

13. Names and registration numbers

Introduction

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

Amendments

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

14. Termination, winding up and administration

Introduction

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

Termination

Terminating events

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

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

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

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

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

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

Winding up

Which schemes?

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

Liquidators

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

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

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

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

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

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

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

Preferences

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

Administration of schemes

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

15. The ASC's powers

Introduction

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

Surveillance audits

Introduction

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

Power of entry

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

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

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

Power to take possession

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

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

Help to be given

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

Enhanced enforcement powers

Enforceable undertakings

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

Order for compliance

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

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

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

Use of computers

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

Exemptions

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

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

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

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