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The Parliament of the
Commonwealth of Australia

The Senate

Statute Law (Miscellaneous Amendments)
Bill (No. 1) 1982

Explanatory Memorandum

(Circulated by authority of the
Attorney-General, Senator
The Honourable P.D. Durack, Q.C.)

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PART XV - AMENDMENTS OF THE COMPANIES ACT 1981

Sub-clause (5) of clause 2 of this Bill provides that this Part shall come into operation on the day on which the Principal Act comes into operation.

Clause 84 - Principal Act

Formal

Clause 85 - Investigation or certain matters

The National Companies and Securities Commission (NCSC) is empowered to inspect the books of any company that is required by the Principal Act to be kept and is also empowered to require the production of books relating to the affairs of a corporation. (Principal Act, ss. 11, 12). A magistrate may also issue a warrant for the seizure of books required to be produced (s. 13).

This clause inserts a new section 16A providing that where the NCSC has reason to suspect that a person has committed an offence under a provision of the Principal Act it will be able to investigate that matter. This capacity to investigate will also extend to suspected offences against the Companies (Acquisition of Shares) Act 1980 by virtue of the operation of section 5 of that Act and of section 12 of the Companies (Acquisition of Shares) Amendment Act (No. 2) 1981. The effect of those 2 provisions is that the Companies (Acquisition of Shares) Act is incorporated and read as one with the relevant companies legislation. In the ACT the relevant companies legislation is the Companies Ordinance 1962 until the commencement of operation of the Principal Act.

Clause 86 - Cancellation or suspension of registration

Persons seeking to practise as either auditors or liquidators must register with the NCSC (Principal Act, Division 2 of Part II). Such registration may be suspended or cancelled by any of the Companies Auditors and Liquidators Disciplinary Boards established in the ACT and the six States (see Principal Act, s. 27 as to the functions of the Boards). Separate legislation establishing these Boards will be enacted in each state. It is anticipated that the ACT Board will be created by ordinance.

Under these amendments to section 27 of the Principal Act, the disciplinary boards will be able to summon persons to give evidence and produce documents at hearings, and to require evidence to be given on oath or affirmation. These powers will be similar to those conferred on existing Companies Auditors Boards by sub-section 9(10) of the Companies Acts of

the States which are parties to the Interstate Corporate Affairs agreement.

In addition, the amendments create offences for interrupting Board hearings or otherwise acting in contempt of the Board.

Clause 87 - Interpretation

Section 38(1) of the Principal Act allows for the reservation of a name for a company unless that name is rejected by the NCSC on grounds set out in the section.

Paragraph (a) of this clause will enable the Ministerial Council to review decisions taken by the NCSC with respect to such names under paragraphs 38(1)(a) (b) or (c) of the Principal Act. The amendment will bring the provision into line with the companies Acts in force in the States which are parties to the Interstate Corporate Affairs Agreement.

Paragraph (b) of this clause inserts a new sub-section (5) which will make it clear that the only avenue of appeal for a review of a decision by the NCSC under section 38 is to the Ministerial Council and not to a court under section 537 of the Principal Act.

Clause 88 - Alteration of provisions of memorandum

This amendment of section 73 of the Principal Act makes it clear that it is only a special resolution effecting an alteration to the memorandum with respect to the objects or powers of the company which is to be lodged with the NCSC not before the expiration of 21 days after the passing of the resolution or before any appeal to the court has been considered.

Clause 89 - Copies of memorandum and articles

This amendment of section 79 of the Principal Act provides that companies will now be required to provide copies of the memorandum and articles of a company requested by shareholders within 21 days of payment or of the date of the request, if not fee is payable. The NCSC may however approve a longer period.

Clause 90 - Application by recognised company for registration under Division

Companies, wherever incorporated, can apply to transfer their "home jurisdiction" to a State or Territory which is a participating jurisdiction under the co-operative companies and securities scheme. A company incorporated in a participating jurisdiction must apply to the NCSC in both the

State or Territory in which it is currently incorporated and the State or Territory of its proposed domicile (Principal Act, ss. 83, 84).

This amendment of section 84 provides that a company registered in another jurisdiction and making application for registration in the ACT will need to provide details of the proposed registered office of the company in the Territory.

Clause 91 - Application by foreign company for registration under Division

Foreign companies applying to transfer incorporation to a participating jurisdiction are required to notify the NCSC in that State or Territory of their proposed registered office. This amendment of section 85 of the Principal Act gives effect to this requirement in the ACT.

Clause 92 - Redeemable preference shares

The clause amends section 120(8) of the Principal Act by providing that details of the redemption of any preference share are to be required on the prescribed form. The details proposed are -

- the shares redeemed;
- the nominal value of the shares redeemed;
- whether they are redeemed out of profits or the proceeds of a fresh issue of shares.

Clause 93 - Commission to be informed of special rights carried by, or division or conversion of, shares

This amendment to section 124(1) of the Principal Act requires a prescribed form to be used for the statement required relating to special rights carried by shares. The form is to cover -

- the nominal value of each share;
- the names of the holders of the shares; and
- the number and classes of shares.

Clause 94 - Company financing dealings in its shares, etc.

The amendment corrects a cross referencing error in subsection 129(10) of the Principal Act.

Clause 95 - Register of options

This clause inserts a new sub-sections 131(4) and (5) in the Principal Act which will make it clear that the register may be inspected or copies obtained without charge. If a charge is made by the company then such a charge is not to exceed the prescribed amount. Copies are to be sent to a person applying for a copy within 21 days of the date of application, if not charge is made, or 21 days of payment of the amount charged whichever is applicable. The NCSC may however approve a longer period.

A new sub-section 131(5A) is also inserted which provides that companies are not required to keep copies of every instrument by which options to take up unissued shares in the company are granted if the options have been granted official quotation by a stock exchange.

Clause 96 - Company to keep register of substantiated shareholders

These amendments of section 143 of the Principal Act are similar to those made to sub-sections 131(4) and (5) by clause 95.

Clause 97 - Powers of Court with respect to defaulting substantial shareholder

Under section 146 of the Principal Act the Supreme court of the ACT may, on the application of the NCSC, make certain orders in respect of a failure to comply with the obligations of a substantial shareholder relating to notice of his shareholding or changes in his shareholding.

The amendment of section 146 of the Principal Act provides that the Court will be empowered, before considering an application by the NCSC, to grant an interim order pending the determination of the application. The NCSC will not be required to give any undertakings as to damages when seeking an interim order.

Clause 98 - Register of debenture holders and copies of trust deed

These amendments of section 147 of the Principal Act are similar to those made to sub-section 131(4) and (5) by clause 95.

Clause 99 - Branch registers

This amendment of section 148 of the Principal Act, provides that details of every entry in a branch register are to be transmitted to its principal register within 28 days of their entry in the branch register.

Clause 100 - Obligations of borrowing corporation

A typographical error in sub-section 158(17) of the Principal Act is corrected.

Clause 101 - Loss or destruction of certificates

Where a certificate of title to shares, debentures or prescribed interests in a company is lost or destroyed, the company may be required by the owner to issue a duplicate certificate.

This amendment of section 182 of the Principal Act provides that the requirement is to be completed within 21 days of application, if not payment is required, or 21 days of payment. The NCSC may however approve a longer period.

Clause 102 - Charges required to be registered

This is a technical amendment of section 200 of the Principal Act to widen the category of charges that need to be registered to include a "charge on wool".

Clause 103 - Company to keep documents relating to charges and register of charges

This amendment of section 209 of the Principal Act is similar to the amendments of sub-section 131(4) and (5) made by clause 95.

Clause 104 - Registration under Instruments Ordinance 1933

A company which transfers, assigns or gives security over a personal chattel within the meaning of the local bills of sale legislation is not required to register it under that legislation if it also constitutes a charges that is subject to registration under the companies code whether locally or in any other participating jurisdiction in the co-operative companies and securities scheme. A drafting change is made by this clause in section 211 of the Principal Act to ensure that this intention is given effect.

Clause 105 - Charges created before commencement of this Act

A variety of charges over company property created after the commencement of the Principal Act are required to be registered with the NCSC. This requirement extends to charges existing on property acquired by a company. The registration will determine the priorities to be accorded these registrable charges as against each other.

The new section 215A inserted in the Principal Act by this clause gives effect to the decision that charges created by any company (wherever incorporated) prior to the commencement of the Principal Act and charges over property acquired before the commencement of the Act are to continue to be subject to the registration system operating in each jurisdiction prior to the commencement of the Principal Act, namely a system in which registrable charges not registered within 30 days of creation are void against the liquidator and any creditor of the company.

Determination of priorities between charges registrable under the "old" system vis-à-vis charges registrable under the "new" system will be left to the general law.

Clause 106 - Register of directors' shareholdings, etc.

Clause 107 - Register of directors, principal executive officers and secretaries

These amendments of sections 231 and 238 respectively of the Principal Act are similar to those made to sub-section 131(4) and (5) by clause 95.

Clause 108 - Statutory meeting and statutory report

The directors of a public company issuing its first prospectus must provide members, prior to a statutory meeting of the company, with a report as to the total number of shares allotted, total cash received by the company for the shares allotted, etc.

This amendment of section 239 of the Principal Act will make it necessary for the report to distinguish not only between shares fully and partly paid up otherwise than in cash but also between shares fully or partly paid up in cash.

Clause 109 - Resolutions of exempt proprietary companies

This clause corrects a typographical error in sub-section 250(5) of the Principal Act.

Clause 110 - Lodgement with the Commission, etc., of copies of certain resolutions and agreements

Clause 111 - Inspection of minute books

Clause 112 - Inspection and closing of register

These amendments of section 251, 254 and 257 respectively of the Principal Act are similar to the amendments of sub-section 131(4) and (5) of the Principal Act made by clause 95.

Clause 113 - Branch registers

This amendment of section 262 of the Principal Act has the same effect in relation to branch registers of members as clause 99 above has in relation to branch registers of debenture holders.

Clause 114 - Provisions for facilitating reconstruction and amalgamation of corporations

Where a Supreme Court in one participating jurisdiction under the co-operative scheme makes an order approving a reconstruction or amalgamation of any company or companies and the order affects property in another participating jurisdiction, it may be enforced in relation to that property by the filing of an office copy thereof with the Supreme Court of the latter jurisdiction (Principal Act sub-section 317(4)).

This clause makes a drafting change to ensure that this intention is given effect.

Clause 115 - Functions of committee of management and appointment of deputy official manager

This amendment makes a drafting change in section 357(4) of the Principal Act.

Clause 116 - Liabilities as contributories of present and past members

This amendment corrects a cross-referencing error in paragraph 360(1)(h) of the Principal Act.

Clause 117 - Certain notices to be lodged with the Commission

An applicant for the winding-up of a company is required at appropriate times to lodge with the NCSC -

- (a) notice of the application;
- (b) notice of the making of the winding up order; and
- (c) if the application is withdrawn or dismissed, notice of the withdrawal or dismissal (Principal Act, s. 370).

This amendment requires the applicant to indicate the date on which the application was filed, withdrawn or dismissed or the winding-up order made, as the case may be.

Clause 118 - Effect of voluntary winding up

This amendment of section 394 of the Principal Act corrects a spelling error.

Clause 119 - Liquidator's accounts

This amendment of paragraph 422(1)(b) of the Principal Act requires the liquidator of a company to lodge the statement on the position in the winding up in a prescribed form. The proposed form will cover -

- (a) an account of his receipts and payments; and
- (b) a statement of the position in the winding-up.

Both matters will need to be verified by a statement in writing.

Clause 120 - Member of committee not to accept extra benefits

A creditor of a company may apply to the Supreme Court to set aside any arrangement which a member of a committee of inspection may have made to derive a pecuniary benefit from the winding-up of the company or to purchase any property of the company (Principal Act, s. 435).

The effect of this amendment is that a member of the company will also have standing to apply to the Court to set aside such an arrangement.

Clause 121 - Agents

This amendment of section 514 of the Principal Act corrects drafting errors.

Clause 122 - Notice to be filed where documents, etc., altered

This amendment of section 515 of the Principal Act requires notification of a change of name of an agent.

Clause 123 - Service of documents on company

This amendment of section 513 of the Principal Act provides for some required cross-referencing.

Clause 124 - Address of registered office, principal office, etc.

This amendment of section 530A of the Principal Act allows for notification of a proposed registered office.

Clause 125 - Continuing offences

This amendment corrects a typographical error in sub-section 571(4) of the Principal Act.

Clause 126 - Power of Court to prohibit payment or transfer of moneys, securities or other property

The Supreme Court is empowered under section 573 of the Principal Act to prohibit a person subject to investigation or to legal proceedings from transferring his property out of the ACT or Australia.

This amendment will allow the Court to grant an interim order before considering an application of the NCSC under section 573, pending the determination of the application. When the NCSC applies for an interim order, it will not be required to give any undertakings as to damages.

Clause 127 - Injunctions

This amendment corrects a typographical error in sub-section 574(1) of the Principal Act.

Clause 128 - Schedule 1

Schedule 1 of the Principal Act sets out the ACT Ordinances to be repealed when the Principal Act comes into operation.

This amendment updates the list by adding the companies (Amendment) Ordinance (No. 2) 1980 and the Companies (Amendment) Ordinance 1981.

PART XVI - AMENDMENTS OF THE COMPANIES
(ACQUISITION OF SHARES) ACT 1980

Clause 129 - Principal Act

Formal

Clause 130 - Provisions relating to acquisition and disposal of, end entitlement to, shares, and associated persons

For the purposes of the Principal Act, the shares to which a person is entitled include those in which he or any of his associates has a relevant interest, except where the person is a nominee corporation approved by the NCSC by a certificate in force under sub-section 7(8) of the Principal Act.

This amendment to sub-section 7(3) makes reference to a certificate in force under a provision of a law of a participating State or Territory that corresponds to sub-section 7(8) of the Principal Act. This will mean that once a nominee corporation has been declared to be an approved nominee corporation under the law of its home jurisdiction it has equivalent status under the laws of the other participating jurisdictions.

Clause 131 - Miscellaneous provisions relating to orders

Section 49 of the Principal Act contains general provisions relating to orders which the Supreme Court of the ACT may make under the Act.

This clause inserts a new sub-section (2A) under which the Court will be empowered to grant an interim order pending the determination of an application made to the Court for an order under one of the following provisions of the Act: -

- Section 45 (Orders where prohibited acquisitions take place)
- Section 47 (Orders to protect rights under take-over schemes or announcements)
- Section 48 (Court may excuse contravention or non-compliance due to inadvertence, etc.)
- Section 57 (Power to exempt from compliance with Act)
- Section 60 (Power of Commission to declare acquisition of shares or other conduct to be unacceptable).

Such interim orders are to be taken to be an order under sections 45, 47, 48, 57 or 60, as the case may be, for purposes of sub-sections 49(3), (7) and (8) with result that:

- (a) the Court will also be empowered to include in the interim order such ancillary or consequential provisions as it thinks just;
- (b) the Court will also be empowered to rescind, vary or discharge the interim order or suspend its operation; and
- (c) contravention or failure to comply with an interim order will be an offence.

This clause also inserts a new sub-section 49(2B) providing that, where the NCSC applies for an interim order, it will not be required to give any undertakings as to damages.

Clause 132 - Power of Commission to declare acquisition of shares or other conduct to be unacceptable

Under section 60 of the Principal Act, the NCSC is empowered within 14 days to declare that, for the purposes of that Act, a specified acquisition is an unacceptable acquisition and that specified conduct (once a Part A statement has been served, or a take-over announcement has been made) is unacceptable conduct. Before the NCSC makes a declaration

under section 60 it must be satisfied of certain matters set out in sub-section 60(7) or sub-section (7A).

Paragraph (a) of this clause amends sub-sections 60(1), (3) and (4) to extend the relevant time periods from 14 days to 90 days. This allows the NCSC to make a declaration under section 60 within 90 days after the acquisition of shares in a company or within 90 days after specified conduct has been engaged in by a specified person in relation to the shares in, or the affairs of, a target company.

Paragraph (b) of this clause amends sub-section 60(5) to allow the target company or a member of the target company to apply to the Court for an order to protect the rights of any person affected by unacceptable conduct. Previously, only the NCSC had the right to apply for such an order.

Paragraphs (c) and (d) of this clause substitute new paragraphs (7)(d) and (7A)(d) in section 60. In future, before the NCSC makes a declaration under section 60 it will have to be satisfied, amongst other things, that shareholders of the company concerned did not have reasonable and equal opportunities to participate in any benefits accruing in connection with the acquisition or proposed acquisition.

Clause 133 - Power of Commission to make certain orders

This clause inserts a new section 60A which provides that where the NCSC has declared an acquisition of shares or other conduct to be unacceptable under section 60 it may make certain orders by written instrument published in the Gazette. The nature of additional orders that may be made are set out in the sub-section 60A(1). The orders will be one or more of the following:

1. An order restraining the disposal or acquisition of an interest in specified shares;
2. An order restraining the exercise of voting rights;
3. An order directing the registered holder of shares subject to an order under this clause to notify that order to any person entitled to exercise a right to vote attached to those shares;
4. An order directing a company not to make a payment in respect of those shares (except in a winding up);
5. Directing a company not to register a transfer;
6. Directing a company not to issue shares to a person who holds shares in it.

Other features are:

- The NCSC will be able to vary or revoke an order (new sub-section 60A(2)).
- A copy of an order shall be served on any person to whom the order is directed and on a company where it relates to specified shares in that company (new sub-section 60A(3)).
- A person aggrieved by an order will be able to apply to the supreme Court for its variation or revocation and the Court will be able to do either if satisfied it is reasonable to do so (new sub-section 60A(4)).
- It will be an offence not to comply with an order of the NCSC (new sub-section 60A(5)).
- Where an offence is committed by a company, each officer of the company in default is guilty of an offence (new sub-section 60A(6)).
- An order will cease to operate after 30 days, or on the day specified in the order, whichever is the earlier (new sub-section 60A(7)).
- The NCSC may not make an order unless the person to whom it is directed has had an opportunity to be heard and to make submissions (new sub-section 60A(8)).
- The NCSC may not make an order in reliance on a declaration made by it if -
 - (i) an application has been made to the Court for an order under s. 45 of the Principal Act;
 - (ii) an application has been made to the Court under sub-section 60(5) of the Principal Act for an order to protect the rights of any person affected by unacceptable conduct; or
 - (iii) the Court has revoked the order. (New sub-section 60A(9)).