COMPANIES AND SECURITIES LEGISLATION (MISCELLANEOUS AMENDMENTS) BILL 1983

Date Introduced: 5 October 1983
House: Senate
Presented by: The Attorney-General, Senator the Hon. G.J. Evans

Short Digest of Bill

Purpose

To amend several laws relating to companies and securities.

Background

This Bill amends the Commonwealth Acts which regulate company law and the securities industry in the A.C.T. Once the Bill is passed by the Commonwealth Parliament, it will automatically amend identical laws in all the States. This process is part of the machinery set up to implement the co-operative Commonwealth/State scheme for uniformity of law and administration in the companies and securities field. Details of the history of the scheme are contained in the explanatory memorandum. An earlier draft of this Bill was exposed for public comment in December 1982.

The Bill proposed amendments to the following Acts:

National Companies and Securities Commission Act 1979
Securities Industry Act 1980
Companies (Acquisition of Shares) Act 1980
Companies and Securities (Interpretation and Miscellaneous Provisions) Act 1980
Companies Act 1981
Companies (Transitional Provisions) Act 1981

Main Provisions

Companies (Acquisition of Shares) Act 1980

Clause 17 of the Bill would amend s.60 of this Act so that the present power of the National Companies and Securities Commission (NCSC) to intervene would be extended...
to potential takeover situations. Section 60 of the Act at present enables the NCSC to make a declaration of an unacceptable acquisition or of unacceptable conduct. The consequence of the NCSC making such an order is that the conduct or acquisition is deemed to have breached the Act enabling the Court to make an order under section 45 directing what action must occur in relation to the conduct or acquisition. The Court can set aside the NCSC's declaration of non-acceptability. The declaration can only be made where the NCSC is satisfied that various circumstances exist and the NCSC has also issued further guidelines on when it will intervene in takeover situations. At present the NCSC can only make a declaration of unacceptable conduct where a Part A statement has been served or a take-over announcement has been made. The proposed amendment will remove these restrictions thus enabling the NCSC to make a declaration of unacceptable conduct before a formal takeover situation arises. The amendment therefore increases the ability of the NCSC to intervene in rapidly changing market situations.

Companies Act 1981

Clauses 23 to 31 would insert new provisions into the Companies Act relating to auditors and liquidators. Clause 31 proposes new sections 30A to 30S which give powers to the Companies Auditors and Liquidators Disciplinary Board. This Board was established by an Ordinance in the ACT in 1982. Similar legislation exists in other participating jurisdictions. These new powers will ensure that the Boards can operate uniformly throughout Australia. The powers are an expanded version of the current section 27 which is repealed by clause 29 of the Bill.

Clause 33 of the Bill would amend section 37 of the Act so that it would no longer be compulsory for a company to have stated objects. This amendment is part of the scheme for changing the ultra vires rule which determines what happens when a company acts outside its objects.

Clause 34 would replace sections 67 and 68 with new provisions. At present section 67 gives to a company a standard set of operational powers (contained in Schedule 2), unless the company expressly modifies or excludes these in its articles or memorandum. New section 67 would abolish this treatment by giving a company the rights, powers and privileges of a natural person.

The new sections 68 to 68D follow on from the change made by clause 33 removing the necessity to have stated objects. Where a company chooses to state its objects, then it cannot act outside those objects.
Otherwise, a company has full powers (new section 67) to pursue whatever objects it chooses and the doctrine of ultra vires will no longer operate. This means that third parties can deal confidently with companies without fear that the companies do not have the capacity for those particular dealings. This change should clarify the operation of an area of company law where the case law has often led to difficulties. It has often been considered unrealistic in these days of diversification in business ventures for a company to be bound by an artificial list of activities. In the past companies have tended to adopt an extraordinarily wide range of objects to overcome the constraints of the ultra vires rule. Although the proposed amendment increases certainty in the commercial dealings of third parties with companies, it also affects the position of shareholders who may wish their company to restrict its operations to a defined field. If this is the case, these companies should adopt an objects clause.

In accordance with the above changes, clause 36 would amend section 73 to rationalise the procedure for altering an objects clause in the memorandum.

Clause 68 would introduce a new Division 10 into Part IV to replace individual exemptions at present in the Act. The new Division will enable the NCSC to grant exemptions from compliance with the provisions on prospectuses (Division 1) the allotment and variation of contracts (Division 2), debentures (Division 5), prescribed interests (Division 6) and the prohibition on sharehawking (section 552). New section 215C would give the NCSC considerable freedom in applying the provisions in the above areas.

Clause 70 of the Bill would insert a new section 227A to provide for court orders preventing company officials from managing companies if they have breached companies and securities legislation. This will add to present prohibitions preventing (1) insolvent people or (2) people convicted of various offences, from being directors or promoters of companies (section 227).

Clause 76 of the Bill inserts new sections 261 and 261A to replace present section 261 which deals with the power of a company to obtain information in relation to the beneficial ownership of its shares. This provision was a new one inserted into the 1981 Companies Act. It is part of a wider scheme in the Act that the public and the company itself need to be aware of the identity of substantial shareholders. The new provisions would change the operation of the process which is the subject of the present section 261. The NCSC or 5 per cent of the company's shareholders
would be able to direct the company to exercise its powers in relation to seeking information on beneficial ownership. Once received, the information must be entered on a register which is available for public inspection. The NCSC is empowered to exempt people from complying with the company's notice. Otherwise there are strong sanctions for non compliance.

Clause 79 inserts new provisions on accounts requiring compliance with accounting standards developed by the Accounting Standards Review Board. The Board, which is due to come into operation on January 1 1984, will set accounting standards which will be published in the Gazette.

Clause 80 of the Bill would amend section 269 of the Companies Act which requires directors to attach to the company accounts a statement that the accounts represent a "true and fair view" of the state of the company. The amendments to the section would require directors to take into account circumstances that have arisen since the end of the financial year (new sub-sections 269(11) and (12)). If the company has been dormant the director must include this fact in the statement (new paras 269(9)(d) and 269(10)(d)). The directors must state whether the accounts are prepared in accordance with the accounting standards approved by the Accounting Standards Review Board and if they were not, the director must explain why compliance with the standards would have given a false picture of the company's state of affairs.

In addition to these changes to the director's statement, clause 81 would amend section 270 of the Act to require more detail in the directors' report. Under the proposed changes, the directors' report must contain the names of directors, principal activities of the company, profit or loss information and details of dividends. The second requirement is to report on the company's operations and results, any changes in its affairs during the financial year, any change of circumstances since the end of the financial year, and likely future developments. Thirdly, the directors are required to give particulars of their qualifications, shareholdings and interests in contracts with the company. The aim is that this general type of report would result in a more informative document than occurs with the itemised list of requirements in the present section 270. The draft of the Bill which was exposed for public comment in December 1982 contained a much wider range of matters for Directors to report on e.g. the affect on the company of such factors as research and development, use of new technology, takeovers involving the company, economic conditions, government decisions etc. These matters would have resulted in information of value to the general public.
not just company members. These amendments were not included in the present Bill after the public comment stage where they were criticised because it was claimed that the confidentiality of such material was necessary to ensure future success in commercial ventures.

Clause 89 of the Bill would amend section 320 of the Act which makes it possible for company members to apply for various Court orders where they believe that the affairs of the company are being conducted in an oppressive manner. The amendments would make the remedy more widely available and remove certain doubts that have arisen in the application of this section by the Courts.

Clause 93 would insert new sections 324A to 324F specifying some details in relation to the powers and duties of receivers and managers. At present these matters are not specified in the legislation.

Clause 121 would insert a new penalties section 570A to introduce a system of "on the spot" fines for company law offences. The system would speed up the enforcement of the law in the companies and securities area. The process involves serving a notice on the person setting out details of the offence committed and the penalty which must be paid. If the person has failed to perform a required act, then he must pay the fine and perform the act in order to prevent court action. If the offence does not relate to a failure to perform an act, then payment of the fine would prevent court action.

Companies and Securities (Interpretation and Miscellaneous Provisions) Act 1980

Clause 132 would insert a new provision into this Act which contains the interpretation code for all of the scheme legislation. The new provision is a directive to the Courts to construe legislation with a view to its purpose or object. It performs the same function for scheme legislation as the new section 15AA of the Acts Interpretation Act (inserted in 1981) performs for Commonwealth legislation generally.

Securities Industry Act 1980

Clause 147 of the Bill would insert new provisions on penalties into this Act. These provisions are identical to the new provisions on penalties proposed to be inserted in the Companies Act 1981.

For further information, if required, contact:

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