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THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

SENATE

CORPORATIONS LAW (SECURITIES AND FUTURES)
AMENDMENT BILL 1994

EXPLANATORY MEMORANDUM

(Circulated by authority of the Attorney-General,
the Honourable Michael Lavarch MP)

SUMMARY OF KEY AMENDMENTS PROPOSED BY THE BILL

3. The proposed amendments will permit the regulations to prescribe particular exchange-traded agreements and to regulate such agreements as if they were securities or futures contracts. They will enable consideration to be given to the trading of new and innovative products on Australian securities and futures exchanges on a more flexible basis than is presently the case.
4. The need for the amendments has arisen because of the development of products which have characteristics in common with both equities and futures. It is the responsibility of the Government to ensure adequate regulation of such products while not retarding innovation.
5. Currently securities and futures contracts are separately regulated. Futures contracts are regulated under the regime set out in Chapter 8 of the Corporations Law while securities are regulated under Chapter 7.
6. The proposed amendments will permit certain kinds of agreements to be prescribed by regulation and a range of provisions of the Corporations Law governing securities and futures markets to be applied to such agreements. This will provide an appropriate and comprehensive regulatory regime for their trading and ensure that investors are adequately protected.
7. The agreements that may be prescribed as if they were "securities" or "futures contracts" are restricted to agreements that are entered into on a stock exchange or a futures exchange. The provisions will not affect other markets such as the over the counter derivatives markets.
8. A draft Bill similar to the present Bill seeking to facilitate the trading of new and innovative products on Australian securities and futures exchanges was exposed for public comment on 5 September 1994.

CLAUSE-BY CLAUSE COMMENTARY

Clause 1 - Short title

9. Upon enactment the Bill will be known as the *Corporations Law (Securities and Futures) Amendment Act 1994*.

Clause 2 - Commencement

10. The Bill will commence on the day on which it receives Royal Assent.

Clause 3 - Futures contract

11. Section 72 of the Corporations Law defines 'futures contract'. Clause 3 adds a note at the end of subsection 72(1) drawing attention to proposed subsection 72A(2). The note states that regulations under subsection 72A(2) may provide that specified provisions of this Law and the regulations apply in relation to Chapter 8 agreements to which section 72A applies as if the agreements were futures contracts.

Clause 4 - Application of Law to Chapter 8 agreements as if they were futures contracts

12. Clause 4 inserts new section 72A into the Corporations Law. Proposed new section 72A permits agreements to be prescribed for the purposes of paragraph 72A(1)(b). The agreements that may be prescribed under paragraph 72A(1)(b) will be restricted to Chapter 8 agreements that are entered into on a futures market of a futures exchange. The need for this amendment has arisen because of the development of derivative products which have characteristics in common with both equity and futures products.

13. A Chapter 8 agreement is defined in section 9 of the Corporations Law. It is essentially an agreement broadly defined. It is linked with the term "relevant agreement". A "relevant agreement" (also defined in section 9) is an agreement, arrangement or understanding whether formal or informal or written or oral, and whether or not having legal or equitable force and whether or not based on legal or equitable rights.

14. Proposed subsection 72A(2) will enable the regulations to modify the Law in relation to Chapter 8 agreements to which the section applies. In effect, agreements prescribed under proposed paragraph 72A(1)(b) will be regulated in a similar manner to futures contracts.

15. Proposed paragraph 72A(2)(a) will enable the regulations to specify provisions of the Law and the Corporations Regulations that are to apply in relation to prescribed agreements. Proposed paragraph 72A(2)(b) will enable the regulations to provide that specified provisions of the Law and the Corporations Regulations do not apply in relation to prescribed agreements. Proposed paragraph 72A(2)(c) will enable the regulations to modify the Law and the Corporations Regulations as applying in relation to prescribed agreements.

16. The effect of proposed subsection 72A(2) will be to allow the prescription in the regulations of a comprehensive regulatory regime for the trading of prescribed agreements, as if those agreements were futures contracts. Prescription of an agreement will not have the effect of amending the definition of "futures contract" in subsection 72(1) of the Law. Private instruments which adopt the definition of "futures contract" in the Corporations Law will not be affected by the proposed amendments.

17. Proposed paragraph 72A(3) clarifies that the regulations may modify provisions specified in regulations made under paragraph (2)(a) as well as provisions not so specified.

Clause 5 - Securities

18. Subsection 92(1) of the Corporations Law defines 'securities'. Clause 5 adds a note at the end of subsection 92(1) drawing attention to proposed subsection 92A(2). The note states that regulations under subsection 92A(2) may provide that specified provisions of this Law and the regulations apply in relation to relevant agreements to which section 92A applies as if the agreements were securities.

Clause 6 - Application of Law to relevant agreements as if they were securities

19. Clause 6 inserts new section 92A into the Corporations Law. Proposed new section 92A permits agreements to be prescribed for the purposes of paragraph 92A(1)(b). The agreements that may be prescribed under paragraph 92A(1)(b) are restricted to relevant agreements that are entered into on a stock market of a securities exchange. The need for this amendment has arisen because of the development of derivative products which have characteristics in common with both equity and futures products. The words in brackets

clarify that relevant agreements that may be prescribed may be futures contracts.

20. A "relevant agreement" (defined in section 9) is an agreement, arrangement or understanding whether formal or informal or written or oral, and whether or not having legal or equitable force and whether or not based on legal or equitable rights.

21. Proposed subsection 92A(2) will enable the regulations to modify the Law in relation to relevant agreements to which the section applies. In effect agreements prescribed under proposed paragraph 92A(1)(b) will be regulated in a similar manner to securities.

22. Proposed paragraph 92A(2)(a) will enable the regulations to specify provisions of the Law and the Corporations Regulations that are to apply in relation to prescribed agreements. Proposed paragraph 92A(2)(b) will enable the regulations to provide that specified provisions of the Law and the Corporations Regulations do not apply in relation to prescribed agreements. Proposed paragraph 92A(2)(c) will enable the regulations to modify the Law and the Corporations Regulations as applying in relation to prescribed agreements.

23. The effect of proposed subsection 92A(2) will be to allow the prescription in the regulations of a comprehensive regulatory regime for the trading of prescribed agreements, as if those agreements were securities. Prescription of an agreement under proposed subsection 92A(2) will not have the effect of altering the basic definition of "securities" in the Corporations Law. Private instruments which adopt the definition of "securities" in the Corporations Law will not be affected by the proposed amendments.

24. Proposed paragraph 92A(3) clarifies that the regulations may modify provisions specified in regulations made under paragraph (2)(a) as well as provisions not so specified.

Clauses 7 and 8 - Gaming and wagering laws

25. Proposed subsection 778(2), to be inserted by clause 7, will ensure that laws concerning gaming or wagering will not prevent the entering into, or affect the validity or enforceability of, an agreement prescribed for the purposes of paragraph 92A(1)(b).

26. Proposed subsection 1141(2), to be inserted by clause 8, will ensure that laws concerning gaming or wagering will not prevent the entering into, or affect the validity or enforceability of, an agreement prescribed for the purposes of paragraph 72A(1)(b).

