



1997

THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA  
SENATE

**CORPORATIONS LAW AMENDMENT (ASX) BILL 1997**

**EXPLANATORY MEMORANDUM**

(Circulated by authority of the Treasurer,  
the Honourable Peter Costello, MP)

10-11-74

Dear Mr. [Name],

I have your letter of [Date] regarding [Subject].

The information you provided is being reviewed.

We will contact you again once a decision has been reached.

Thank you for your patience.

Sincerely,  
[Signature]

[Name]  
[Title]

[Address]  
[City, State, Zip]

[Phone Number]

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**1****Outline****The role of Australian Stock Exchange Limited (ASX)**

1.1 Australian Stock Exchange Limited (the ASX) plays a central role in Australia's capital markets. It is Australia's national exchange for the trading of shares, bonds, notes and debentures of over 1200 Australian and overseas companies and other entities and government and public bodies.

1.2 The ASX essentially undertakes three roles within the securities industry. It is a market regulator (self regulatory organisation or SRO); a commercial entity conducting a public securities market as a business; and a trade association representing the interests of its members.

1.3 In its capacity as a market regulator, the ASX is the front line regulator of the day to day operations of the market. The ASX, in making and administering its listing rules regulating listed companies, occupies a formal, statutorily recognised position in the system of co-regulation of companies and securities with the Australian Securities Commission (ASC).

**Current structure of the ASX**

1.4 The ASX is currently organised and governed in a manner that is traditional for stock exchanges. It is a 'co-operative' or mutual. It is owned and controlled by its members and run on behalf of its members under its own constitution and operating rules. Its members are the brokers who use the exchange to deal in the securities of businesses and governments.

1.5 The ASX is a company limited by guarantee. It does not have a share capital or 'shareholders' per se. It is conducted on a 'not for profit' basis. Any surplus is to be applied towards promoting the objects of the ASX and cannot be transferred to its members.

**Decision by ASX members to 'demutualise'**

1.6 After consideration of a business case prepared for members, members of the ASX voted on 18 October 1996 to 'demutualise', i.e. convert the ASX from a company limited by guarantee to a company limited by shares (a public company that is owned and controlled by its shareholders and conducted as a conventional business for the purpose of yielding a return in the form of dividends to its owners).

1.7 The ASX also proposes that its shares be listed on its own exchange and able to be purchased by any member of the public. As a public company, the ASX would be operated on a 'for profit' basis.

**Bill to facilitate change of type**

1.8 The Bill will facilitate the proposed changes to the ASX's governance arrangements while, at the same time, ensuring that the role of the ASX in the regulatory framework is not diminished or impaired as a result of its conversion to a public company.

**2**

## **Regulation Impact Statement**

### **Problem identification and specification of regulatory objectives**

2.1 The primary regulatory objectives of the bill are:

- (i) to ensure that essential Government policies underlying the regulation of stock markets are maintained and enhanced in the legislative framework in which the ASX will operate;
- (ii) to clarify the responsibilities of the ASX as a self regulatory organisation in ensuring the honesty and integrity of the securities markets for which it is responsible; and
- (iii) to enhance the efficiency and competitiveness of Australia's capital markets domestically and internationally.

2.2 The subsidiary objective is to facilitate the decision of the members of the ASX to change its traditional structure as a mutual organisation and adopt a corporate structure which is considered by the members to be more efficient and appropriate in the rapidly changing and competitive environment that the ASX now faces.

### **Reasons for the change**

2.3 The central principles for the regulation of securities markets are to maintain the confidence of investors in securities markets by providing adequate protection for users of these markets, especially retail users, and to enhance the integrity and efficiency of these markets.

2.4 The conversion of the Exchange to a company limited by shares represents a significant change to the way in which stock exchanges have traditionally been conducted. The concern from a policy perspective is that the commercial pressures of a 'for profit' entity may undermine the commitment of resources and capabilities of the Exchange to effectively fulfil its regulatory and public interest responsibilities to an appropriate standard. To ensure appropriate levels of investor protection, the Corporations Law will be amended to clarify the responsibilities of the ASX as an SRO, and ensure there is appropriate accountability of the ASX to the ASC and the Government in carrying out its SRO responsibilities. The Law will impose obligations on the Exchange to do

everything necessary to ensure that the market it conducts is an orderly and fair market and self regulatory functions are carried out on an ongoing basis.

2.5 The ASX has put forward the following reasons in support of its proposal to change its corporate form:

- Under its current structure the ASX does not properly represent its principal stakeholders, namely the leading stockbroking firms who are responsible for most of the trading that takes place on the ASX, the institutions who invest heavily in the market, listed companies and the public at large.
- The ASX is facing increased competition domestically and internationally. To respond adequately to these competitive pressures the ASX must become a profit-oriented, efficient, entrepreneurial, consumer-driven enterprise. External ownership of the ASX by a broader range of key stakeholders whose interests the ASX is meant to serve will facilitate those objectives.

### **Background to the need for a legislative solution**

2.6 Legislation is necessary to convert the ASX from a company limited by guarantee to a company limited by shares for the following reasons:

- (i) It is not possible under the current law to convert from a company limited by guarantee to a company limited by shares.
  - The ASX is presently, pursuant to subsection 36B(1) of the *Securities Industry Act 1980*, incorporated as a company limited by guarantee and in the absence of the amendments proposed by this Bill, would be unable to convert to a company limited by shares.
  - While proposals for amendments to the Corporations Law to provide a new, direct mechanism for a company limited by guarantee to convert to a company limited by shares are presently being examined, those amendments are unlikely to be in place before the ASX's preferred date for commencement of operations under its new corporate form, i.e. 1998.
- (ii) In any event, the proposed change of form by the ASX will also require changes to the law other than simply converting the ASX to a company limited by shares. Legislation is also necessary to:
  - (a) separate access to the trading and other facilities of the ASX from ASX membership. The provisions of the Corporations Law governing stock markets currently assume that a 'member' of a stock exchange must be a member of that exchange in the company law



sense. Following the ASX's change of corporate form, brokers will not need to be members of the ASX in the company law sense;

- (b) clarify the regulatory and public interest responsibilities of the ASX in ensuring the honesty and integrity of the securities markets and clearing and settlement facilities for which it is responsible;
- (c) restrict individual ownership in the ASX to 5%;
- (d) provide for supervision of the listing of the ASX on its own exchange by the ASC; and
- (e) ensure that the ASX continues to be responsible for the conduct and integrity of persons admitted to trading on the ASX.

2.7 The proposed legislation will not impose any significant new requirements on the ASX, but will seek to confirm the responsibilities of the ASX as a self regulatory organisation in ensuring the honesty and integrity of the securities markets for which it is responsible and in overseeing the conduct of stockbrokers.

#### **Identification of alternatives**

2.8 In deciding on the necessity for a legislative response to the ASX's proposed change of corporate form, the following three options were considered:

- (i) to decline to make the necessary legislative changes;
- (ii) to allow the ASX to change its corporate form but operate wholly as a self-regulatory body in the absence of ASC oversight; and
- (iii) to support the proposal but ensure that the change did not undermine the regulatory and public policy objectives underlying the legislation governing the conduct of public stockmarkets.

**Option (i):**        *Decline to make the proposed legislative changes necessary to implement the ASX's decision.*

2.9 One option would be to decline to make the legislative changes necessary to implement the ASX's decision to change its corporate form. This option would effectively require the ASX to retain its current mutual structure and conduct its market under the current law.

2.10 This option has not, however, been pursued as to do so would prevent the ASX from adopting a structure which is considered by it and its members to be more efficient. It may be seen as an unwarranted restriction on a private body in structuring its affairs. The ASX is essentially a private body which is not funded by the Government and the corporate form under which it chooses to conduct its

affairs is a matter for it, just as it is a matter for other bodies choosing to carry on a business. This option would prevent the ASX from benefiting from efficiency gains resulting from the proposed change of corporate form.

**Option (ii):** *Allow the ASX to change its corporate form but operate wholly as a self-regulatory body in the absence of ASC oversight.*

2.11 A second option would be to allow the ASX to change its form but operate wholly as a self-regulatory body without ASC oversight. Again, this option has not been pursued.

2.12 Under the current framework for the regulation of the securities industry in Australia, self-regulatory organisations (SROs) generally assume the role of co-regulator with the designated regulatory authority — the ASC — to ensure investor protection, market integrity and efficient market regulation.

2.13 The Campbell Report<sup>1</sup> recognised that there can be a conflict between the interests of the SRO and those of the community in general, but on balance favoured co-regulation, i.e. self regulation but with some minimum government involvement to the extent necessary to ensure that the desired prudential objectives are achieved effectively and equitably. The Corporations Law reflects this approach.

2.14 Co-regulation offers many advantages that are not available either with a statutory or self-regulatory approach and reduces the rigidities associated with legislative approaches. It is in the public interest for the broad role of SROs in the regulatory framework, and an effective working relationship between SROs and the regulatory authority, to be maintained given that SROs are in the best position to monitor market practices and detect breaches of securities laws by market participants.

**Option (iii):** *Support the proposal but ensure that the change will not undermine the regulatory and public policy objectives underlying the legislation governing the conduct of public stock markets.*

2.15 The third option, and the one that is preferred, is to support the ASX's proposal to change its corporate form but ensure that the change will not undermine the regulatory and public policy objectives underlying the legislation governing the conduct of public stock markets.

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<sup>1</sup> J K Campbell (Chairman) *Australian Financial System — Final Report of the Australian Committee of Inquiry*, Australian Government Publishing Service, Canberra, 1981.

2.16 The case for change has been carefully considered by ASX members. It is essentially a commercial decision for the members. Nevertheless, the change to a more effective and appropriate form of corporate structure is seen as likely to enhance the competitiveness of the ASX and Australia's capital markets domestically and internationally.

2.17 While it would not be appropriate to stand in the way of the decision taken by ASX members, it is appropriate to ensure that the change will not undermine the regulatory and public policy objectives underlying the legislation governing the conduct of Australia's public stock markets.

### **Effect on business**

2.18 Apart from the obvious impact on the ASX itself, adoption of this option will not impact on businesses generally. The ASX, through its Listing Rules and Business Rules and Articles of Association, does affect listed companies and stockbrokers in significant ways. The Listing Rules are one of the primary means of regulation of public listed companies. However, the ASX's proposal to change its corporate type is predicated on the assumption that any new rules that are necessary as a result of the restructure, or any restructuring of these rules, will essentially replicate those currently in force.

2.19 While there may be a capacity for increases in charges for services provided by the ASX to business, the ASX's capacity to increase charges will be restricted by competitive pressures (as discussed in paragraphs following).

### **Effect on the stockbroking profession**

2.20 Under the proposal, ownership of the ASX is to be separated from the right of access to trade on the ASX market. The right to trade on the market is to be based on a contract between the ASX and brokers, and would not require any ownership interest by brokers in the Exchange.

2.21 As membership of the ASX (in the company law sense) will not be required for brokers, the Corporations Law will need to reflect this. The Law is presently predicated on the fact that brokers are also ASX members in the company law sense. This will no longer necessarily be the case.

2.22 The Bill will not impose significant new requirements on the stockbroking profession. Rather, it recognises the ASX's altered relationship with brokers, while ensuring that the ASX continues to be responsible for the conduct and integrity of brokers trading on the ASX.

2.23 Again, there may be capacity for increases in the costs of the services provided by the ASX to stockbrokers. However, the market for broking services is competitive and the capacity of the ASX to increase fees paid by brokers is limited (as discussed in paragraphs following).

**Effect on investors (the general public) — charges for ASX services**

2.24 A public company structure could create the potential for the new owners of the ASX, and its managers, to increase charges for the services the ASX provides. The ASX has indicated that all its customers, including stockbrokers (who are the main direct users of the exchange's facilities) and listed companies (through listing fees), will bear the cost of the services provided to them if the ASX becomes a 'for profit' entity. The ASX is also seeking to make its Clearing House Electronic Subregister System (CHESS) a profitable body. The question of ASX charges for services is likely to be a more contentious matter under a public company structure than at present, given that one focus of the 'new form' ASX will be to generate a profit for its owners (shareholders).

2.25 Nevertheless, the ASX currently operates as a business and seeks to generate profits notwithstanding its 'not-for-profit' status. The ASX has the capacity to increase charges for the services it provides whether the ASX changes its form or not. However, the capacity of the ASX to charge excessive prices is limited as it would result in the ASX losing business to overseas exchanges and invite competition from newly established Australian exchanges.

2.26 The ASX's main competition is international. To retain or increase its share of the international equity market the ASX must ensure that the range, price and quality of its services are competitive with overseas stock exchanges. It can be expected that international and domestic competition pressures will restrict the scope for increases in ASX charges.

2.27 In addition, the market for broking services is competitive and likely to remain so for the foreseeable future. There are a number of factors that currently, or have the potential to, restrict brokerage fees: the emergence of discount brokers, the push by some Australian banks into private client stockbroking, potential competition from cross-border computer trading, the growth of Asian exchanges and trading via the Internet, and increased competition from domestic competitors such as the Sydney Futures Exchange.

2.28 The Australian Competition and Consumer Commission (ACCC) also currently plays an important role in overseeing the ASX through the authorisation process of the Trade Practices Act. The ASX has had to seek authorisation for various kinds of conduct that may otherwise be in breach of the Trade Practices Act. It is not proposed that the role of the ACCC in relation to any restrictive practices of the ASX be altered by the Bill.

**Impact on the role of subsidiaries of the ASX**

2.29 The ASX conducts some important operations through subsidiaries. Two subsidiaries with important responsibilities in the regulatory framework are the ASX Settlement and Transfer Corporation Ltd (ASTC) and the Securities Exchange Guarantee Corporation (SEGC).

## ASTC

2.30 ASTC is the body corporate approved under the Corporations Law to operate CHESS. CHESS is the automated transfer and settlement system for ASX transactions. It provides a computerised electronic register of holdings in most ASX securities.

2.31 A clearing house such as CHESS needs to be able to make independent decisions in carrying out its clearing and settlement functions. As a wholly owned subsidiary of the ASX this independence cannot be taken for granted.

2.32 However, the statutory recognition of CHESS under the Corporations Law and oversight of its rule making by the ASC and the Minister under that Law reinforces the independence of CHESS. The statutory role of CHESS will not be affected by the measures proposed in the Bill.

## SEGC

2.33 The SEGC is responsible for the administration of the National Guarantee Fund (NGF). It is established under Part 11 of the *Corporations Act 1989*. Its functions are set out in Division 2 of Part 7.10 of the Corporations Law. The SEGC is a wholly owned subsidiary of the ASX and its Board is appointed by the Board of the ASX. However, in all other respects it is independent of the ASX and must necessarily be so as it has a range of statutory responsibilities assigned to it under the Corporations Law.

2.34 It is not envisaged that the role of the SEGC will be affected by the change of form of the ASX.

## Effect on ASC

2.35 The proposal includes provision for the ASX to pay the ASC for the costs of ASC oversight of the listing of the ASX.

## Costs/benefits

2.36 In summary, adoption of Option (iii) should enhance the efficiency and the competitiveness of the ASX and Australia's capital markets domestically and internationally by permitting the ASX to adopt a more appropriate and efficient corporate structure.

2.37 The change of form of the ASX will not alter the basic co-regulatory framework for the securities industry, which sees the ASX working with the designated regulatory authority — the ASC — to ensure investor protection, market integrity and efficient market regulation. That framework has, over the years, worked efficiently and in the public interest to ensure the honesty and integrity of the securities markets and to maintain the confidence of investors in those markets.

2.38 As a profit oriented body the ASX may be expected to push for increases in charges for the services it provides. However, the ASX will continue to be subject to competitive pressures and authorisation processes under the Trade Practices Act.

### **Consultations and evaluation strategy**

2.39 The ASX has engaged in consultations with its members on the proposed changes to its corporate structure, canvassing the arguments for and against the change of form.

2.40 The decision in July 1995 by the Board of the ASX to examine the issue of ownership and governance of the exchange followed several years of discussion and debate about options for the future governance of the Exchange. A governance task force was established, consisting of members of the ASX Board and senior management of the ASX. A reference panel was established, consisting of stockbrokers from each State. The panel provided comment on governance issues and feedback from ASX members on their views and preferences.

2.41 The ASX commissioned Hogan Stokes Pty Ltd to prepare a "Report on Future Governance of the Australian Stock Exchange". That Report, which was finalised in July 1996, recommended that the ASX convert from a company limited by guarantee (the typical form of a 'co-operative or 'mutual' company) to a company limited by shares (a company that is owned and controlled by its shareholders and conducted as a conventional business for the purpose of yielding a return in the form of dividends to its shareholders). Members considered the Report prior to the meeting to vote on the proposal.

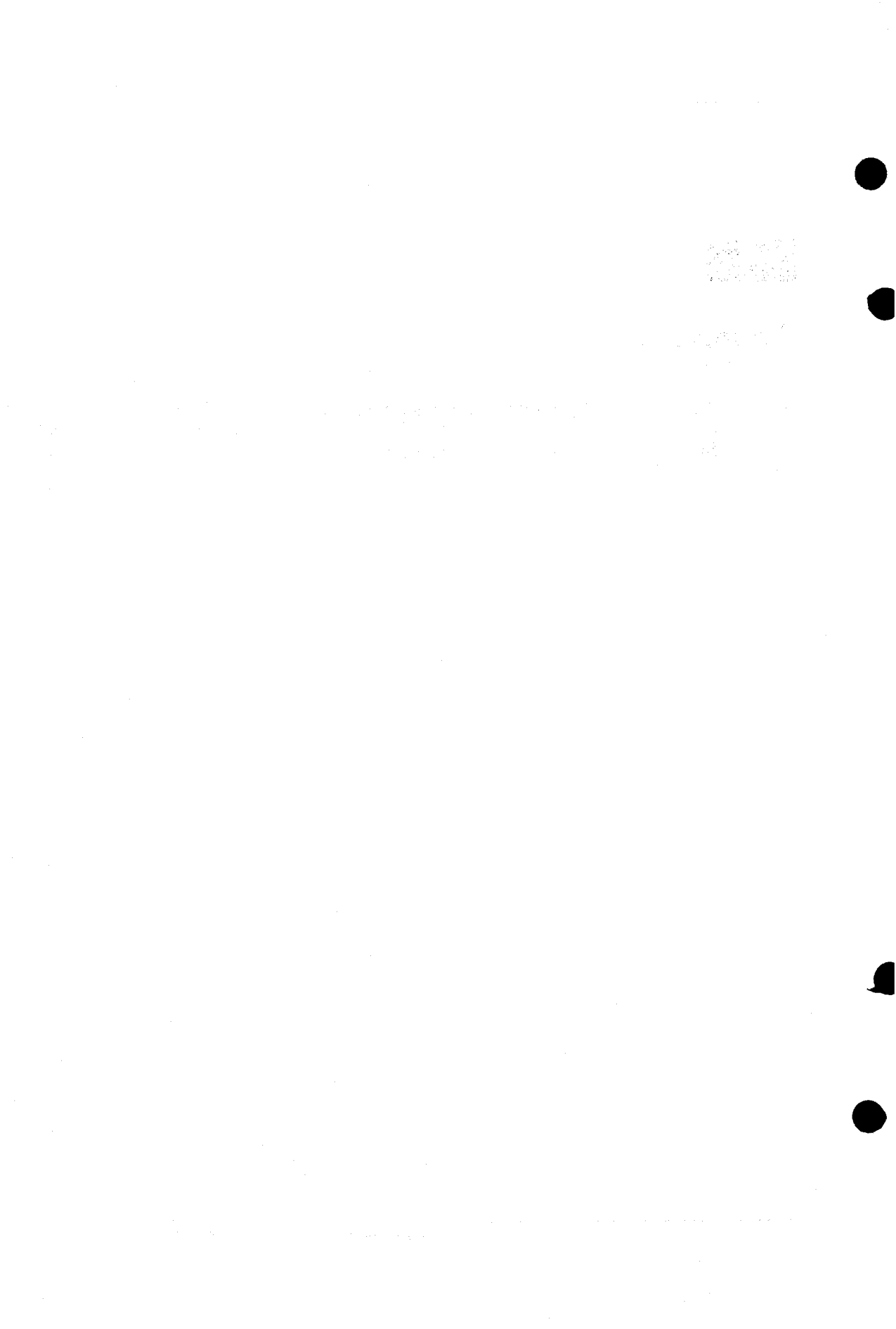
2.42 This Bill has also been subject to wide public consultation prior to its introduction into the Parliament. The Corporations Agreement between the States, the Northern Territory and the Commonwealth forms the political compact on which the national companies and securities scheme is based. That Agreement requires that legislation affecting the national companies and securities scheme be exposed for public comment prior to its introduction.

2.43 After enactment, the operation of the legislation will be kept under constant review by the Treasury and the ASC as part of their ongoing program responsibilities. In addition, a review of the legislation regulating the securities and futures markets (which includes the role of the ASX) was announced on 4 March 1997 as part of the Government's Corporate Law Economic Reform Program. This review also affords an opportunity to consider the appropriateness of the legislative changes consequential on the ASX's change of form.

**3**

## **Financial Impact Statement**

3.1 It is not envisaged that the Bill will have a financial impact on the operations of government. While additional costs will be incurred by the ASC in supervising the listing of the ASX, the ASX has agreed to reimburse the ASC for these costs.





**4**

**Abbreviations**

The following abbreviations are used in this explanatory memorandum:

- ASC — Australian Securities Commission
- SRO — Self-regulatory organisation
- ASX — Australian Stock Exchange Limited



**5**

## **Summary of key amendments proposed by the Bill**

5.1 The Bill's aim of facilitating the proposed changes to the ASX's governance arrangements while, at the same time, ensuring that the role of the ASX in the regulatory framework is not diminished or impaired as a result of its conversion to a public company will be achieved by:

- Clarifying the responsibilities of the ASX as a self regulatory organisation (SRO), and ensuring appropriate accountability of the ASX to the ASC and the Government in carrying out its SRO responsibilities.
  - Obligations will be imposed on the ASX (and securities exchanges generally) to do everything necessary to ensure that the market it conducts is an orderly and fair market and self regulatory functions are carried out on an ongoing basis. The ASX's altered relationship with brokers is also recognised and the ASX will continue to be responsible for the conduct and integrity of market participants in trading on the ASX and in related activities.
- Limiting persons and their associates (Australian and foreign) to owning or controlling no more than 5 per cent of the shares in the ASX.
  - In the event that the ownership limitation is breached, a Court will be able to make remedial orders (including divestiture) on the application of the Minister, the ASC, the ASX or a shareholder of the ASX. The proposed 5 per cent limit (in contrast to the current individual limit on bank ownership of 10 per cent) is considered appropriate in light of the relatively small amount of capitalisation of the ASX.
- Providing that the ASC supervise the ASX's compliance with its listing rules in respect of the ASX's own proposed listing.
  - If the ASX's role in oversighting the listing of publicly listed companies is to remain credible, it must ensure that, in relation to its own prospective listing, it adheres to the highest standards it sets for other companies. It is also necessary to

## Key Amendments

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ensure that there is no conflict of interest such as would arise if the ASX were to oversight its own listing. These objectives can only be met if its listing is oversighted by a separate body. The ASC, as a public authority with statutory responsibility for the proper conduct of securities markets and expertise in overseeing public stock markets, is best placed to undertake such a task.

## 6

### **Formal clauses**

#### **Clause 1 — Short title**

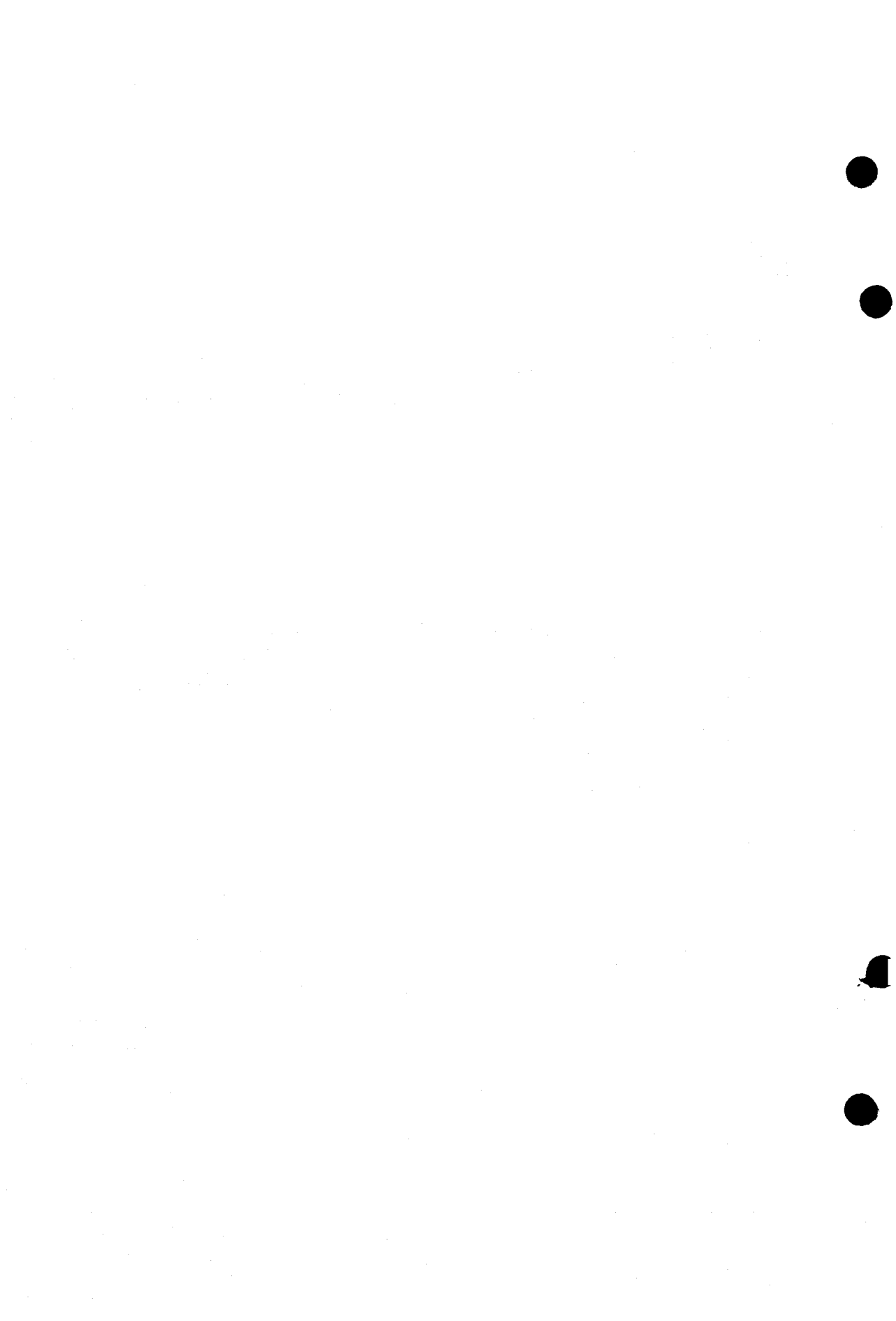
6.1 Upon enactment, the Bill will be known as the *Corporations Law Amendment (ASX) Act 1997*.

#### **Clause 2 — Commencement**

6.2 The Act will commence on the day it receives Royal Assent.

#### **Clause 3 — Schedules**

6.3 The Corporations Law is to be amended as set out in the draft Bill.



## 7

## Schedule 1 — Amendment of the Corporations Law

### Item 1 — Proposed amendment to section 9 — (paragraph (a) of the definition of *member*)

7.1 Paragraph (a) of the current definitions of *member* and *member organisation* in section 9 of the Corporations Law connotes members of securities exchanges and stock exchanges in the company law sense. One effect of the ASX change of company type will be, however, that existing members of the ASX need not necessarily continue to be members in the company law sense in that they will not need to be shareholders in the ASX to carry on business on the exchange.

7.2 The proposed new definition of *member* in paragraph (a) will clarify that member has a particular meaning when used in Chapter 6 or Chapter 7 in relation to a securities exchange or stock exchange, and does not necessarily connote member in the company law sense. A member will be a person who satisfies the definition of *member organisation* (see discussion following) or who is a partner in a member organisation.

7.3 The new definition will also omit the existing words 'within the meaning of the provision where the expression occurs'. These words are merely an acknowledgment that 'stock exchange' and 'securities exchange' have varying meanings in the Corporations Law and are unnecessary.

7.4 Proposed new paragraph (aa) will include in the definition of *member*, for a limited number of purposes, those persons recognised by an exchange (whether the ASX or any other exchange) as affiliates. Such persons will need to have appropriate qualifications and be involved in the carrying on of a business of dealing in securities (whether as an employee or director or in any other capacity). That is, they will not themselves carry on a business of dealing in securities and will not themselves have contractual or other rights of access to an exchange's trading facilities. Such persons will, for example, be able to adopt the title of stockbroker or sharebroker without contravening subsection 1115(1). Consistently with paragraph (a), a person falling within this paragraph need not be a member of an exchange in the company law sense.

**Item 2 — Proposed amendment to section 9 — (paragraph (a) of the definition of *member organisation*)**

7.5 Paragraph (a)(i) of the existing definition of *member organisation* in section 9 of the Corporations Law requires a member organisation to satisfy two main requirements — firstly that they be a member of an exchange in the company law sense, and second that they carry on a business of dealing in securities. In line with the discussion above, paragraph (a)(i) of the definition of *member organisation* will be amended to substitute, for the first requirement, a requirement that the member organisation be recognised by an exchange as a suitably qualified participant of the exchange. In the case of the ASX, for example, this will encompass stockbroking firms who will have a contractual right of access to the trading facilities of the ASX.

7.6 Proposed paragraph (a)(ii) will include in the definition of *member organisation* a partnership that the exchange recognises as a suitably qualified participant of the exchange and that carries on a business of dealing in securities. It will substantially replicate existing paragraph (a)(ii) of the definition of *member organisation*.

**Item 3 — Proposed amendment to section 761 (paragraph (a) of the definition of *business rules*)**

7.7 Paragraph (a) of the current definition of *business rules* in section 761 of the Corporations Law specifically includes the constitution (ie the memorandum and articles of association) of a body corporate conducting a stock market. The existing articles of association of the ASX, for example, include many of the rules governing the activities or conduct of its stock market, and thus appropriately form part of the business rules of that stock market.

7.8 On its conversion to a public company, however, the ASX proposes to adopt a conventional set of articles for a public company and set out the rules governing the activities or conduct of the stock market in a separate document. In these circumstances, the articles will no longer appropriately form part of the business rules of the stock market conducted by the ASX. Thus, the specific reference to the constitution is to be omitted from the definition of *business rules* in section 761.

7.9 Nevertheless, if the constitution documents of the ASX (or any other body corporate operating a stock market) were to contain an article that could be said to govern the activities of the stock market or the conduct of persons in relation to the market, those particular articles would continue to be business rules and would, for example, continue to be subject to the notification obligations imposed by section 774.



**Item 4 — After Part 7.1 insert Part 7.1A — The Australian Stock Exchange Limited**

7.10 Item 4 will insert a new Part 7.1A into Chapter 7 of the Corporations Law. Division 1 of Part 7.1A will set out a mechanism that will allow the ASX to convert from a company limited by guarantee to a public company limited by shares and give statutory recognition to the ASX's new constitution, business and listing rules. Division 2 of Part 7.1A will limit holdings of shares in the ASX.

**PROPOSED DIVISION 1 — CHANGE OF COMPANY TYPE**

**Proposed section 766A — Exchange may change its type under this Division**

7.11 Part IIA of the *Securities Industry Act 1980* established the ASX as a national stock exchange (in place of the former state based exchanges). Section 36B of that Act incorporates the ASX in the Australian Capital Territory and deems it to be incorporated under the *Companies Act 1981* and to be a company limited by guarantee. The Securities Industry Act is part of the co-operative scheme legislation which has been substantially repealed and replaced by the current national companies and securities scheme laws. However, the operation of Part IIA of the Securities Industry Act is specifically preserved by subsection 81(1) of the *Corporations Act 1989*.

7.12 Proposed section 766A will permit the ASX to change its type to that of a public company limited by shares, notwithstanding subsection 36B(2) of the Securities Industry Act.

**Proposed section 766B — Applying for change of type**

7.13 To change its type, the ASX will be required to lodge an application with the ASC under the Corporations Law of the Capital Territory (proposed subsection 766B(1)).

7.14 Proposed subsection 766B(2) sets out the documents that must accompany that application. Conversion to a public company limited by shares could disadvantage creditors of the ASX and, accordingly, a statement by the directors of the ASX that creditors are not likely to be prejudiced by the change is one of the documents that must accompany the application.

7.15 The revised constitution, business rules and listing rules of the ASX will take effect as from the date of conversion of the ASX to a public company (proposed paragraph 766D(2)(d)). In light of the likely difficulties in coordinating the revision of those documents with the actual mechanism for conversion, the usual requirements for approval of amendments to the constitution, business rules and listing rules will not apply (proposed subsection

766B(3)). The ASX has advised that its members will, however, be consulted closely on the necessary amendments. Nor will the usual disallowance procedures set out in section 774 apply. These procedures will be replaced by the requirement for the Minister's prior written approval of the amended constitution, business rules and listing rules under proposed paragraph 766B(2)(e).

### **Proposed section 766C — Change of type**

7.16 Proposed section 766C sets out the steps in the conversion process. On receiving the ASX's application to change its type, the ASC is to publish in the *Gazette* a notice of the date on which the conversion will take effect (proposed subsection 766C(1)). The change of type will take effect at the beginning of the day notified in the *Gazette* (proposed subsection 766C(2)). The ASC will alter the ASX's registration and give it a new certificate of registration (proposed subsection 766C(3)). A court may not reverse the alteration of the details of the ASX's registration made by the ASC (proposed subsection 766C(4)).

### **Proposed section 766D — Effect of change of type**

7.17 The change of type will not create a new legal entity, affect the ASX's existing property, rights or obligations (except as provided by proposed subsection (2)), or render defective any legal proceedings (proposed subsection 766D(1)).

7.18 On the change of type, the liability of each member and past member as a guarantor on the winding up of the ASX will be extinguished (proposed paragraph 766D(2)(a)). The members will cease to be members of the ASX (proposed paragraph 766D(2)(b)).

7.19 Proposed paragraph 766D(2)(c) implements the decision taken by members of the ASX as to who shares in the ASX are taken to be issued to on the change of type. They are the persons who satisfy the criteria set out in Articles 83 and 84 inserted in the ASX's articles of association by the special resolutions of members of the ASX on 18 October 1996, dealing with the change of type. Each of those persons will become a member of the 'new' ASX and will be taken to have consented to be a member.

7.20 The special resolutions of 18 October 1996 generally envisage that persons who were members of the ASX at the date of the vote on conversion, i.e. 18 October 1996, will become holders of shares in the capital of the ASX on the basis of equality among those persons. However, there are some qualifications to this, as follows:

- (a) 'Post-entitlement' members of the ASX (ie persons who become members after 5 July 1996) will not be able to participate in any distribution of

shares on the change of type (Article 35A of the ASX's articles of association).

- (b) Persons who were members of the ASX on 18 October 1996, but who cease to be members before the change of type of the ASX takes effect because of the application of Articles 38(4), 52, 59 and 60(1) of the ASX's articles of association, will not be able to participate in the distribution of shares. Cessation of membership as a result of the application of these articles would essentially be for serious professional or other misconduct.

However, a member who ceases to be a member after 18 October 1996 because of the application of Article 45 (ie as the result of the failure to devote the substantial part of the working week to the business of the member organisation) will still be entitled to a distribution of shares. Also, if a person was a member on 18 October 1996 but dies before the date of conversion, that person's estate will be entitled to a distribution of shares.

7.21 A court may not make an order reversing the issue of the shares (proposed subsection 766D(3)). Proposed subsection 766D(4) provides that the Division does not, by implication, prevent the ASX from changing its constitution, business rules or listing rules, changing its type, or being registered as a company under the Corporations Law of another jurisdiction, and ceasing to be incorporated under the Corporations Law of this jurisdiction. This would, for example, allow the ASX to transfer its place of incorporation.

## **PROPOSED DIVISION 2 — LIMITATIONS ON HOLDING SHARES IN THE EXCHANGE**

7.22 The ASX has a critical role to play in the national economy. It would not be in the public interest for any one party to gain control of the ASX. Persons and their associates will generally be limited to owning or controlling no more than 5 per cent of the voting shares of the ASX. A limitation of this order will encourage diverse ownership of the ASX. The limitation of 5 per cent will apply to both Australian and foreign persons.

### **Proposed section 766E — Unacceptable ownership situation**

7.23 Proposed section 766E clarifies the meaning of 'unacceptable ownership situation' and outlines the manner in which a person's entitlement to voting shares in the ASX will be determined. If any one person becomes entitled to more than 5 per cent of the voting shares in the ASX an 'unacceptable ownership situation' will exist (proposed subsection 766E(1)).

7.24 A person's entitlement to voting shares in the ASX will be determined in the same way that a person's percentage entitlement to voting shares in a company is determined for the purposes of Part 6.2 of the Corporations Law (proposed subsection 766E(2)).

7.25 Part 6.2 contains the central controls on the acquisition of voting shares in a company in a takeovers context. Section 615 of Part 6.2 prohibits the acquisition of shares in a corporation if, after the acquisition, a person is entitled to more than the prescribed percentage of the voting shares in the company. The definition of *voting share* in section 9 and the provisions for calculating entitlement to shares in section 609 are also relevant to the operation of section 615. Under section 609, the shares in a body corporate to which a person is entitled include not only shares in which a person has a relevant interest, but also shares in which a person who is an *associate* of the person has a *relevant interest*. *Relevant interest* (defined in Division 5 of Part 1.2) and *associate* (defined in Division 2 of Part 1.2) are both broadly defined terms encompassing the various ways in which a person may exercise, or control the exercise of, the right to vote attached to a share or dispose of a share.

**Proposed section 766F — Causing an unacceptable ownership situation**

7.26 Proposed section 766F makes it an offence for a person to acquire shares in a corporation (or enter into a 'relevant agreement' to acquire shares in a corporation) where the acquisition has the result that the person becomes entitled to more than 5 per cent of the voting shares of the ASX; or a person who was previously entitled to more than 5 per cent of the voting shares in the ASX becomes entitled to a greater percentage. The person must have known the action would have that result, or have been reckless as to whether the acquisition would have that result. The penalty for a contravention of proposed section 766F will be 400 penalty units.

**Proposed section 766G — Exchange's obligation to avoid unacceptable ownership situation**

7.27 Proposed section 766G imposes an obligation on the ASX to take all reasonable steps to ensure that an unacceptable ownership does not exist. The obligation to 'take all reasonable steps' will not, however, require the ASX or a subsidiary of the ASX, without more, to refuse or fail to register a share transfer on the CHES subregister that will, once registered, result in an unacceptable ownership situation.

**Proposed section 766H — Remedial orders**

7.28 Proposed subsection 766H(1) provides that, where an 'unacceptable ownership situation' exists, the Court may, on the application of the Minister, the ASC, the ASX or a shareholder of the ASX, make such orders as it considers appropriate to ensure that an 'unacceptable ownership situation' ceases to exist.

7.29 Those orders may include an order to dispose of shares, an order restraining the exercise of any rights attached to shares, an order prohibiting or deferring the payment of any sums in respect of shares held by the person, an order that any exercise of rights attached to shares be disregarded, an order directing any person to do or refrain from doing a specified act or an order containing such ancillary or consequential provisions as the court thinks

just (proposed subsection 766H(2)). The orders the Court may make are not, however, limited to orders of the kind detailed in proposed subsection 766H(2) (proposed subsection 766H(3)).

7.30 Proposed subsection 766H(4) provides for notice of an application to be given to such persons and/or in such manner as the Court thinks fit. The Court may, by order, rescind, vary or discharge any order or suspend the operation of an order (proposed subsection 766H(5)).

**Proposed section 766I — This Division extends to things outside Australia etc**

7.31 Section 766I provides for the extra-territorial operation of Division 2 of Part 7.1A.

**Item 5 — After section 769**

7.32 Item 5 will insert proposed sections 769A, 769B, 769C and 769D to clarify the ongoing requirements to be observed by a securities exchange and to outline the means by which compliance with those requirements will be enforced.

**Proposed section 769A — Ongoing requirements to be observed by securities exchange**

7.33 Section 769 of the Corporations Law sets out threshold requirements for approval as a stock exchange. Proposed section 769A will complement section 769 and clarify the responsibilities of the ASX (and securities exchanges generally) as an SRO, ensuring appropriate accountability of the ASX to the ASC and the Government in carrying out those SRO responsibilities.

7.34 Proposed section 769A will make it clear that a stock exchange is subject to ongoing requirements to:

- do all things necessary to ensure that each stock market of the exchange is an orderly and fair market;
- have adequate arrangements for monitoring and enforcing compliance with its business and listing rules;
- have adequate arrangements for the expulsion, suspension or disciplining of a member for conduct inconsistent with just and equitable principles in the transaction of business, or for a contravention of the exchange's business rules, Chapter 7 or the conditions of a licence held by a member;
- have adequate arrangements for the settlement of transactions that result from trading on the stock market; and

- have adequate arrangements for investigating complaints by investors relating to business transacted on the market operated by the exchange.

7.35 Proposed sections 769A, 769B, 769C, 769D, 772A and 772B will apply to securities exchanges generally and will not be specific to the ASX.

7.36 Proposed subsection 769A(2) provides that a contravention of proposed subsection 769A(1) will not be an offence.

**Proposed section 769B — Minister's directions to comply with ongoing requirements**

7.37 Proposed subsection 769B(1) permits the Minister to publish a notice in the *Gazette* directing a securities exchange to do specified things that the Minister believes will promote compliance by the exchange with the requirements set out in proposed section 769A, if the Minister is of the opinion that a securities exchange is not complying with the requirements of section 769A.

7.38 It is anticipated that the ASC will oversight the activities of the exchange and issue a policy statement outlining what it sees as appropriate compliance with clause 769A and the circumstances in which it will recommend to the Minister that a direction be issued to an exchange.

7.39 Proposed subsection 769B(2) provides that a securities exchange must comply with a direction given by the Minister under proposed subsection 769B(1). If a securities exchange contravenes the direction, the Court may, on the application of the ASC, order the exchange to comply with it (proposed subsection 769B(3)).

**Proposed section 769C — Annual report by securities exchange about compliance with ongoing requirements**

7.40 Proposed subsection 769C(1) requires a securities exchange to prepare and give to the ASC, within 3 months of the end of each financial year, a report on the extent to which the exchange has complied with the requirements of section 769A during that year. The ASC will, in turn, forward the report to the Minister.

7.41 Proposed subsection 769C(2) sets out the material that is to accompany the report.

7.42 Proposed subsection 769C(3) provides that the Minister may require a securities exchange to obtain an audit report on the annual report. The audit report must be prepared either by the ASC or some other person or body nominated by the Minister.

**Proposed section 769D — Special report by securities exchange about compliance with ongoing requirements**

7.43 Proposed subsection 769D(1) permits the Minister to, at any time, require a securities exchange to prepare and give the ASC a special report on the extent to which the exchange is complying with the ongoing requirements of section 769A, for forwarding to the Minister.

7.44 The special report must be accompanied by any audit report required by the Minister under subsection 769D(3) (proposed subsection 769D(2)). The audit report must be prepared either by the ASC or some other person or body nominated by the Minister. The reports must be given to the ASC within the time required by the Minister.

**Item 6 — After section 772**

7.45 Item 6 will insert proposed sections 772A and 772B, which will facilitate self-listing by the ASX, and other securities exchanges, on their own exchange.

**Proposed section 772A — Business rules bind securities exchange and its members**

7.46 By virtue of section 180 of the Corporations Law, presently the business rules of a securities exchange have the legal effect of a contract under seal between the exchange and its members, and between a member and each other member. On the commencement of this Bill, stockbrokers will not be required to be members of a securities exchange in the traditional company law sense contemplated by the term 'member' in section 180, with the result that section 180 will have no application to stockbrokers who are not shareholders of an exchange.

7.47 Proposed section 772A will address this situation by providing that the business rules of a securities exchange have effect as a contract under seal between the exchange and each member, and between a member and each other member.

**Proposed section 772B — Self-listing by securities exchanges**

7.48 The ASX is responsible for the administration and enforcement of its listing rules against listed companies. The proposal by the ASX to list on its own exchange raises the possibility of a conflict of interest in the ASX monitoring its compliance with, and enforcing, its listing rules against itself.

7.49 To remove the potential for any conflict of interest, the ASC will undertake the supervision of the ASX's compliance with its listing rules, and the ASX will meet the supervisory costs incurred by the ASC. The provisions providing for self listing of an exchange will, however, not be specific to the ASX and self listing will be available to securities exchanges generally.

7.50 Proposed section 772B permits the listing of a securities exchange on that exchange and facilitates such a listing. Proposed subsection 772B(1) clarifies that a body corporate that is a securities exchange may be included in its own official list.

7.51 Proposed subsection 772B(2) provides that securities of a securities exchange may be granted quotation on the exchange if the ASC and the exchange have entered into arrangements for:

- dealing with possible conflicts of interest that might arise from the quotation of the exchange's securities on the exchange; and
- ensuring the integrity of trading in securities of the exchange.

'Arrangements' for the purpose of proposed subsection 772B(2) may include provisions of listing or business rules.

7.52 Arrangements with the ASC for the listing of a securities exchange on that exchange may provide for the payment of fees to the ASC for oversighting the listing of the exchange (proposed subsection 772B(3)). Fees will be payable to the Commonwealth in the same manner as fees for chargeable matters under Part 9.10 of the Corporations Law.

7.53 The listing rules of the exchange must provide that the ASC (or the ASX on its behalf), and not the exchange, will make decisions and take action on the following matters:

- the admission of the exchange to its own official list;
- the removal of the exchange from its own official list; and
- granting, stopping or suspending the quotation of securities of the exchange on a stock market of the exchange.

7.54 The ASC will have such powers and functions as are conferred on it by the arrangements entered into between it and the exchange, and also the powers and functions conferred on it by the listing rules of the exchange (subsection 772B(5)). Existing section 776 of the Corporations Law will complement proposed subsection 772B(5) in that it will impose an obligation on a securities exchange to provide such assistance to the ASC as the ASC reasonably requires for the performance of its functions.

7.55 Proposed subsections 772B(6) to (10) permit the ASC to exempt a self-listing exchange from certain specified provisions of the Law or modify the operation of those provisions in relation to the exchange, either conditionally or unconditionally. The exchange must comply with any conditions so set (proposed subsection 772B(9)) and the ASC may apply to the Court for an order that the exchange so comply (proposed subsection 772B(10)).



7.56 The provisions of the Corporations Law that may be so modified are section 235 and any of the provisions of Chapters 6 and 7, and any regulations made for the purposes of any of these provisions (proposed subsection 772B(11)).

7.57 A 'self-listing exchange' will be defined by proposed subsection 772B(11) to mean a securities exchange whose securities have been granted quotation on a stock market of the exchange.

### **SCHEDULE 3**

7.58 The following penalties will be included in Schedule 3 of the Corporations Law.

7.57. The penalty for a contravention of proposed section 766F (causing an unacceptable ownership situation) will be 400 penalty units.

7.58. The penalty for a contravention of proposed section 766G (exchange's obligation to avoid unacceptable ownership situation) will be 500 penalty units.

