example, that a person who is involved in a contravention of existing subsection 232(2), because of section 5 of the Crimes Act 1914 (Cth), may also take advantage of proposed section 1317DA. It also means that the Courts which would have original jurisdiction to try a prosecution under existing section 232 or subsection 318(1) will also have original jurisdiction to hear the application for a civil penalty order.

1438. Proposed subsection 1389(5) provides that, except as provided in paragraph (3)(b), the section does not affect the operation of section 1375 or 1378. Those provisions preserve the effect of existing sections 232 and subsection 318(1) in relation to conduct or omissions which occurred before the commencement of proposed Part 9.4B.

SCHEDULE 1 - AMENDMENTS OF THE CORPORATIONS LAW CONSEQUENT ON PART 4 OF THIS ACT

1439. Clause 123 will provide that the Corporations Law is to be amended, consequent on the amendments proposed by Part 4 of this Bill relating to the external administration of companies and Part 5.7 bodies, as set out in this schedule (proposed Schedule 1).

1440. Many of the amendments will be consequential on the proposal by clause 56 to delete Part 5.3 relating to the official management of companies and to insert a new Part 5.3A to provide for the administration of a company's affairs with a view to executing a deed of company arrangement. In line with these proposed amendments, it will be necessary delete existing references to official management in those sections of the Corporations Law that contain such references, (except where transitional arrangements I require the continued reference to official management in those sections), and to substitute references to the new administration procedure to be inserted by Part 5.3A.

Paragraph 67(4)(e)

1441. This paragraph will be amended by omitting the existing reference to an official manager or deputy official manager of a body corporate and substituting references to an administrator of a body corporate and an administrator of a deed of company arrangement executed by a body corporate.

Paragraph 68(2)(f)

1442. This paragraph will be amended by omitting the existing reference to an official manager or deputy official manager of a body corporate and substituting references to an administrator of a body corporate and an administrator of a deed of company arrangement executed by a body corporate.

Paragraph 206QB(3)(d)

1443. This paragraph will be amended by omitting the existing reference to where a company is placed under official management and substituting a reference to where an administrator of the company is appointed under section 436A, 436B or 436C.

Paragraph 206QC(1)(a)

1444. This paragraph will be amended by omitting the existing reference to where a company is placed under official management or commences to be wound up and substitutes references to where a Court orders that a company be wound up, or a company resolves that it be wound up, or a company is placed under official management, or an administrator of a company is appointed.

Subparagraphs 206QC(1)(b)(i) and (ii)

1445. Subparagraph 206QC(1)(b)(i) will be omitted and, consequential on the amendment

proposed to paragraph 206QC(1)(a) (discussed in the preceding paragraph), three new subparagraphs will be inserted to provide for the circumstances to be outlined in proposed subparagraphs 206QC(1)(a)(i), (ii), (iii) and (iv). Subparagraph 206QC(1)(b)(ii) will also be omitted and replaced by a subparagraph (206QC(1)(b)(ii)) to similar effect, but which takes account of proposed subparagraphs 206QC(1)(b)(i), (ia) and (ib). These proposed amendments are in turn consequential on the proposed amendments to the point at which a winding up is taken to have commenced, which is explained in detail at the paragraphs of this memorandum relating to proposed sections 513A to 513D inclusive.

#### Paragraph 206QC(1)(c)

1446. This paragraph will be amended by omitting the word ‘that’ and substituting the word ‘those’. This proposed amendment is consequential on the amendments proposed to subparagraphs 206QC(1)(b)(i) and (ii).

#### Paragraph 206RB(1)(c)

1447. This paragraph will be amended by omitting the existing reference to where a company is under official management and substituting references to where a company is under administration and where a deed of company arrangement executed by a company has not yet terminated.

#### Subsection 206RC(3)

1448. This subsection will be amended by omitting ‘section 553 or 554’ and substituting ‘Subdivision A, B or C of Division 6 of Part 5.6’. This proposed amendment is consequential on the proposal to include in the Corporations Law matters that are currently dealt with under the Bankruptcy Act and incorporated into the Corporations Law by reference under section 553.

#### Subsection 230(6) (paragraph (a) of the definition of ‘prescribed person’)

1449. This proposed amendment will have the effect of deleting the existing reference to an official manager of a body corporate in paragraph (a) of the definition of ‘prescribed person’, and substituting references to an administrator of a body corporate and an administrator of a deed of company arrangement executed by a body corporate.

#### Subsection 241(4) (paragraph (c) of the definition of ‘officer’)

1450. Paragraph (c) of the definition of ‘officer’ will be amended by omitting the existing reference to an official manager or deputy official manager of a company and substituting references to an administrator of a company and an administrator of a deed of company arrangement executed by a company.

#### Paragraphs 266(1)(b) and (3)(b)

1451. The existing reference to an official manager in each of these paragraphs will be

omitted and references to where an administrator of a company is appointed and where a company executes a deed of company arrangement will be substituted.

#### Subsection 266(1)

1452. This proposed amendment will have the effect of deleting the existing reference to an official manager of a company where it appears following paragraph (1)(b), and substituting references to an administrator of the company and an administrator of a deed of company arrangement executed by the company.

#### Subparagraphs 266(1)(c)(ii) and (3)(c)(ii)

1453. The existing reference to the commencement of the winding up or appointment of the official manager in each of subparagraphs (1)(c)(ii) and (3)(c)(ii) will be omitted and a reference to ‘critical day’ (which is to be defined in subsection (8)) substituted.

#### Paragraphs 266(1)(d), (e) and (f)

1454. The existing reference to the commencement of the winding up or appointment of the official manager in each of paragraphs (1)(d), (e) and (f) will be omitted and a reference to the start of the ‘critical day’ (which is to be defined in subsection (8)) substituted.

#### Paragraph 266(3)(d)

1455. The existing reference to the commencement of the winding up or appointment of the official manager in paragraph (3)(d) will be omitted and a reference to the start of the ‘critical day’ (which is to be defined in subsection (8)) substituted.

#### Subsection 266(5)

1456. The existing reference to an official manager of a company in subsection (5) will be omitted and references to an administrator of the company and an administrator of a deed of company arrangement executed by the company substituted.

#### Paragraph 266(6)(a)

1457. The proposed amendment is a minor drafting amendment to include the word ‘or at the end of paragraph (6)(a).

#### Paragraph 266(6)(c)

1458. Paragraph 266(6)(c), which refers to the passing of a resolution that a company be placed under official management, will be omitted, and new paragraphs (6)(c) and (d), which refer to the appointment of an administrator of a company and a company executing a deed of company arrangement, substituted.

### Subsection 266(7)

1459. The proposed amendment is a minor drafting amendment to include a reference to proposed paragraph (6)(d) in subsection (7).

### Section 266

1460. The term 'critical day' will be defined in new subsection 266(8) to mean

- if the company is being wound up - the day when the winding up began;
- if the company is under administration - the section 513C day in relation to the administration; or
- if the company has executed a deed of company arrangement - the section 513C day in relation to the administration that ended when the deed was executed.

### Subsections 493(1) and (2)

1. The existing reference to 'commencement of the winding up' in each of subsections 493(1) and (2) will be omitted and 'passing of the resolution' substituted.

### Subsection 500(1)

2. The existing reference to 'a company after the commencement of a creditors' voluntary winding up' in subsection 500(1) will be replaced by 'the company after the passing of the resolution for voluntary winding up'.

### Subsection 500(2)

3. The existing reference to 'commencement of a creditors' voluntary winding up of a company' in subsection 500(2) will be replaced by 'passing of the resolution for voluntary winding up'.

### Paragraph 585(a)

1461. This paragraph will be amended by deleting the existing reference to '\$1,000' and substituting a reference to 'the statutory minimum'. This proposed amendment is consequential on the proposed amendment to the corresponding provisions for the deemed insolvency of a company which fails to comply with a statutory demand, to provide that the amount of the debt claimed in the demand is to be 'the statutory minimum' in lieu of \$1,000. This proposed amendment is in turn explained in detail at the paragraphs of this memorandum relating to 'Proposed Division 2 (of Part 5.4) - Statutory demand'. 'Statutory minimum' is to be defined in section 9 to be \$2,000, or such other amount as is prescribed.

Paragraph 599(1)(c)

1462. This paragraph will be amended by omitting the existing reference to a body that has been or is under official management and substituting references to a body that has been or is under administration and a body that has executed a deed of company arrangement, even if the deed has terminated.

Paragraph 599(3)(c)

1463. This paragraph will be amended by omitting ‘official management’ and substituting ‘administration, having executed a deed of company arrangement’.

Section 603 (paragraph (k) of the definition of ‘prescribed occurrence’)

1464. Paragraph (k) of the definition of ‘prescribed occurrence’, which refers to where a target company or a subsidiary being placed under official management, will be omitted and replaced by references to an administrator of a target company or a subsidiary being appointed and a target company or subsidiary executing a deed of company arrangement.

Paragraphs 647(2)(b) and 683(2)(b)

1465. The effect of this proposed amendment will be to omit the existing provision in each of subsections 647(2) and 683(2) for the situation where a company is under official management and to substitute provision for the situations where a company is under administration or has executed a deed of company arrangement.

Paragraph 684(4)(a)

1466. This paragraph, which refers to a body corporate (or bodies corporate) under official management, will be omitted and replaced by a reference to an administrator of a body corporate (or bodies corporate) appointed under sections 436A, 436B or 436C.

Subsection 684(4)

1467. This subsection will be amended by omitting ‘body corporate was placed under official management’ and substituting ‘administrator was so appointed’.

Section 750 (paragraph (1)(a) in Part B and paragraph (1)(a) in Part D)

1468. This proposed amendment will omit the reference to a target company that is under official management from each of paragraph (1)(a) in Part B, and paragraph (1)(a) in Part D, of section 750.

Section 750 (paragraph (1)(b) in Part B)

1469. This proposed amendment will make provision in paragraph (1)(b) in Part B of section

750 for the situation where a target company is under administration or has executed a deed of company arrangement.

Section 750 (paragraph (13)(b) in Part B)

1470. This proposed amendment will have the effect of deleting the existing reference to an official manager in paragraph 13(b) in Part B of section 750 and substituting references to an administrator of a company and an administrator of a deed of company arrangement executed by a company.

Section 750 (paragraph (1)(b) in Part D)

1471. This proposed amendment will make provision in paragraph (1)(b) in Part D of section 750 for the situation where a target company is under administration or has executed a deed of company arrangement

Section 750 (paragraph (12)(b) in Part D)

1472. This proposed amendment will have the effect of deleting the existing reference to an official manager in paragraph 12(b) in Part D of section 750 and substituting references to an administrator of a company and an administrator of a deed of company arrangement

Before paragraph 922(1)(a)

Paragraph 922(1)(a)

1473. The effect of these amendments will be to omit from subsection 922(1) the existing reference to a body corporate that comes under official management and to substitute a reference to a body corporate to which an administrator is appointed under sections 436A, 436B or 436C.

Paragraph 922 (1)(c)

1474. This proposed amendment is a minor technical amendment to insert ‘or class of them’ after ‘creditors’.

Paragraph 1058(11)(a)

1475. The effect of this proposed amendment will be to exempt, for the purposes of subsection 1058(11), a borrowing corporation or a guarantor body if it under administration.

Paragraph 1252(2)(c)

1476. This proposed amendment will have the effect of deleting the existing reference to an official manager or deputy official manager of a body corporate, and substituting references to an administrator of a body corporate and an administrator of a deed of company arrangement executed by a body corporate.

Subparagraph 1274(2)(a)(iv)

1477. This subparagraph will be amended by inserting '438D' after '422'. This proposed amendment is consequential on the proposed inclusion of section 438D, under which an administrator of a company under administration will be required to lodge a report with the ASC in relation to offences and other breaches by company officers, among others.

Paragraph 1317C(f)

1478. This proposed amendment is consequential on the proposed amendments of section 597 to, inter alia, delete existing subsection 597(2). The proposed amendments of section 597 are in turn explained in detail at the paragraphs of this memorandum relating to 'Division 1 (of Part 5.9) - Examining a person about a corporation'.

Paragraph 1318(5)(c)

1479. This proposed amendment will have the effect of deleting the existing reference to an official manager or deputy official manager of a corporation, and substituting references to an administrator of a corporation and an administrator of a deed of company arrangement executed by a corporation.

Paragraph 1321(c)

1480. This proposed amendment will have the effect of deleting the existing reference to an official manager or deputy official manager of a company, and substituting references to an administrator of a company and an administrator of a deed of company arrangement executed by a company.

## SCHEDULE 2- AMENDMENTS OF ACT'S CONSEQUENT ON PART 4 OF THIS ACT

1481. Clause 125 provides that the Acts specified in this Schedule (Schedule 2) will be amended as set out in this Schedule. These proposed amendments are consequential on the proposal by clause 56 to delete Part 5.3 (relating to the official management of companies) and to insert a new Part 5.3A (to provide for the administration of a company's affairs with a view to executing a deed of company arrangement). In line with these proposed amendments, it will be necessary to delete existing references to official management in the Acts specified in this Schedule (except where transitional arrangements require the continued reference to official management in those Acts), and to substitute references to the new administration procedure to be inserted by Part 5.3A.

### Australian Meat and Live-stock Corporation Act 1977

#### Subparagraphs 16F(c)(i), (ii) and (iii)

1482. The proposed amendment is a minor drafting amendment to include the word 'or' at the end of each subparagraph.

#### Subparagraph 16F(c)(v)

1483. The effect of this proposed amendment will be to substitute in paragraph 16F(c) an administrator of a holder of a licence and a holder of a licence that executes a deed of company arrangement for a holder of a licence that is placed under official management.

### Bankruptcy Act 1966

#### Subsection 5(1) (definition of 'company officer')

1484. The proposed amendment will include an administrator of a corporation and an administrator of a deed of company arrangement executed by a corporation within the definition of 'company officer'.

#### After subparagraph 5G(c)(i)

1485. The proposed amendment will include times when a company is under administration and a deed of company arrangement executed by the company has not been terminated, for the purposes of paragraph 5G(c).

#### Paragraph 5G(c)

1486. The proposed amendment will include any conduct of an administrator of a company and an administrator of a deed of company arrangement for the purposes of paragraph 5G(c).

## Child Support (Registration and Collection) Act 1988

### Subsection 4(1) (paragraphs (a), (b), (c) and (d) of the definition of ‘trustee’)

1487. The proposed amendment is a minor drafting amendment to include the word ‘or’ at the end of each of paragraphs (a), (b), (c) and (d) of the definition of ‘trustee’.

### Subsection 4(1) (definition of ‘trustee’)

1488. This proposed amendment will include an administrator of a company and an administrator of a deed of company arrangement within the definition of ‘trustee’.

## Customs Act 1901

### After paragraph 81(3)(c)

1489. This proposed amendment will include the following matters as matters to which the Comptroller shall have regard in determining whether a company is a fit and proper company for the purposes of paragraph (1)(da):

- whether the company is under administration; or
- whether the company has executed a deed of company arrangement.

### Paragraph 82(1)(a)

1490. The effect of this proposed amendment will be to omit from paragraph 82(1)(ba) the existing reference to where a company is placed under official management, and to substitute references to where an administrator of a company is appointed and where a company executes a deed of company arrangement.

### After paragraph 183CC(4A)(c)

1491. This proposed amendment will include the following matters as matters to which the Comptroller shall have regard in determining whether a company is a fit and proper company to hold an agents licence:

- whether the company is under administration; or
- whether the company has executed a deed of company arrangement.

### Paragraph 183CG(1)(c)

1492. The effect of this proposed amendment will be to omit the existing reference to where a company is placed under official management, and to substitute references to where an

administrator of a company is appointed and where a company executes a deed of company arrangement.

#### Fringe Benefits Tax Assessment Act 1986

##### Subsection 136(1) (paragraphs (a), (b) (c) and (d) of the definition of ‘trustee’)

1493. The proposed amendment is a minor drafting amendment to include the word ‘or’ at the end of each of paragraphs (a), (b), (c) and (d) of the definition of ‘trustee’.

##### Subsection 136(1) (definition of ‘trustee’)

1494. This proposed amendment will include an administrator of a company and an administrator of a deed of company arrangement executed by a company within the definition of ‘trustee’.

#### Insurance Act 1973

##### Subsection 50(1) (definition of ‘prescribed person’)

1495. This proposed amendment will include in the definition of ‘prescribed person’ an administrator of a body and an administrator of a deed of company arrangement executed by a body.

#### Insurance (Agents and Brokers) Act 1984

##### Section 9 (definition of ‘insolvent company under administration’)

1496. The effect of this proposed amendment will be to replace existing references to the former Companies Act with appropriate references to the Corporations Law, and to include within the definition of an ‘insolvent company under administration’ a company that is under administration and a company that has executed a deed of company arrangement that has not yet terminated.

#### Overseas Students (Refunds) Act 1990

##### After subparagraph 5(4)(a)(ii)

1497. This proposed amendment will include in paragraph 5(4)(a) an administrator of an institution and an administrator of a deed of company arrangement executed by an institution.

##### After sub-subparagraph 5(4)(b)(ii)(B)

1498. This proposed amendment will include in subparagraph 5(4)(b)(ii) an administrator of a person and an administrator of a deed of company arrangement executed by a person.

## Petroleum Resource Rent Tax Assessment Act 1987

### Section 2 (paragraphs (a), (b), (c) and (d) of the definition of ‘trustee’)

1499. The proposed amendment is a minor drafting amendment to include the word ‘or’ at the end of each of paragraphs (a), (b), (c) and (d) of the definition of ‘trustee’.

### Section 2 (definition of ‘trustee’)

1500. This proposed amendment will include an administrator of a company and an administrator of a deed of company arrangement executed by a company within the definition of ‘trustee’.

## Sales Tax Assessment Act 1992

### Section 5 (definition of ‘trustee’)

1501. This proposed amendment will include an administrator of a company and an administrator of a deed of company arrangement executed by a company within the definition of ‘trustee’.

## Taxation Administration Act 1953

### After paragraph 8Y(4)(b)

1502. This proposed amendment will include in the definition of ‘officer’ for the purposes of section 8Y an administrator of a corporation and an administrator of a deed of company arrangement executed by a corporation. -

## Training Guarantee (Administration) Act 1900

### Section 4 (definition of ‘trustee’)

1503. This proposed amendment will include an administrator of a company and an administrator of a deed of company arrangement executed by a company within the definition of ‘trustee’.

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