Corporations Bill 1988

Date Introduced: 25 May 1988
House: House of Representatives
Presented by: Hon. Lionel Bowen, MP, Attorney-General

Digest of Bill

Purpose

To set up a Commonwealth-controlled national scheme of corporate regulation. The Corporations Bill is part of a package of 16 Bills.

Background

The existing scheme of corporate regulation is a national co-operative scheme whereby the Commonwealth has enacted a standard form company law code in the Australian Capital Territory, and the States and the Northern Territory (since 1 July 1987) have enacted similar legislation.

The scheme was enacted as a result of a Formal Agreement made between the Commonwealth and the six States on 22 December 1978. There was provision for the Northern Territory to enter the agreement at a later date.

The three basic elements of the co-operative scheme are:

1. The Ministerial Council consisting of Ministers of the Commonwealth and each of the States (and the Northern Territory). The role of the Ministerial Council is to review the scheme legislation and to exercise general oversight and control over the operation of the scheme;

2. The National Companies and Securities Commission (the NCSC). The NCSC’s prime function is the administration of the legislation, which comprises essentially the companies code, the take-overs code and the securities industry code. The NCSC is accountable to the Ministerial Council;
3. The existing State and Territory corporate affairs offices. These offices are responsible for the day-to-day administration of the scheme and act as delegates of the NCSC.

The general aim of this scheme was to achieve uniformity in the law applying to companies and to corporate activities. Some commentators at the time doubted whether the Commonwealth has the power to regulate all aspects of corporate activity. Thus national uniformity was seen to require the co-operation of the State legislatures.

The scheme has been criticised in recent years on a number of grounds, including:

- the scheme lacks accountability because it is not answerable to any one Minister or to any one Parliament;
- the nature of the Ministerial Council tends to result in 'lowest common denominator' legislation; and
- there is administrative inefficiency and duplication resulting from the relationship between the NCSC and its State and Territory delegates, the corporate affairs offices.

In April 1987 the Senate Standing Committee on Constitutional and Legal Affairs recommended that the Commonwealth should enact comprehensive legislation covering the field currently regulated by the co-operative scheme.

The Committee based its recommendation on a variety of criticisms of the existing scheme and on an opinion given by the former Commonwealth Solicitor-General, Sir Maurice Byers, QC, who is chairman of the Constitutional Commission. The Byers opinion found that the Commonwealth does have the constitutional power to enact comprehensive legislation covering company law, take-overs and the securities and futures industries.

The Government intends that the legislation be enacted during the Budget Session of Parliament. However, on 30 June 1988, the Attorney-General announced that the legislation will be withdrawn if the business community expresses disagreement.

The Commonwealth Legislation

The package of Commonwealth Bills contains three major Bills:

- a Corporations Bill setting out the law covering the regulation of companies, take-overs, the securities industry and the futures industry;
• an Australian Securities Commission Bill to provide for the administrative arrangements for the new scheme, setting up a new federal regulatory body to replace the NCSC; and

• a Close Corporations Bill providing a simpler and more flexible form of incorporation for small business.

In many respects these Bills mirror existing law. But the format has been changed and some significant amendments have been made.

Corporations Bill

The Corporations Bill is divided into nine Chapters:

1. Introduction (definitions and interpretation and application provisions);

2. Constitution of Companies (registration, legal capacity, share procedures and rights);

3. Internal Administration (internal affairs, meetings, directors, registrable charges, accounts);

4. Various Corporations (investment and mining companies, registrable Australian Corporations trading interstate);

5. External Administration (schemes and arrangements, receivership, winding up and dissolution);

6. Acquisition of Shares (take-over, substantial shareholdings);

7. Securities (stock exchanges, dealers and advisers, prospectuses, transfer and settlement of marketable securities);

8. Futures Industry (futures exchanges, regulation of participants in futures industry);

9. Miscellaneous (ASC registers, registration of auditors and liquidators, offences, unclaimed property).
Major reforms

(a) Incorporation

New companies that will be trading corporations or financial corporations or will carry on banking business as their sole or principal business will incorporate federally under the legislation and not in a specific State. Companies of those kinds already incorporated in a State or Territory will be transferred into the new system (Part 2.2).

But many companies will not be incorporated under the new legislation. Some insurance companies and certain territory companies will remain incorporated under the old law. In addition, there may be argument over the coming months as to whether the new legislation can apply at all to some companies.

The legislation distinguishes between a ‘company’, a ‘corporation’ and a body corporate. A ‘company’ is defined as a body corporate that is incorporated in Australia and has a share capital (Clause 9). A ‘corporation’ is a ‘constitutional entity’, that is, a corporation which falls within Commonwealth power relating to foreign corporations, trading and financial corporations, banking or insurance corporations, bodies corporate incorporated in a Territory, a company as defined, and holding companies of any of these (Clause 9).

(b) Company Names

All company names will be allowed except for identical names and names of a type to be prescribed in the Regulations such as names suggesting connection with the Government (Clause 366 – 383). The existing tests of whether a name is available for reservation have been removed.

(c) Prospectuses

The Australian Securities Commission (the ASC) (which is to be set up by the Australian Securities Commission Bill) will not pre-examine prospectuses. Prospectuses will still be required to be lodged but will not be registered (see Clause 1018). The existing rules about the content of prospectuses will be replaced by more basic disclosure rules and a general requirement that the prospectus contain a fair and accurate presentation of all material information relevant to a decision by an investor to invest (Clauses 1021 – 1023).

A prospectus may be tailored to meet the requirements of the market at which it is aimed (Clause 1022). Thus a prospectus directed at institutional investors may differ significantly from one directed at individuals. The ASC can audit a filed prospectus on the basis of sampling or following a complaint, and to issue a stop order (Clause 1033).
A general provision prohibiting misleading and deceptive conduct in relation to the issue, dealing in or trading in securities has been included in the Bill (Clause 995).

Investors will be able to sue a wider class of persons involved in the preparation of a prospectus including directors, underwriters, stockbrokers, sharebrokers and professional advisers who are named in the prospectus and fail to exercise due diligence in carrying out their functions (Clause 1005-1012).

(d) Offers to the Public

Under the present law the obligation to register a prospectus arises only, as a general rule, where there is an offer or invitation to the public or a section of the public.

In view of the existing problems in determining what an 'offer to the public' is, the Bill requires all offers of securities to be initiated by the lodgement of a prospectus (Clause 1018). However, there are some exceptions:

- issues where the minimum subscription by any person is $500,000;
- issues to persons whose ordinary business is dealing in securities;
- issues pursuant to an underwriting agreement; and
- offers in relation to debentures to existing debenture holders (Clauses 66 and 1017).

(e) Tracing Beneficial Ownership of Shares

The ability of companies to trace the beneficial owners of shares is to be removed. Only the ASC will have this power and, even then, only in relation to listed companies (and companies specified by regulation) (Clauses 717-727).

(f) Substantial Shareholding Threshold

The substantial shareholding threshold is reduced from 10% to 5% (Clauses 707-716), but this percentage can be amended by regulation (Clause 708). The requirement that substantial shareholder disclosures be in a prescribed form has been abolished.

(g) Abolition of Vetting of Take-over Documents

Part A statements, profit forecasts and asset valuations are no longer to be pre-examined (Clause 644). Take-over documents must still be registered but
the registration process is to be limited to checking compliance with formal requirements, such as signatures and inclusion of reports. The regulations may specify further matters required to be lodged with the take-over documents for registration (Clauses 644 and sub-clause 18 of Clause 750, Part A).

Misleading and deceptive conduct in relation to take-over offers or announcements is prohibited (Clause 995).

(h) Simplification of Transfer and Settlement Systems

Transferors need no longer sign a transfer form (Clause 1098). Transfer forms will be able to be validated by a broker authorised by the transferor who will indemnify the transferor and the company where a transfer has been made without authority (Clause 1105). The requirement for transferee acceptance forms has also been removed (Clause 1101).

The ASC has been given power to exempt and modify provisions dealing with the transfer of securities (Clause 1113).

The requirement that companies maintain branch registers at the request of a shareholder has been abolished (Clause 214). This is intended to simplify the operation of the proposed new transfer and settlement system currently being developed by the Australian Stock Exchange.

(i) Licensing of Representatives

The licensing of representatives of securities dealers and advisers and of futures brokers and advisers will be discontinued. It will be replaced by a system where brokers and advisers are made fully liable for the conduct of their respective representatives. They are also responsible for their training, education and supervision. This liability will extend to actions which are outside the scope of their authority (Clauses 806 - 823).

(j) Memorandum and Articles of Association

Proprietary companies will no longer be obligated to lodge a copy of their memorandum and articles of association with the ASC, upon incorporation (Clause 118). However the lodging of a memorandum may be required by the ASC (Clause 119).

(k) Accounting

The Bill substantially repeats the accounting provisions of the Companies Code with some modifications. These include:

• the Accounting Standards Review Board is prevented from making standards that conflict with the proposed Corporations Act or regulations (Clause 283);
- companies are allowed to use a new standard mode after the end of a year but prior to the completion of the accounts for that year (Clause 285);
- a company is required to include comparative amounts in accounts where the company has in both the current year and the previous year complied with an accounting standard in respect of an item (Clause 300).

For further information, if required, contact the Law and Government Group.

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Bills Digest Service
Legislative Research Service

This Digest does not have any official legal status. Other sources should be consulted to determine the subsequent official status of the Bill.

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