COMPANIES BILL 1981

Date Introduced: 30 April 1981
House: House of Representatives
Presented by: Hon. John Moore, M.P., Minister for Business and Consumer Affairs

Short Digest of Bill

Purpose

To provide a company law code which will operate in the Australian Capital Territory as part of a co-operative Commonwealth/State Scheme for a uniform system of company law.

Background

History of this Bill

An earlier version of this Bill was introduced into the House on 27 August 1980. That Bill was not debated but instead exposed for public comment. This was the second opportunity for community contribution to the legislative provisions since an earlier draft of the Bill was also exposed for public comment in April 1980. The current Bill is therefore an updated version of that introduced on 27 August 1980, and was drafted taking into account public comments on the August Bill.

The National Scheme

This Bill and the nine other Bills introduced into the House with it on 30 April 1981 constitute the final major package of legislation which implements a scheme for national uniform company and securities industry law by co-operation between the States and the Commonwealth. On the 22 December, 1978 a Formal Agreement was signed by the Commonwealth and the six states setting out the framework for a uniform system of law and administration in relation to company law and the regulation of the securities industry in the six States and the Australian Capital Territory. There is provision in the Agreement for the Northern Territory to become a party to the scheme (clause 49). The scheme can also be extended to external territories (clause 50). The Formal Agreement makes provision for the following basic elements of the scheme:
a Ministerial Council comprising Ministers of the Commonwealth and the six States

- a National Companies and Securities Commission which will have responsibility for the administration of the scheme, chiefly by direction to State and Territory corporate affairs offices and co-ordination of their activities

- continuation of existing State and Territory corporate affairs offices

- a system of legislative uniformity whereby the Commonwealth must enact for the A.C.T. substantive legislation agreed to by the Ministerial Council. The States will then pass laws adopting the law in force in the A.C.T. to operate in their respective States.

The National Commission was set up pursuant to the National Companies and Securities Commission Act 1979. Three codes of law have been enacted by the Commonwealth Parliament in relation to the scheme. These codes are embodied in the Companies (Acquisition of Shares) Act 1980 (dealing with company takeovers), the Securities Industry Act 1980, and the Companies and Securities (Interpretation and Miscellaneous Provisions) Act 1980 (which establishes an interpretation code for the scheme). The Companies Bill and associated Bills will enact the remaining body of law, a companies code, for the A.C.T.

The remaining steps which must be taken before the above legislation operates nationally are the making of regulations and the enactment by the States of adopting legislation. These steps are in progress in relation to the first three codes with the aim of bringing them into operation on 1 July 1980. Parties to the Formal Agreement are hoping that the companies code will be in operation on a national basis from 1 January 1982.

Legislative Basis of the Companies Bill

The Formal Agreement provides that the Legislation already in force in the ICAC States (those States which are a party to the 1975 agreement to establish an Interstate Corporate Affairs Commission) should be the basis for the co-operative scheme legislation. The Agreement envisaged that the ICAC Acts would be modified to the extent agreed upon by the Ministerial Council. Changes have also been made where they are required by the nature of the co-operative scheme. Paras 40 to 43 of the explanatory memorandum on the Companies Bill set out the main changes
which have been made to the body of company law which is at present in force in the ICAC states.

Appendix C of the explanatory memorandum sets out the differences between the draft Bill exposed for public comment in April 1980 and the August 1980 Bill. One of the major changes noted in Appendix C is the absence of the provisions on trading trusts. New provisions were set out in the April 1980 draft Bill relating to disclosure by nominee companies which act as trustees for trading trusts. These provisions were not included in the August 1980 Bill nor do they appear in the present Bill. In his second reading speech on the Bills, the Minister stated that consideration of these provisions was continuing and that trading trusts might be the subject of an amending Bill.

Appendix D of the explanatory memorandum sets out the differences between the August 1980 Bill and the present Bill. Some of the more significant changes outlined in Appendix D are as follows:

- Clause 27 which deals with the cancellation or suspension of a person as a registered auditor or liquidator has been substantially amended to take account of the fact that a new body, the Companies Auditors and Liquidators Disciplinary Board, has been established to perform this function.

- the provisions dealing with registration of charges (Part IV Division 9 and Schedule 5) have been substantially changed.

- Clause 363, dealing with applications for winding up a company, has been amended so that the Insurance Commissioner may make an application for the winding up of a company.

- The Schedule dealing with accounts (Schedule 6 of the August 1980 Bill) has been removed from the Bill. Matters previously dealt with in this schedule will now be covered in the Regulations.

Main Provisions

The Bill makes major modifications to existing company law. These major changes, as summarised in the Bill's explanatory memorandum at paragraphs 40 to 43, are as follows:
One place of registration

The most important of these modifications are those that are required to ensure that an Australian company incorporated in a jurisdiction covered by the co-operative scheme (referred to in the Companies Bill as a 'participating State' or 'participating Territory') can lodge all its documents with the local corporate affairs office in its jurisdiction of incorporation ('home jurisdiction') without the need to lodge documents anywhere else. A company incorporated in a participating State or another participating Territory is referred to as a "recognised company" in the Companies Bill (see definition in s.cl. 5(1)).

Similarly, overseas corporations will only have to register in one of the jurisdictions covered by the co-operative scheme. An overseas corporation that is registered as a foreign company in a participating State or another participating Territory is referred to as a "recognised foreign company" in the Companies Bill (see definition in sub.cl. 5(1)).

Any Australian body which is not a company in its jurisdiction of formation and any Australian company incorporated in a non-participating Australian jurisdiction will still be required to register as a 'foreign company' in each other Australian jurisdiction covered by the co-operative scheme in which that body wishes to carry on business or to establish a place of business.

Other modifications

Some of the more important of the other modifications are as follows:

(a) An attempt has been made to provide a more appropriate monetary penalty for some offences and to resolve a large number of anomalies that exist in the penalty provisions of the existing companies legislation. Further details are contained at Appendix A of the Explanatory Memorandum.

(b) Provisions requiring companies to publish notices in newspapers and the Gazette have been examined and rationalised so that there are similar requirements where the different provisions reflect similar policies. A list of all the requirements for publication in a newspaper and the Gazette and the type of publication required is set out in Appendix B of the Explanatory Memorandum.
(c) New powers of inspection are contained in Division 1 of Part II to ensure that the NCSC will have adequate powers of inquiry when performing its functions under the Companies Bill.

(d) A national system of registration for auditors, liquidators and official liquidators has been formulated (see Companies Bill Division 2 of Part II).

(e) More flexibility will be able to be exercised in determining the upper limit to the size of accounting and other professional partnerships (see Companies Bill s.cl. 33(4)).

(f) A company will be permitted to alter any condition in its memorandum that might have been included in its articles (see Companies Bill cl. 73).

(g) The law in relation to pre-incorporation contracts is reformed (see Companies Bill cl. 81).

(h) There are new provisions dealing with the transfer of incorporation of companies and of certain corporations (see Companies Bill Division 4 of Part III).

(i) The content of prospectuses and statements made under cl. 170 will now be prescribed in the regulations (i.e. the provisions contained in the Fifth and Seventh Schedules to the ICAC Companies Acts are generally not contained in the Companies Bill).

(j) Provisions dealing with statements in lieu of a prospectus have been omitted from the Companies Bill.

(k) The existing provisions of the ICAC Companies Acts relating to the power of a company to pay commissions etc. have been amended (see Companies Bill cl. 117).

(l) Comprehensive amendments have been made to the existing provisions of the ICAC Companies Acts relating to the prohibition of a company financing and dealing in its own shares (see Companies Bill cls 129 and 130).

(m) A company will now be required to keep a register of options (see Companies Bill cl. 131).
(n) The State and Territory Marketable Securities Acts and Ordinances will be repealed as similar provisions are contained in Companies Bill Division 8 of Part IV.

(o) Comprehensive reforms are made of the provisions relating to the registration of charges (see Companies Bill Division 9 of Part IV).

(p) S124 of the ICAC Companies Acts which imposes duties of honesty and diligence on directors has been extended to all officers (see definition in s-cl. 229(5)).

(q) A number of amendments have been made to the provisions prohibiting loans to directors (see Companies Bill cl 230).

(r) A number of amendments have been made to the provisions which deal with payments by a company to persons for loss of or retirement from office, to give effect to recommendations in the UK Jenkins Committee Report (see Companies Bill cl 233).

(s) There are new provisions which will enable a company to obtain information as to the beneficial ownership of its shares (see Companies Bill Cl 261).

(t) Significant amendments have been made to the provisions relating to the preparation and laying of accounts to remedy defects in the existing provisions of the ICAC Companies Acts that were identified in Jensen v. Viney [1979] VR 597 (see Companies Bill Part VI and definition of "financial year" in s-cl. 5(1)).

(u) S-sec 162(12) of the ICAC Companies Acts, which imposes an obligation on principal accounting officers of companies to state whether to the best of their knowledge and belief the accounts give a true and fair view of the matters required to be dealt with, has been deleted.

(v) The special investigation provisions, while based generally on Part VIA of the ICAC Companies Acts, have been substantially redrafted to incorporate the system of control and the allocation of powers set out in Part VI of the First Schedule to the Formal Agreement (see Companies Bill Part VII).
(w) A person appointed to administer a compromise or arrangement will now have a number of the obligations that are imposed on a receiver (see Companies Bill s-cl s 315(7) to (11)).

(x) There are new provisions designed to overcome jurisdictional problems that exist under the ICAC Companies Acts in relation to schemes of arrangement (see Companies Bill cl 315). These new provisions are consistent with the "one place of registration" concept discussed above.

(y) Expenses of an auditor in certain circumstances will now be accorded priority in a receivership (see Companies Bill cl. 331).

(z) Consistent with the "one place of registration" concept, provisions have been included in Part XII to ensure that there is only one winding up in all participating jurisdictions in relation to the affairs of a company incorporated in a participating jurisdiction or an overseas corporation registered as a foreign company in a participating jurisdiction (see Companies Bill Division 5 of Part XII).

(aa) There is a new provision that rationalises existing provisions in the ICAC Companies Acts relating to reports by a liquidator and now applies to all forms of winding up (see Companies Bill cl 418 cf. s. 235 of the ICAC Companies Acts).

(ab) New powers have been given to the NCSC in relation to the supervision of liquidators (see Companies Bill cl 420).

(ac) A new provision has been included which gives a liquidator the right to recover from an officer of a corporation in certain circumstances (see Companies Bill s-cl. 453(5)).

(ad) More flexibility has been given to the NCSC in relation to the exercise of its powers concerning investment companies under Division 2 of Part XIII (see Companies Bill cl 490).

(ae) A general power has been given to the NCSC to intervene in any proceeding relating to a matter arising under the legislation (see cl. 540).
(af) There are comprehensive examination provisions which replace a number of existing provisions (e.g. ss 249 and 250) in the ICAC Companies Acts, (see Companies Bill cl 541).

(ag) The provisions which deal with the form and inspection of books contain new provisions to take account of the fact that many company records are now kept in computerised form (see Companies Bill cls 544 to 546).

(ah) A number of amendments have been made to the "defaulting officers" provisions (see generally Companies Bill Division 2 of Part XIV).

(ai) Consistent with the "one place of registration" concept, various minute books and registers will be able to be kept at the registered office of the company, at its principal place of business in its home jurisdiction or at such other place in Australia as has been approved by the NCSC (paras 609 to 611 of the explanatory memorandum set out where these changes are made).

For further information, if required, contact:

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