

SUMMARY OF THE ISSUES IN THE PROPOSALS PAPER

Financial services regulation (FSR) issues

ISSUE	PROPOSAL	OBJECTIVES/COMMENTS
<p>[1.1] Scope of financial services advice — sales recommendation</p>		
<p>In some situations, pure product sales activities are (inappropriately) being captured by the ‘personal advice’ definition, which has licensing, training and disclosure implications for those providing the advice (and also supervision and compliance requirements for licensees).</p>	<p>The Government proposes <i>an alternative regulatory system</i> on this issue – rather than the focus being on classifying advice as ‘general’ or ‘personal’, a more useful and appropriate way of regulating financial product advice (in appropriately defined situations) is to consider the purpose of the activity in question and its usefulness to the client. Accordingly, in applicable situations, financial product providers and their representatives will be able to recommend financial products (ie, provide ‘sales recommendations’) based on a client’s objectives, financial situation and needs without the recommendation constituting financial advice (general or personal). However, this does not apply to superannuation or retirement savings account (RSA) products .</p> <p>Note that a sales recommendation would still be a ‘financial service’ under the legislation but would be subject to its own regulatory requirements, so that a person making financial product sales recommendations must:</p> <ul style="list-style-type: none"> • be a representative of a licensed product issuer (or its related licensee) and only deal in/make sales recommendations on financial products on behalf of the product issuer; • not hold themselves out as a financial adviser, financial planner, insurance broker or stockbroker; • provide a product disclosure statement (PDS) or other applicable disclosure if a financial product is recommended (even if the advice is not ‘personal’); • provide up front and in writing (except where oral disclosure is allowed) a ‘sales recommendation warning’ (which could form part of the representative’s financial services guide (FSG)), which states: <ul style="list-style-type: none"> – that the representative acts for the product issuer and not the client; – that the representative may only recommend/sell products and cannot give financial advice; – the scope of the service (ie, classes of products which the representative is able to sell/recommend); – says that the client should consider whether the product is appropriate for them and that they should read the disclosure document; and – information on the costs of the product (including commissions, benefits etc) and any conflicts of interest. • The objective is to help consumers distinguish between the value-adding component of financial advice from simple product sales and, therefore, enhance the professional standing of financial advisers. 	<p>The purpose of this proposals is to increase transparency for consumers so that they understand the difference between the two different types of activity; ie, when financial <i>advice</i> is being provided as opposed to when a product is being recommended by a financial services provider on behalf of a product issuer for whom they act as a representative (<i>a sales recommendation</i>).</p> <p>Note: This alternative regulatory system was not presented in these terms in the consultation paper, although it is a logical (and, in broad terms, sensible) extension of the overall objectives that the Government is trying to achieve as part of the financial services review process. (The proposals paper also notes that this proposal may help to some extent in alleviating concerns about conflicts of interest and remuneration disclosure, which have been topical issues that have received much media and regulatory attention this year. The Government believes that this proposal helps to distinguish between situations where advice is provided in the interests of a client and pure product sales advice. Any advances on addressing this complex area will be very welcome.)</p>

[1.2] Scope of financial services advice — statement of advice (SOA) exemption — no product recommendation and no remuneration

<p>The requirement for financial advisers to provide an SOA for personal advice when no specific product is recommended and no remuneration is received for the advice may impose excessive compliance costs for advisers. (A common example of how this arises is where advisers offer a free initial consultation to a person and it becomes apparent that the client only has a small amount of money to invest – many advisers consider the cost of producing an SOA is not economic and, from the consumer's point of view, it may ultimately reduce their ability to access general strategic advice.)</p>	<p>The proposal is to remove the requirement to provide an SOA when:</p> <ul style="list-style-type: none"> • personal advice is provided which does not involve recommending a specific financial product or the products of a specific issuer (or the advice is just that the client continue to hold an existing product); • no remuneration (or other benefit) is received (although a wage or salary which the adviser would receive in any case and is not directly related to the provision of the advice could be specifically excluded to avoid any doubt on this aspect); and • the adviser keeps a record of advice (ROA) containing brief details of the advice to the client and the client can get a copy of the ROA on request. 	<p>Obviously, this would help small-scale investors to get access to financial advice and would allow (and hopefully encourage) financial advisers to conduct free initial consultations with clients at a lower cost – a benefit to all involved.</p>
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[1.3] Scope of financial services advice — threshold for requiring an SOA

<p>The cost of providing (personal) advice (particularly for minor advice or to small-scale investors) results in some investors having limited access to affordable (and quality) financial advice. (This issue is related to the previous SOA proposal.)</p>	<p>To overcome this, the suggestion is to amend the SOA requirements so that an SOA would only be required if the (personal) advice given is in relation to an investment amount that is above \$10,000; advisers will be required to keep an ROA in relation to advice on amounts below this threshold. However, it is also proposed that this exemption from the SOA requirements not apply to:</p> <ul style="list-style-type: none"> • specific insurance advice (on life risk insurance products and general insurance (sickness and accident and consumer credit insurance)) • derivatives • superannuation and RSA products • an investment which is part of a series of transactions where the total accumulated investments would be more than the threshold amount (eg, advice on a managed investment scheme (MIS) where it is clear that the investment (even if initially less than the threshold amount) is likely to be part of a series of future (related) investments). 	<p>While the Government is not suggesting that this proposal will decrease all costs associated with advice, it considers it will provide significant help in lessening the cost of providing advice to small-scale investors. Consequently, it is hoped that personal financial advice will become more accessible for small-scale investors.</p>
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[1.4] Scope of financial services advice — FSG exemption — public forum

<p>An FSG must be provided where general advice is given, except if given in a 'public forum' (even though such events fall within the definition of 'financial product advice'). However, the definition of a public forum takes account of the nature of the invitation issued to attendees, which results in an inconsistent application of the disclosure requirements for public forums.</p>	<p>As a result of feedback from industry participants, the Government is proposing to change the law so that an FSG would not need to be provided at any public (financial education) forum where 10 or more retail clients attend (or the number of retail clients attending could not reasonably be ascertained before the event started).</p>	<p>This will result in consistent regulation of financial services disclosure requirements in relation to all public forums. However, depending on the proposed scope of this suggested change, the Government still needs to consider what general (oral) disclosures might be required in these situations and ensure that the requirements are not too onerous (and impractical) for those required to make them and are meaningful for investors.</p>
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[1.5] Non-cash payment facilities (NCPFs)

<p>NCPFs (ie, facilities for making payments (or causing them to be made) other than by the physical delivery of cash) are 'financial products' under FSR. Therefore, the relevant Corporations Act licensing and disclosure provisions apply to them unless they fall within current class order relief given by the Australian Securities & Investments Commission (ASIC) (issued under ASIC policy statement PS 185)³. In that case, different (and inconsistent) licensing, disclosure, conduct and hawking prohibitions apply to the particular NCPFs and some have been declared by ASIC not to be financial products for the purposes of FSR.</p> <p>For an NCPF not covered by the class order relief, varying disclosure requirements apply, depending on whether it is a basic deposit product (BDP). NCPFs that are not related to a BDP and not covered by ASIC class order relief are subject to the full disclosure regime.</p> <p>The lack of consistency in regulating NCPFs causes confusion.</p>	<p>The Government wants to provide for greater consistency in relation to NCPFs and therefore proposes to amend the Corporations Act so that (except for gift vouchers and pre-paid mobile phone accounts) the same basic disclosure requirements apply to NCPFs:</p> <ul style="list-style-type: none"> covered by ASIC class order relief; and not covered by ASIC class order relief and not related to a BDP. <p>For these NCPFs, the Government is proposing disclosure limited to: the terms and conditions of the facility (including the expiry date); any ability to vary the terms and conditions and how consumers would be notified; costs and fees that must be paid by the client; procedures for dealing with unauthorised/mistaken transactions or loss or theft; the issuer's name, contact details and dispute resolution arrangements; significant risks associated with the product; and convenient means for customers to obtain details of balances and past transactions.</p> <p>The current disclosure regime for NCPFs that are related to a BDP would continue to apply (so that the same disclosure requirements apply to both the BDP and the related NCPF).</p> <p>Also, the unconditional class order relief for gift vouchers and mobile phones would also continue to apply. (This approach is consistent with ASIC's view that these facilities not be subject to unnecessary and inappropriate regulation; these facilities are low risk and, in the case of pre-paid mobile phone accounts, subject to other regulatory requirements (eg, telecommunications legislation).)</p>	<p>The rationale for these proposed changes is to reduce complexity and increase consistency in the disclosure requirements applying to NCPFs.</p> <p>Note: This issue was not specifically included in the consultation paper. In fact, one of the eight projects assigned to ASIC to assist in implementing the Government's proposals paper, <i>Refinements to Financial Services Regulation</i> (which was released on 2 May 2005), was to issue guidance and/or relief to deal with the unintended application of the NCPF definition to some kinds of facilities. ASIC's response was to release PS 185 and the current class order relief.</p>
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[1.6] Sophisticated investors

<p>The Corporations Act currently contains various tests to determine whether a client is to be categorised as 'retail' or 'wholesale'; for financial services and products, the default classification is retail. The distinction is relevant in determining whether additional disclosure protections, which must be provided to retail clients, apply. While the existing tests adequately address the circumstances of many investors, some investors who are very experienced or have received professional training in the financial services industry, consider retail disclosure and the inability to access wholesale investments directly an unnecessary limitation for their particular situation. However, under the current law, they do not have any mechanism for seeking designation as a wholesale investor, even if they consider themselves to be financially sophisticated investors.</p>	<p>To enable investors to elect to change their status from wholesale to retail (where they would otherwise be designated as retail under the legislation), the Government proposes to adopt in Chapter 7 of the Corporations Act a mechanism similar to provisions in Chapter 6D (section 708(10)), which allow the licensee to be satisfied that the investor is adequately equipped to be designated a wholesale investor, which works in the following way.</p> <p>The determination of wholesale status is made through an Australian financial services (AFS) licensee in relation to an offer of an entity's securities on the grounds that the licensee:</p> <ul style="list-style-type: none"> is satisfied that the person to whom the offer is made has previous experience that allows them to knowledgeably assess the offer; and provides a written statement to the person of their reasons for being satisfied and the person to whom the offer is being made signs a written acknowledgement that they have not been provided disclosure in relation to the offer. 	<p>This change will allow sophisticated investors who do not satisfy the monetary threshold tests for wholesale investor status to have that designation if both the investor and the relevant AFS licensee are satisfied on reasonable grounds that wholesale status can be granted. (Licensees should give serious consideration to what criteria they would require to determine that an investor (who is, for the purposes of the Corporations Act, a retail investor) be treated as a sophisticated investor. At this stage, there is no indication that the Government or ASIC will provide any guidance on this.)</p> <p>Note: In the consultation paper, it was suggested that such accreditation apply in relation to dealing in financial products traded on markets. It was unclear why this restriction would be necessary and the current proposal does not appear to be restricted in this way.</p>
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3. Under PS 185, ASIC issued class order relief in relation to the following NCPFs: low value NCPFs (class order CO 05/736); gift vouchers or cards (class order CO 05/738); prepaid mobile phone accounts (class order CO 05/740); loyalty schemes (class order CO 05/737); and electronic road toll devices (class order CO 05/739).

[1.7] Cross-endorsement of authorised representatives of insurers

<p>Under current law, the cross-endorsement arrangements (by which insurance companies consent to their authorised agents being the authorised representative of other licensees) expose the endorsing insurers to joint and several liability for the activities of all cross-endorsed authorised representatives, even where the insurers do not authorise their agent in relation to the same sub-class of insurance product. (The example included in the proposals paper is that an authorised representative of Insurer A, who only offers motor vehicle insurance, could expose Insurer A to liability in respect of that authorised representative's conduct in relation to travel insurance products on behalf of Insurer B.)</p>	<p>The proposal is to refine the cross-endorsement arrangements so that an AFS licensee can only potentially be jointly and severally liable for the conduct of their authorised representative where the authorised representative is cross-endorsed in relation to the same class of financial service and the same sub-class of insurance product (eg, advice in relation to motor vehicle insurance).</p>	<p>The change will more appropriately divide the liability of AFS licensees for the activities of cross-endorsed authorised representatives and will no doubt be welcomed by the insurance industry.</p> <p>It appears that the proposed change is to extend only to general and life risk insurance. The question is whether this proposal goes far enough.</p>
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[1.8] ASIC policy statement 146 (PS 146) — training requirements

<p>As a result of various changes to FSR since commencement, industry participants are concerned about the appropriateness and applicability of the detailed training and competency requirements set out in PS 146, including that the training:</p> <ul style="list-style-type: none">• is at times not appropriate for the service being provided; and• does not adequately take into consideration prior study and training. <p>Also, it is likely that PS 146 will need to be reviewed to take account of changes made in response to other issues in the proposals paper (eg, the scope of personal and general advice covered under proposal 1.1).</p>	<p>Although ASIC has made changes and provided additional guidance over time in relation to some aspects of PS 146 (including as part of ASIC's projects implementing the Government's proposals paper <i>Refinements to Financial Services Regulation</i> (announced on 2 May 2005)), there are still concerns that the policy needs to be more flexible in some respects. It is now proposed that ASIC consider</p> <p>The proposal now is that ASIC will review PS 146 to consider:</p> <ul style="list-style-type: none">• consequential changes arising as result of proposal 1.1• implications of any other proposals in the proposals paper• specific concerns raised in the consultation process (eg, the application of training requirements for general insurance products, credit for prior study and training, scope for industry guidance etc).	<p>The review process is intended to ensure that training undertaken by authorised representatives and employees of AFS licensees is appropriate and tailored to the role being performed.</p>
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[1.9] Product activity and data collection

<p>This issue focuses on the effectiveness to ASIC of the in-use notice. The notice ensures ASIC is aware of all products when first promoted in the market (as the notice must be lodged with ASIC within five business days of the first use of the PDS for the financial product to which the notice relates). However, in its current form, the notice has limited value because it does not help ASIC to know when a PDS is no longer current (eg, the PDS is out-of-date or the product to which it relates is withdrawn from the market).</p>	<p>The proposal is to amend section 1015D of the Corporations Act to replace the current reporting requirements for the in-use notice with a new standardised on-line report (possibly to be called a 'Financial Product Activity Report' (<i>FPAR</i>)).</p> <p>The FPAR will require the 'responsible person' for a PDS to provide information in the standardised on-line report within five business days from when:</p> <ul style="list-style-type: none"> • the financial product for which the PDS must be prepared is first recommended, issued or sold; • there is a change in the contact details previously reported; the financial is withdrawn from being recommended, issued or sold; • the financial product is closed; • there is a change in the fees and charges set out in the enhanced fee disclosure table; or • changes are made in a supplementary or new PDS. 	<p>It is important that the revised approach strikes an appropriate balance between minimising the compliance burden on industry while still enabling ASIC to monitor financial products that are actively being promoted in the market. Industry will also need to consider whether the proposed FPAR is the most appropriate means of providing some of this information to ASIC and whether the timeframe is sufficient.</p> <p>Note: This issue was included in the consultation paper under the heading 'Product Disclosure Statement In-Use notices' and was categorised as an issue relating to dealings with regulators. Recommendation 5.11 of the Banks Report⁴ proposes a review of <i>data collection and regulatory reporting obligations</i>. The Government agreed to the recommendation, noting that this issue is being considered as part of the corporate and financial services regulation review. The Banks Report's recommendation has a more general focus (ie, is not limited to PDS in-use notices).</p>
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[1.10] Self-listing and licensed market operators

<p>Currently, the Corporations Act does not address where a market licensee (or its related body corporate) may hold an AFS licence and also be a participant on its own market (or that of its related body).</p>	<p>It is proposed to amend Division 5 of Part 7.2 of the Corporations Act to allow for ASIC to be responsible for overseeing compliance with the relevant market operating rules by a participant who is an AFS licensee and a market licensee (or a related body corporate of a market licensee).</p>	<p>This issue is particularly relevant given the current status of the Australian Stock Exchange (ASX). By giving ASIC the appropriate authority (as outlined in this proposed amendment), it will no longer be necessary for any special (interim) arrangement between ASX and ASIC to overcome the current legislative limitations.</p> <p>Note: This issue was not specifically raised in the consultation paper or the proposed categories list.</p>
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[1.11] Pooled superannuation trusts (PSTs)⁵ and product disclosure

<p>Under the Corporations Act, the retail/wholesale tests apply to PST trustees in relation to the provision of financial services (other than the issue of a superannuation product) and dealing (including issuing), but not in relation to the product disclosure and associated retail client protections (under Part 7.9). This means, therefore, that PST trustees must give all investors (including wholesale investors) a PDS, periodic statements and allow them the benefit of a cooling off period (in applicable circumstances), which results in the anomalous situation that PST trustees are dealt with inconsistently under the FSR regime.</p>	<p>It is proposed to apply the retail/wholesale definition to the product disclosure regime in relation to PST trustees so that they are treated in a consistent manner under the FSR regime. (This will mean that PST trustees will not need to give a PDS to investors with at least \$10 million in assets and nor would those investors (which are often large superannuation funds) have the benefit of a cooling off period.)</p>	<p>Note: This issue was not specifically included in the consultation paper or the proposed categories list. It is, however, consistent with the Government's objectives of ensuring that financial services providers are not burdened with the cost and effort of providing information to those who do not need it and sophisticated/wholesale investors are not restricted by legislative protections that they do not require. (It also makes sense in the context of the Government considering the treatment of superannuation trustees under the consultation paper – specifically whether it may be appropriate to allow for aggregation of funds under the control of one superannuation trustee to enable that trustee to be treated as a wholesale investor. This issue is expected to be covered in the draft regulations due for release shortly.)</p>
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⁴ On 15 August 2006, the Federal Government announced its formal (final) response to the Banks Taskforce report Rethinking Regulation: Report of the Taskforce on Reducing Regulatory Burdens on Business, addressing all 178 recommendations of the Banks Report's recommendations. (On 12 October 2005, the Government announced the appointment of a taskforce (chaired by Gary Banks) to identify practical options for alleviating the compliance burden on business from Government regulation. The brief given to the taskforce was to examine and report on areas where regulatory reform could provide significant immediate gains to business. The Banks Taskforce reported to the Government on 31 January 2006. The Government made an interim response to the recommendations in the Banks Report on 7 April 2006.)

⁵ A PST is a trust in which the assets of a group of superannuation funds, approved deposit funds (**ADFs**) or other PSTs are invested and managed by a professional manager. PSTs can accept deposits only from complying superannuation funds, complying ADFs and other PSTs. (Complying funds are funds that meet the requirements of the Superannuation Industry (Supervision) legislation and, on that basis, enjoy special tax treatment.) The investment income of a PST is taxable at concessional rates within the PST.

[1.12] Registered MISs investing in unregistered MISs		
<p>The current regime in place under Chapter 5C of the Corporations Act prevents a responsible entity of a registered MIS from investing in another MIS where that MIS is not registered under Chapter 5C (unless ASIC relief is obtained) (section 601FC(4)).</p>	<p>In recognition of the increasing preference for fund managers to be able to diversify their portfolios by taking advantage of benefits offered by offshore investments, the Government proposes that the restriction in section 601FC(4) be amended to remove the prohibition on investments in unregistered MISs that are predominantly operated outside Australia and are not operated by the responsible entity itself, or any associate of the responsible entity.</p>	<p>This amendment, which recognises that the current restriction under Chapter 5C impedes legitimate forms of offshore investment, will no doubt be welcomed by industry, particularly in view of the increasing trend in overseas markets to ease restrictions on foreign investment; this change will, therefore, increase investment opportunities for responsible entities of registered MISs.</p> <p>Note: This issue was not included in the consultation paper or the proposed categories list. Given the Government has taken the opportunity to review the law in this area, it might have been appropriate to seek feedback on removing the restriction altogether.</p>

Corporate (non-FSR) issues

- Company reporting obligations
- Auditor independence
- Corporate Governance
- Fundraising
- Takeovers
- Compliance

Company reporting obligations

ISSUE	PROPOSAL	OBJECTIVES/COMMENTS
<p>[2.1] Executive remuneration</p> <p>Currently, there is duplication between the accounting standards set by the Australian Accounting Standards Board (AASB) and the Corporations Act in relation to executive remuneration disclosure requirements (for listed companies). (The Banks Report made a recommendation (5.23) that the existing reporting requirements for executive remuneration be reviewed. The Government agreed but said any review must ensure that there is no dilution of the remuneration disclosure requirements for directors and executives.)</p>	<p>It is proposed to remove this duplication by including the requirements only in the Corporations Act (except where necessary for listed companies to be able to comply with International Financial Reporting Standards). As part of this proposal:</p> <ul style="list-style-type: none"> • all companies that are disclosing entities would be required to prepare an audited remuneration report – the Government is still considering whether it would be appropriate to incorporate the relevant AASB remuneration disclosure requirements for non–corporate disclosing entities into the Corporations Act; • the current requirements in paragraphs Aus25.2–Aus25.7.2 of AASB 124*, <i>Related Party Disclosures</i>, would form the basis for the Corporations Act disclosure requirements, but these will also be supplemented to include disclosures currently required in the Corporations Act that are not covered by the requirements in AASB 124 (although the current requirements relating to some option valuation disclosures will be repealed as in some cases they are meaningless and in other situations their inclusion can be potentially misleading); • the remuneration disclosures would be required for all ‘Key Management Personnel’ (KMP) (see note below), but the definition would be supplemented to mandate disclosure of the five most highly remunerated executives; and 	<p>Note: On 2 November 2006, the ASX Corporate Governance Council (council) released an Explanatory Paper for public comment on its proposed changes to the <i>Principles of Good Corporate Governance and Best Practice Recommendations (principles)</i> and an Exposure Draft of the Proposed Changes. The proposed changes to the principles are designed (among other things) to remove areas of regulatory overlap between the principles and equivalent provisions in the Corporations Act and Accounting Standards. The proposed changes include:</p> <ul style="list-style-type: none"> • removing areas of regulatory overlap in relation to sign-off on financial statements, disclosure of remuneration policies and attendance by an external auditor at annual general meetings; and • recommending that the hedging of unvested options be prohibited. <p>If the Government is serious about facilitating a simpler regulatory system, reducing compliance costs for companies and removing (where possible) overlap between regulatory requirements, it needs to work with the council to ensure that this does not occur in relation to this proposal.</p>

	<ul style="list-style-type: none"> • a new disclosure requirement would be introduced requiring companies to disclose the board's policy on executives and directors entering into contracts to hedge their exposure to options or shares granted as part of their remuneration package and how the company enforces this policy (<i>executive hedging policy</i>). <p>[*AASB 124 (which is the Australian equivalent to International Accounting Standard 124) was issued in July 2004 and became effective for annual reporting periods ending on or after 1 January 2005. AASB is consistent with, but less prescriptive than, its predecessor (AASB 1046, <i>Director and Executive Disclosures by Disclosing Entities</i>). Accordingly, it does not include extensive measurement guidance (as these principles are included in other standards). AASB 124 relies solely on the definition of 'KMP' (which replaces the former concepts of 'specified director' and 'specified executive'). Paragraphs Aus25.2–Aus25.7.2 deal with disclosure of 'compensation' in relation to KMP (including options and rights provided as compensation) and equity instruments issued or issuable by the disclosing entity or any of its subsidiaries to KMP.]</p>	
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[2.2] Thresholds for reporting for large proprietary companies

<p>The current monetary thresholds* for determining whether a proprietary company is 'large' (ie, economically significant) and, therefore, required to prepare and lodge an audited financial report, have not been updated since 1995 (when they were first introduced). The concern is that they are now too low and are placing an unnecessary regulatory burden on some companies. (The Banks Report made a recommendation (5.21), with which the Government agreed, that the thresholds for the definition of a 'large proprietary company' be raised.)</p> <p>[*The current minimum thresholds (of which at least two must be satisfied) are: \$10 million for consolidated gross operating revenue, \$5 million for consolidated gross assets and 50 employees.]</p>	<p>It is proposed:</p> <ul style="list-style-type: none"> • to change the definition of 'large proprietary company' in the Corporations Act so that the test will be if either: <ul style="list-style-type: none"> – the consolidated gross operating revenue for the financial year of the company and the entities it controls is \$25 million or more; or – the value of consolidated gross assets at the end of the financial year of the company and the entities it controls is \$12.5 million or more; • that those companies that have been eligible for relief since the new rules were introduced in 1995 (referred to as 'grandfathered exempt proprietary companies'), meaning that they have needed to prepare but not lodge audited financial reports, will now be subject to the same requirements as other proprietary companies and lodgment relief will no longer be available to them; • to amend the Corporations Act so that wholly-owned entities that lodge an 'election notice' with ASIC will not be required to lodge a financial report, provided that their parent company also lodges an election notice and a consolidated financial report. (This proposal will involve incorporating the relief currently available under ASIC class order CO 98/1418 into the Corporations Act. The Corporations Act will also include a statutory cross-guarantee for the relevant group companies, which will remove the need for the companies to enter into deeds of cross-guarantee.) 	<p>The Government's objective is to ensure that there is a consistent regulatory framework for proprietary companies and also to ensure that those with genuine economic significance are required to meet the more onerous requirements and expense of having to prepare and lodge audited financial reports. No doubt companies that can meet the new threshold tests will welcome the proposed changes. (In fact, the thresholds should be reviewed on a regular basis to ensure they are appropriate.) However, the proposed new definition of 'large proprietary company' now requires that only one of the threshold tests be met, which may mean that some companies who would not have been caught under the current tests will fall within the amended definition (eg, asset rich small proprietary companies that only hold property but do minimal trading and currently do not meet the employee and revenue tests might under the new rules be caught by an assets test). No doubt those affected will lobby the Government in relation to this proposed change.</p> <p>The proposal for election notices is really quite separate and essentially makes law the current ASIC policy.</p>
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[2.3] Notifications — change in officeholders

<p>The current requirement for a company to notify ASIC of an officeholder's resignation under section 205B of the Corporations Act, even when the relevant officeholder has already notified ASIC of that resignation under section 205A, is unnecessary.</p>	<p>The proposal is simply to remove the requirement in section 205B for the company to notify ASIC of a change in officeholder where the officeholder has already notified ASIC.</p>	<p>It is clearly unnecessary to require a company to provide ASIC with information that ASIC has already received from another (relevant) source. According to the proposals paper, it is estimated that 20,000 fewer ASIC Form 484s would need to be prepared and lodged by business if the proposed change is made, which would obviously also mean a reduction in ASIC's processing burden and costs.</p>
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[2.4] Notifications — company addresses

<p>Under the Corporations Act, a company must have a registered office. However, in relevant circumstances, a company may also have other business locations and associations (eg, principal places of business, registered agents or nominees acting on the company's behalf, other contact addresses etc). Details of these addresses (or any changes in relation to them) are currently able to be notified to ASIC in various ways and using different ASIC forms.</p>	<p>The proposal is now to streamline the updating process for all company addresses by allowing address details to be updated through a common form.</p>	<p>This change will help to clarify the regulatory requirements for companies/ businesses which is likely to result in less (often, inadvertent) breaches of the requirements. It will also reduce administration costs to business and ASIC by removing the duplicated notification processes.</p>
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[2.5] Share and member reporting

<p>The law currently requires listed and unlisted public companies to notify ASIC annually of their top 20 members in each class (as part of the annual review process). However, this obligation seems of limited value (either as public information (because the company's member register is publicly available anyway and, also, for some companies, the information changes frequently) or to regulatory and enforcement outcomes).</p>	<p>It is now proposed to amend Corporations Regulation 2N.2.01 to remove the obligation on public companies to notify ASIC each year of the company's top 20 members.</p>	<p>This will reduce compliance costs for business. It also reduces the possibility of the public potentially being misled regarding information about member holdings in annual reports (which, as noted, is often out-of-date on this issue by the time the public sees it).</p>
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[2.6] Reduce compliance burden associated with voluntary deregistration

<p>Due to statutory notice periods which must be complied with before a company can finally be voluntarily deregistered, some companies are in the position of still having to comply with annual review requirements, including the requirement to pay the annual review fee, that arise after the deregistration application is approved by ASIC but before the company is eligible to be deregistered. This means that deregistration cannot proceed until the fee is paid and a new application must be made.</p>	<p>It is proposed to amend section 601AA of the Corporations Act to allow deregistration of a company to proceed where an annual review fee becomes payable or is incurred after the application for deregistration is approved (or, where applicable, not more than two months prior to the deregistration being approved).</p>	<p>The purpose of this change is to reduce duplication in process and fees for voluntary deregistration of a company.</p>
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[2.7] Upfront payment of annual fees for companies

<p>Having the option to pay the annual review fees up front in a lump sum for a number of years rather than only being able to pay it each year as it falls due would help businesses to reduce their transaction costs and increase their efficiency.</p>	<p>It is proposed to amend the <i>Corporations (Review Fees) Act 2003</i>, the <i>Corporations (Review Fees) Regulations 2003</i> and section 1351(3) of the Corporations Act to allow companies to pay a single sum to cover review fees for an extended period (possibly up to 10 years).</p>	<p>It makes sense to allow companies this option.</p> <p>At this stage, there does not seem to be any suggestion that there would be a discount given for fees paid in advance for an extended period. Clearly, this would be welcome to companies and would provide a further incentive to take up the upfront payment option.</p>
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[2.8] Electronic distribution of annual reports

<p>The requirement for companies, registered MISs and disclosing entities to provide members, by default, with a hard (paper) copy of the entity's annual report each financial year imposes a significant cost on them.</p>	<p>It is now proposed to amend the Corporations Act so that the default option for members to receive annual reports will be via the entity's website. Hard copies will only be sent to members who request them. Following on from this:</p> <ul style="list-style-type: none">• the proposal will apply to all reports prepared under section 314 of the Corporations Act (annual financial reporting to members), including concise reports (where a company, registered scheme or disclosing entity has elected to prepare a concise report);• where an entity does not have a website, or does not wish to distribute annual reports electronically, it may continue to send hard copies of the annual report;• an entity must to notify members in writing of their right to elect to receive the hard copy of the annual report (and members will still be able to ask to receive reports by email (or other electronic means) if the entity offers this facility, as is currently the case);• each year, the entity will need to directly notify each member when the annual report is available on its website and where it can be located;• the annual report must be 'reasonably accessible' on the entity's website;• a member may make a standing request to receive a hard copy of the annual report and the entity will be required to comply with the request and must send it free of charge (unless the member has already received a free copy) by the deadline set out in section 316(2) of the Corporations Act.	<p>No doubt many will welcome this proposal which will reduce costs for entities while ensuring that members continue to have timely and appropriate access to annual reports.</p> <p>Note: This issue was not included in the consultation paper or the proposed categories list. However, the Banks Report made a recommendation (5.20), with which the Government agreed, to allow companies to make annual reports available on their website and distribute hard copies on request.</p>
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Auditor independence

[3.1] Anomalies arising from CLERP 9

<p>The auditor independence provisions included in the Corporations Act as part of CLERP 9 have subsequently been modified by amendments to the <i>Corporations Regulations</i> (on 1 June 2006) and ASIC class order relief (class orders CO 05/83 and CO 05/910) to address some unintended consequences arising out of the Corporations Act provisions. It would, however, be preferable and less complex to have all matters dealt with in the legislation.</p>	<p>It is proposed to incorporate into the Corporations Act:</p> <ul style="list-style-type: none">• the recent amendments to the Corporations Regulations addressing some unintended consequences relating to auditor independence obligations, being:<ul style="list-style-type: none">– the introduction of an 'ordinary course of business' exemption (relating to the prohibition on an audit firm owing more than \$5000 to an audit client)– clarification that cheques and savings accounts are not intended to be covered by the prohibition on loans by an audit firm to its client– giving ASIC power to extend the current 21 day period within which an auditor is required to resolve a conflict of interest situation• the relief provided in the ASIC class orders relating to the auditor's independence declaration.	<p>The purpose is to simplify and clarify the auditor independence obligations under the Corporations Act.</p>
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Corporate governance

[4.1] Related party approval threshold		
<p>Unless an exception applies, the Corporations Act currently requires that a public company (or an entity that it controls) cannot give any financial benefit to a related party, regardless of the amount. One exception is if the benefit is given to a director or the spouse of a director - in that case, approval is not required where the benefit is currently not more than \$2000 (section 213 of the Corporations Act – but refer to proposal 4.2 below). The requirement to obtain member approval for small payments to related parties attracts a cost to business that outweighs any corporate governance benefit of requiring member approval.</p>	<p>It is proposed that the Corporations Act be amended to provide for a minimum prescribed level for payments to all related parties below which member approval is not required. (The proposal paper suggests that it would be set initially at \$5000 with the ability to prescribe a higher amount by regulation.) It is also proposed that payments would be aggregated to ensure that this exception is not misused.</p>	<p>The proposal paper says there is general support for this suggested change. It would obviously reduce costs for business in applicable circumstances, although a \$5,000 limit is probably too low to be meaningful.</p>
[4.2] Director amounts threshold		
<p>Following on from proposal 4.1, the current requirement for member approval of small payments to director or spouse related parties above the prescribed limit would no longer be necessary if a general threshold is introduced for all related party transactions.</p>	<p>Accordingly, it is proposed that section 213 be repealed as this exception will be incorporated within the amendments introduced under proposal 4.1.</p>	<p>If proposal 4.1 is implemented, it makes sense that this proposal should also be approved and implemented for the same reasons.</p>

Fundraising

[5.1] Quoted securities rights issue disclosure		
<p>The requirement to provide a prospectus or PDS for rights issues may have led to entities favouring other, more efficient forms of fundraising (eg, placements of shares to institutional shareholders for which a prospectus or PDS is not required). Existing members, and in particular, retail members, may be disadvantaged by not being able to participate in alternative forms of fundraisings.</p>	<p>It is proposed to:</p> <ul style="list-style-type: none"> • provide that rights issues for quoted securities and quoted financial products do not require a prospectus or PDS; • specify that a 'cleansing notice' modelled on the relevant provisions in section 708A of the Corporations Act (which deals with the secondary sale disclosure rules) must be provided to the ASX before the rights issue offers are made; • provide that the 'cleansing notice' must include appropriate information on the consequences of any potential effect of the rights issue on the control of the entity (eg, in some circumstances, rights issues may potentially lead to a shareholder or underwriter acquiring control or significantly increasing its voting power). 	<p>If implemented, this proposal will facilitate the removal of impediments to the use of rights issues by listed entities (as they will not be delayed by the need to produce lengthy disclosure documents) while also ensuring that that existing members, and in particular retail members, are given the opportunity to participate in equity fundraisings conducted by the entity, having been provided with an appropriate level of disclosure in relation to the proposed fundraising.</p>

[5.2] Small scale offerings

The Government believes there is scope to provide more relief from the disclosure requirements that apply to fund raisings conducted under Chapter 6D so that more fund raisings can be offered under an Offer Information Statement (OIS) which permits reduced disclosure (compared with what is required in a full prospectus).

To help facilitate more small-scale fundraisings, the Government proposes to:

- to amend the definitions of sophisticated and professional investors in Chapter 6D to apply a comparable test to that introduced under the Corporations Amendment Regulations 2005 (No 5) in relation to Chapter 7 to expand the scope of the wholesale investor category to whom the disclosure framework does not apply; and
- increase the maximum amount of money that may be raised using an OIS (when combined with funds previously raised) to \$10 million (from the current \$5 million).

These changes are intended to align the relevant fundraising provisions in Chapters 6D and 7 and to help facilitate small-scale fundraisings and the wider use of OISs.

[5.3] Secondary sale issues

The secondary sales disclosure provisions for securities in section 708A and financial products in section 1012DA of the Corporations Act do not extend to sales of securities and financial products transferred by a controller (ie, a person making an offer of securities in an entity which that person controls) without disclosure. To date, controllers have had to seek appropriate relief from ASIC to allow on-sale of the securities without disclosure. The disclosure exemptions in sections 708A(5) and 1012DA(5) are only available where the securities and financial products have been listed for at least 12 months.

The Government proposes that:

- sections 708A and 1012DA apply to secondary sales of securities and financial products transferred by controllers without disclosure, subject to the requirement that if the controller seeks to rely on sections 708A(5) and 1012DA(5), both the controller and the listed entity must lodge a 'cleansing notice' with the ASX so that the market has the most up-to-date price sensitive information in relation to the securities; and
- sections 708A(5)(a) and 1012DA(5)(a) be amended so that the current requirement that the securities be listed for 12 months prior to the sale (to show that the entity relying on this exemption has a track record of complying with its continuous disclosure obligations) be reduced to three months. (A corresponding change would also be made to the definition of 'continuously quoted securities' as it applies to sections 713 and 1013FA.)

These amendments are intended to improve the working of the secondary sales provisions.

Note: The Government is seeking further comments on whether any further changes are needed in relation to the issue of the 'cleansing notice'. The proposals paper notes concerns about technical problems arising due to the requirement to release the cleansing notice on the day before the sale offer is made. The Government is interested in feedback on the nature of the technical problems and why compliance with the existing requirements in section 708(5)(e) is not possible or practical.

[5.4] Employee unlisted share schemes disclosure

<p>Disclosure, licensing and advertising issues There are a number of restrictions and challenges (eg, in relation to disclosure and licensing requirements and advertising and hawking restrictions) facing companies that wish to establish an employee share scheme (ESS). While ASIC provides some class order relief, its application is limited. (The Banks Report made a recommendation (5.25), with which the Government agreed, that the requirement to provide a prospectus when issuing shares and options to employees be reviewed.)</p> <p>Self-acquisition issues Under the Corporations Act, a company may hold shares in its parent where the company holds the shares as a trustee and neither the company nor the parent has a beneficial interest in the trust. ASIC has, however, provided relief for some listed companies to allow a subsidiary to hold shares in the parent outright (not as a trustee) for the purposes of allocation and forfeiture under an ESS. (Generally, the relief has been requested to deal with tax and share ownership issues.)</p>	<p>The Government is proposing the following actions.</p> <ul style="list-style-type: none"> • To extend the relief from the licensing and hawking requirements in Chapter 7 and the advertising provisions of the Corporations Act currently provided by ASIC Class Order 03/184 to all companies establishing and operating an ESS, by exempting the operation of ESSs from the licensing, advertising and hawking provisions generally. An unlisted company ESS would also be subject to the requirement that the ESS is disclosed in an OIS or other disclosure document. • To amend the Corporations Act so that funds raised by an unlisted company in an ESS are not counted in the calculation in section 709(4) (which imposes a limit (currently \$5 million but proposed by the Government to be increased to \$10 Million) on the amount of money that can be raised under an OIS). • To specify that the provisions relating to the self-acquisition of shares by companies do not apply in the context of ESSs, subject to safeguards (consistent with the relief previously provided by ASIC in relation to acquisitions of this type). (Note: The Government is proposing to extend relief on a similar basis to unlisted companies and is interested in receiving any comments on the nature of the exemption and any appropriate restrictions that should apply.) • To provide that contribution plans are exempt from the requirement to be registered as an MIS, and that issuers of interests under contribution plans are exempt from the need to hold an AFS licence for dealing in an interest in an MIS. 	<p>These proposals are intended to facilitate wider use of ESSs by unlisted companies.</p>
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[5.5] Prospectus and PDS advertising rules

<p>The current restrictions on prospectus advertising are more onerous than those for PDSs.</p>	<p>It is proposed to:</p> <ul style="list-style-type: none"> • amend the prospectus advertising provisions relating to quoted securities so that they are aligned with the advertising requirements that apply to financial products • align the advertising provisions applying to offers of unquoted securities after the disclosure document has been lodged with those applying to financial products • extend ASIC's stop-order powers to allow it to intervene in the case of misleading and deceptive advertising of securities and other financial products. 	<p>These proposals are intended to remove some of the difficulties in the advertising provisions for prospectuses.</p> <p>Note: The Government has specifically said it does not propose to change the requirements relating to advertising for unquoted securities prior to lodgment of a disclosure document as these provisions were introduced to try and ensure that disclosure in the prospectus is not negated by the content of advertisements. It is not clear why this is considered so important when the rules are not as strict for unquoted financial products.</p>
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[5.6] Stapled securities disclosure

<p>Practical difficulties currently arise regarding stapled security disclosures because the provisions regarding replacement prospectuses do not apply to a combined prospectus/PDS prepared for offers of stapled securities comprising one or more shares and one or more units in MISs.</p>	<p>The Government is proposing to extend the application of the prospectus replacement provisions to combined prospectus/PDSs prepared for offers of stapled securities comprising one or more shares and one or more units in MISs.</p>	<p>This amendment is intended to facilitate more consistent functioning of the disclosure provisions for stapled securities.</p> <p>Note: This proposal was not covered in the consultation paper or the proposed categories list. It is unclear why replacement provisions would be extended to PDSs only in the context of stapled securities and this is not explained in the proposals paper.</p> <p>Also, the Government has noted that it is proposing to introduce by regulation the ability to incorporate information by reference in PDSs, which will be welcomed by those required to prepare PDSs.</p>
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Takeovers

[6.1] Remove telephone monitoring during takeover bids

<p>Since 2002, the takeovers laws have required (for the purpose of protecting shareholders) bidders and targets to record all telephone calls to retail shareholders to discuss a takeover bid during the bid period. (There are also related detailed requirements dealing with filing, storage, destruction etc of the recordings.) It appears now there is no evidence that these telephone monitoring provisions achieve their intended purpose. Also, they add substantial costs to a takeover. (The Banks Report made a recommendation (5.27), with which the Government agreed, that this requirement be reviewed.)</p>	<p>It is proposed to omit the relevant provisions requiring telephone monitoring and dealings with the recorded material (subdivision D, Division 5 of Part 6.5 of the Corporations Act).</p>	<p>This is a sensible proposal as the changes will reduce costs associated with conducting takeovers and there appears to be no current justification for companies to incur those costs (as there is no evidence to show that the laws are necessary given their stated purpose).</p>
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[6.2] Section 665D and 665E notices (85% notices)

<p>The current laws contain various notification/disclosure requirements (both by affected securities holders and the companies in which the securities are held) in relation to holdings of at least 85% of a company's securities (sections 665D and 665E of the Corporations Act). The underlying intention of the requirements is protection for minority shareholders and transparency in the market. However:</p> <ul style="list-style-type: none"> • the laws appear for the most part to be impractical and, again, there is no clear evidence that they achieve their apparent objectives; • ASIC class order relief (CO 01/1545 and CO 00/345) which was put in place to deal with identified problems with the laws has arguably not made any practical impact; and • the laws are frequently not complied with (possibly because of the points noted above). 	<p>It is now proposed to delete the relevant Corporations Act requirements (in sections 665D and 665E) so that notice of such holdings is no longer required.</p>	<p>Again, given the apparent low rate of compliance, impracticality and confusion, this seems a welcome proposal.</p> <p>Note: This issue was not addressed in the consultation paper or the proposed categories list.</p>
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Compliance

[7.1] Breach reporting period

Currently, there are inconsistent threshold requirements in relation to the requirement to report a breach to the relevant regulator and the timeframe within which the breach is required to be notified under:

- the Corporations Act, which applies to AFS licensees (including responsible entities of MISs and auditors) (and, in fact, the requirements are different depending on the entity concerned); and
- prudential legislation (ie, the Banking Act 1959, the Insurance Act 1973, the Life Insurance Act 1995 and the *Superannuation Industry (Supervision) Act 1993*).

Also, in some cases, the timeframes are arguably unreasonably short and some of the requirements are unclear resulting in inconsistent compliance. (The Banks Report recommended (5.8), and the Government agreed in principle, that the Government amend, in consultation with ASIC and APRA, the breach reporting requirements to improve consistency and reduce the compliance burden.)

It is proposed to amend the breach reporting requirements in the Corporations Act and in the prudential Acts to streamline the breach reporting framework (and it is envisaged that APRA and ASIC would work together to provide (so far as possible) consistent guidance on the timeframe for breach reporting so that entities are clear about their obligations) as follows. The person who is responsible for an entity's compliance function (**compliance person**) must report as follows.

- A breach of which the compliance person becomes aware which is significant must be reported as soon as practicable (but within 10 business days).
- A breach of which the compliance person becomes aware, which is unclear as to whether it is significant but is determined to be significant within 10 business days, needs to be reported. (No specific timeframe is suggested but presumably the test will be as soon as practicable but within 10 business days after it is determined to be significant.)
- A breach of which the compliance person becomes aware, which is unclear as to whether it is significant but is determined not to be significant within 10 business days, does not need to be reported.

Note: At this stage, the Government does not propose to amend the timeframe where entities are currently required to report a breach immediately.

The purpose of the proposals is to improve efficiency in and, to the extent possible, make more consistent, the breach reporting process.

The proposal to align the reporting timeframes would reduce costs in complying with different regulatory requirements for those entities that are subject to prudential Acts and the Corporations Act. As noted in the proposals paper, it is important that the timeframe for reporting breaches is transparent, provides clarity and balances the need for entities to identify, analyse and report breaches with the need for timely reporting of breaches.

In addition to the timeframe for reporting breaches, consideration is being given to the most appropriate way to address inconsistencies in the thresholds which determine when regulated entities need to report breaches to the regulators. It is proposed that the issue of materiality of breaches be addressed by aligning the prudential legislation with the existing requirements in the Corporations Act. This issue is being addressed through a separate proposals paper. (The separate paper also contains a proposal to streamline the reporting of breaches where an entity is required to report the same breach to both ASIC and APRA.)

[7.2] Australian business number (ABN) reference

AFS licensees who also have an ABN must currently cite both numbers on disclosure documents.

To facilitate streamlining of disclosure administration, it is proposed that the requirement to include an AFS licence number in disclosure documents (and some other relevant documents referred to in regulation 7.6.01C, eg, application forms) be removed and that AFS licensees be required to:

- cite their ABN; and
- state that they have an AFS licence.

There will need to be changes to the ABN database before this proposal can be implemented; this will allow consumers to trace an AFS licensee (who also has an ABN) through the ABN database. (At present, consumers can check ASIC's AFS licence database by name and licence number, but not by ABN.)

Note: This issue was not included in the consultation paper or the proposed categories list. However, it is an extension of the broad proposals to enhance dealings with regulators and reduce regulatory overlap. It is also consistent with two recommendations in the Banks report with which the Government agreed:

- recommendation 6.2 – to encourage the use of information technology to reduce compliance costs
- recommendation 6.4 – to streamline business name, ABN and related licensing registration processes.

[7.3] Simplifying returns of company particulars

<p>To help ensure that ASIC's Register of Companies is accurate, ASIC may at any time request a company to lodge a Return of Particulars (ROP). Currently, this can occur if ASIC becomes aware that information on the Register is incorrect, if the entity's annual fee has not been paid by the due date, or if no change in particulars or other documents has been lodged for at least a year (section 348 of the Corporations Act). The proposals paper recognises that there are compliance burdens (time factors and the potential for fees for late lodgment) associated with responding to an ROP.</p>	<p>It is proposed that the Corporations Act be amended to:</p> <ul style="list-style-type: none">• limit the circumstances in which ASIC can issue an ROP to situations where it suspects or believes that the details recorded in the Register are not correct; and• extend the period within which the entity must respond to the ROP from 28 days to two months.	<p>This proposal will reduce the compliance burden on affected entities by better targeting the circumstances in which an ROP may be issued and allowing a longer period to respond.</p> <p>Note: This issue was not included in the consultation paper or the proposed categories list.</p>
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[7.4] Electronic registration of charges

<p>The current system for registering charges over company property (under Chapter 2K of the Corporations Act) is paper-based, both for the lodger and also ASIC (which must issue a certificate under its common seal). The volume of paperwork is often considerable, (as well as time consuming and costly) for all concerned.</p>	<p>The Government proposes to amend the relevant provisions of the Corporations Act and Corporations Regulations to:</p> <ul style="list-style-type: none">• facilitate electronic registration of charges and associated documents (and enable ASIC too determine how such documents are to be lodged electronically)• enable ASIC to issue electronic certificates (instead of under its common seal)• enable ASIC to rectify the register to correct misstatements etc due to problems with the electronic lodgment facility• allow ASIC to issue new forms for electronic lodgment (and to remove the outdated forms from the regulations).	<p>The purpose of the proposed reforms is obviously to provide a more efficient registration process through the use of electronic registration of charges. This will result in reduced business and administrative costs and should enhance the integrity of the registration system.</p> <p>Note: This issue was not included in the consultation paper or the proposed categories list. However, it is consistent with recommendation 6.2 in the Banks Report ,with which the Government agreed, to encourage the use of information technology to reduce compliance costs.</p>
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