

AUSTRALIAN CAPITAL TERRITORY
COMPANIES (AMENDMENT) ORDINANCE (NO. 2) 1980

No. 53 of 1980
EXPLANATORY STATEMENT

The purpose of this statement is to explain the provisions of the Companies (Amendment) Ordinance (No. 2) 1980, which is an Ordinance to amend the Companies Ordinance 1962 (hereinafter referred to as the Principal Ordinance).

2. The major amendments that are made to the Principal Ordinance by the amending Ordinance are:-

- . to repeal Part VIA of the Principal Ordinance and insert a new Part VIA relating to special investigations;
- . to amend the Principal Ordinance to include "defaulting officer" provisions;
- . to strengthen the powers of the Registrar of Companies to inspect records of companies.

3. These amendments bring the substantive A.C.T. law relating to special investigations and defaulting officers into line with the substantive law in force in the 4 States that are parties to the Interstate Corporate Affairs Agreement (N.S.W., VIC., QLD., W.A.), subject only to such modifications as are necessary to make the amendments compatible with other relevant legislation relating to the A.C.T. (e.g. the Interpretation Ordinance and the criminal law). As the proposed Commonwealth/State co-operative scheme will be based on the current Companies and Securities Industry Acts of the ICAC States, these amendments should facilitate the integration of the A.C.T. into the co-operative companies and securities scheme.

4. The opportunity has also been taken to make some other miscellaneous amendments to the Principal Ordinance.

5. The substantive amendments contained in this amending Ordinance will come into operation on 1 February 1981 (see cl. 3). Details of the substantive amendments are dealt with below and have been grouped as follows:-

- (a) paras 6 to 43: special investigations (see cls. 4, 7, 9, 10, 11, 13 (s. 367) and 18).
- (b) paras 44 to 66: defaulting officers (see cls. 6, 8, 12, 13 (ss. 367A to 367C) and 14.
- (c) paras 67 to 71: certain miscellaneous amendments (see cls. 5, 15 and 16)

SPECIAL INVESTIGATIONS

6. Part VIA of the Principal Ordinance has, at present, two Divisions, one dealing with inspections and one dealing with special investigations.

7. Part VIA of the Principal Ordinance is repealed and replaced by a new Part VIA (Cl. 7). The new provisions are designed to bring Part VIA into line with the corresponding provisions in the N.S.W. Companies Act (subject to the qualifications set out in para. 3).

EGGLESTON COMMITTEE: THIRD INTERIM REPORT

8. The provisions at present in Part VIA of the Principal Ordinance are the provisions of the uniform companies legislation (then known as Divisions 3 and 4 of Part VI of the legislation) that were reviewed by the Company Law Advisory Committee ('Eggleston Committee') in its Third Interim Report (2 June 1969).

9. The main recommendation of that Report was that the existing provisions of the uniform companies legislation relating to inspections and to special investigations should be integrated.

10. The various recommendations contained in this Report were accepted by the Standing Committee of Commonwealth and State Attorneys-General except for two recommendations which related to -

- (a) the publication of reports; and
- (b) the payment of costs.

11. The companies legislation of the five mainland States was amended to give effect to those of the recommendations of the Third Interim Report that were accepted by the Standing Committee. These amendments came into force on the following dates :-

. N.S.W.	:	31 December 1971
. VIC.	:	6 December 1971
. QLD.	:	1 January 1972
. S.A.	:	5 October 1972
. W.A.	:	15 April 1974

SUBSEQUENT DEVELOPMENTS IN THE ICAC STATES

12. Since then Part VIA has been further amended in N.S.W., QLD., VIC. and W.A. (the 4 States that are members of the Interstate Corporate Affairs Commission) to take account of various problems that had arisen in the course of administering the legislation. The latest of these amendments came into effect in these four States on 1 March 1976. These amendments concerned (inter alia) -

- . authorisation of investigations by the Minister;
- . Power of inspectors to act independently (one of several joint inspectors may act independently of the other inspectors);
- . Power to amend terms of reference.

THE PRESENT AMENDMENTS TO THE A.C.T. COMPANIES ORDINANCE

13. The amending Ordinance (see cl. 7) implements those recommendations of the Eggleston Committee that were accepted by the Standing Committee and includes the subsequent amendments to Part VIA that have been adopted in N.S.W., QLD., VIC. and W.A. (subject to the qualifications referred to in para 3).

14. One result of the repeal of the present Part VIA is that the right of a company under Division 1 of that Part to conduct private investigations of its affairs by appointment of an inspector on special resolution has been abolished. However, it is still possible under the new section 169 for various parties, including the company itself or its members (sub-section 169(2)), to apply to the Minister for an investigation into its affairs.

Interpretation and Application

15. The new section 168 contains various interpretation and application provisions.

16. Part VIA does not apply to an investigation into the affairs of a corporation in relation to insurance or life insurance business (new sub-section 168(2)), as such business is regulated by other legislation.

17. One of several joint inspectors can exercise his powers independently of the other inspector or inspectors (new sub-section 168(3)). In this context an inspector is a person appointed by the Minister under Part VIA, not a person authorised by the Registrar under section 7.

Appointment of Inspectors

18. Applications for the appointment of an inspector may be made to the Minister (new section 170). The Minister may appoint an inspector to investigate the affairs of a company where it appears to him that it is in the public interest or that its affairs are being conducted to the prejudice of members, creditors or holders of debentures or interests in the company.

Conditions, etc., of Appointment of Inspector

19. The instrument appointing the inspector must contain full particulars of the appointment, which may be subject to conditions. The Minister has the power to investigate all affairs or particular affairs of a company. Notice of the appointment of an inspector and of the termination of an appointment are to be published in the Gazette (new section 171).

Investigation of Affairs of Related Corporations

20. An inspector investigating a corporation may be appointed by the Minister to investigate affairs of a related corporation (new section 172).

Power of Inspectors

21. An inspector may require an officer of the company being investigated to produce books relating to the affairs of the company, to give reasonable assistance with the investigation, and to appear before the inspector for examination on oath or affirmation. The inspector is required to furnish the officer with a certificate in the prescribed form stating that he is an inspector and that he believes the person to be an officer of the company. The inspector may take possession of books produced to him under this Part. The books may be inspected by persons otherwise entitled to inspect them at all reasonable times (new section 173).

Examination by Inspector

22. An officer of a company being investigated is obliged to comply with the requirement of an inspector under new section 173, and is prohibited from knowingly furnishing false information, making false statements or refusing to take an oath or affirmation (new sub-section 174(1)). Legal representation is permitted (new sub-section 174(2)) and incriminating answers will not be admissible in certain circumstances in other criminal proceedings (new sub-section 174(3)).

23. A person is given protection against civil action as a result of compliance with a requirement of an inspector (new sub-section 174(4)). A person required to attend for examination by an inspector is entitled to expenses (new sub-section 174(5)).

24. Where an officer fails to comply with a requirement of an inspector, the inspector may apply to the A.C.T. Supreme Court (hereinafter referred to as the 'Court') for an order that the officer comply. If the failure was unlawful the officer may be punished (new section 175).

Notes of Examination

25. An inspector may cause notes to be made of an examination under this Part (new sub-section 176(1)). Notes recorded in writing are to be signed by the person concerned and may (subject to new sub-section 176(5)) be used as evidence in any legal proceedings against him (new sub-section 176(2)). Where a person examined fails to sign notes of an examination, the inspector certifies as to their accuracy and they may be used in evidence in any legal proceedings (new sub-section 176(3)).

26. A person who has signed the notes of his evidence may obtain a copy of these notes (new sub-section 176(4)). Where a person claims that an answer to a question may incriminate him, notes cannot be used as evidence in criminal

proceedings, other than under new sub-section 174(1) or proceedings involving charges of false testimony (new sub-section 176(5)).

27. The Minister may provide a copy of the notes to a legal practitioner acting for a person contemplating legal proceedings relating to matters investigated (new sub-section 176(7)). Certain restrictions are placed on the use of these notes (new sub-section 176(8)).

28. Where a person alleges that the notes are inaccurate, details of these allegations are to be recorded (new sub-section 176(10)) and these details are to be attached to the notes (new sub-section 176(11)).

Delegation of Powers etc. by Inspector

29. An inspector may, by instrument in writing, delegate all or any of his powers except the power of delegation, the power to administer an oath or affirmation and the power to examine on oath or affirmation (new section 177).

Reports by Inspectors

30. Reports by inspectors are dealt with in new section 178. Provision is made for the making of interim reports as well as a final report on the completion or termination of the investigation (new sub-section 178(1)).

31. An inspector may pass books in his possession to the Minister when making a report on the investigation and the Minister may retain the books for the purpose of instituting and prosecuting legal proceedings (new sub-section 178(2)).

32. The Minister has a discretion not to furnish anyone with a copy of the whole or any part of the report if he thinks there is good reason for not divulging its contents (new sub-sections 178(3), (4) and (5)). These provisions are designed to ensure that legal proceedings are not prejudiced by publication of a report. Otherwise the company concerned and the applicant for the appointment of the inspector are

entitled to a copy of a final report.

33. Copies of notes that are forwarded with the report to the Minister may be supplied to such persons and on such conditions as the Minister thinks fit (subject to new section 176 and new sub-section 178(4)), and a penalty is imposed for contravention of a condition (new sub-sections 178(7) and (8)).

34. The Minister can by notice in writing require an officer of a company that has been investigated to give assistance where a prosecution is proposed. An officer likely to be a defendant is excluded (new sub-section 178(9)).

35. The Minister can cause proceedings to be instituted for the recovery of damages or property in the name of the company, where it appears to him to be in the public interest to do so, following the examination of the inspectors report (new sub-section 178(11)).

36. A court in which proceedings are brought may order a copy of a report made under this Part to be given to that company or person to which it relates (new sub-section 178(13)).

Costs of Investigation

37. While the expenses of an investigation are initially paid by the Commonwealth, the Minister can apply to the Court for an order that the expenses or part of them should be paid by the company (new section 179).

Concealing etc. Books of Company

38. It is an offence to conceal or destroy or to send out of the Territory the books of a Company under investigation (new section 179A). A defence is provided in new sub-section 179A(2) where the defendant did not act with intent to defeat the operation of this Part or to delay or obstruct the carrying out of an investigation under this Part.

Orders may be made by the Court

39. An inspector can apply to the Court for various orders concerning rights, issue, transfer, acquisition and sale of shares where it appears that certain facts relating to a company cannot be ascertained because of the failure of a person to comply with the requirements of an inspector under new section 173 (new sub-section 179B(1)). The Court has a discretion in relation to the order (new sub-section 179B(2)) and the inspector or person aggrieved can apply for a variation or revocation of the order which may be made also at the court's discretion (new sub-section 179B(3)).

40. It is an offence not to comply with an order made by the Court under section 179B (new sub-section 179B(6)). The Minister's consent is necessary for a prosecution under this section (new sub-section 179B(8)).

Application for Winding-up

41. The Minister can apply to the Court for the winding-up of a company that has been the subject of a report by an inspector appointed under Part VIA (new section 180).

Consequential Amendments

42. As a result of the new provisions relating to special investigations, consequential amendments have been made to the following sections of the Principal Ordinance:

- . section 221 (which deals with applications for winding up) (cl. 9);
- . section 222 (which deals with the circumstances in which a company may be wound up by the Court (cl. 10); and
- . section 292 (which deals with the priorities in a winding up (cl. 11)).

43. An inspector or a person authorised by him under new section 177 cannot require a qualified legal practitioner to disclose privileged communications, except the name and address of his client (cl. 13 - new section 367).

DEFAULTING OFFICER PROVISIONS

44. The 'defaulting officer' provisions are so called because they were first introduced in Victoria by the Companies (Defaulting Officers) Act 1966. The purpose of that Act was summarised by the Honourable R.J. Hamer in his second reading speech as follows :-

'to strengthen and extend the powers under the Companies Act to investigate and take action against officers of a company who, because of their conduct, fall within the category of "defaulting officers".'

45. The effect of the introduction of the defaulting officer provisions into the Principal Ordinance is

- (a) to repeal ss. 300-305 of the original version of the uniform companies legislation (dealing with offences and the personal responsibility of officers of companies in liquidation) (cl. 12);
- (b) to insert ss. 367A-367C relating to the examination of defaulting officers and the assessment of damages against delinquent officers (this includes the matters dealt with in s. 305 of the original uniform companies legislation) (cl. 13);
- (c) to insert ss. 374A-374G, which contain similar provisions to those contained in ss. 300-304 of the original uniform companies legislation but which, like ss. 367A-367C, now apply to situations other than situations in which the company is being wound up (cl. 14).

46. The Standing Committee of Attorneys-General agreed that the uniform companies legislation should be amended to include these defaulting officer provisions. This has been done in the 5 mainland States, where these provisions first came into force on the following dates :-

N.S.W.	:	1 January 1972
QLD.	:	31 December 1971
S.A.	:	5 October 1972
VIC.	:	20 December 1966
W.A.	:	25 November 1969.

Minor amendments have since been made to these provisions - the latest series of amendments in N.S.W., QLD., VIC and W.A. came into force on 1 March 1976.

Repeal of sections 300-305

47. Sections 300-305 inclusive of the Principal Ordinance are repealed (cl. 12). These sections dealt with the following matters :-

- Section 300 - offences by officers of companies in liquidation;
- Section 301 - inducement to be appointed liquidator; falsification of books;
- Section 302 - frauds by officers;
- Section 303 - liability where proper accounts not kept;
- Section 304 - responsibility for fraudulent trading; and
- Section 305 - power of Court to assess damages against delinquent officers, etc.

Clause 13 inserts the substituted provisions.

Power to Examine Defaulting Officers

48. The A.C.T. Supreme Court can order the examination of an officer or former officer of a company if :-

(a) the company

- . is in the course of being wound up;
- . is under official management;
- . has an inspector appointed to examine its affairs;
- . has had a receiver or manager appointed;
- . has ceased to carry on business or is unable to pay its debts; or
- . has entered into a compromise or scheme of arrangement with its creditors (new section 367C)

and

(b) the Court is satisfied, on the application of the Minister, that the officer or former officer may have rendered himself liable to action by the company in relation to the performance of his duties (new sub-section 367A(1)).

49. The examination is not held in open Court unless the Court otherwise directs (new sub-section 367A(2)).

50. The examination takes place under oath and an officer must answer questions put to him. Where an officer claims that an answer to a question may incriminate him, the answer may not be used in any subsequent criminal proceedings except on a charge of false testimony in relation to that answer (new sub-section 367A(5)). A person examined may be legally represented (new sub-section 367A(6)).

51. Notes in writing are made of the examination and signed by the officer examined, and may be copied by him, the Minister or with the consent of the Court, any creditor or member of the company. The notes may be used as evidence in legal proceedings (new sub-section 367A(7), but subject to new sub-section 367A(5)), and where the person refused or fails to sign them, the Court is to certify in writing their accuracy (new sub-section 367A(8)).

52. Where the Court thinks the application for examination was made without reasonable cause, it may order costs against the applicant (new sub-section 367A(10)).

Power of Court to Assess Damages Against Defaulting Officer

53. The Court may, on the application of the Minister or certain other persons (see new sub-section 367B(2)), make orders against a person who has misapplied, retained, become liable or accountable for money or property of certain companies (see para. 48 above) or has been guilty of any negligence, default, breach of duty or trust of a company in that category of companies.

54. The Court may order that the defaulting officer attend before the Court to be examined, that he repay or restore money or other property or part thereof, or that he pay such sum, by way of damages, as the Court thinks fit.

Offences and Personal Responsibility

55. New sections 374A to 374H create offences and impose personal liability on officers in certain circumstances (clause 14). Except for new sections 374F, 374G and 374H, they are derived from the repealed sections 300 to 304. The major difference between the new sections and the repealed sections is that the new sections apply in a wider range of cases (as set out in new section 374E).

Offence by Officers of Certain Companies

56. A number of offences are created by clause 14 which may appear in the course of a winding up or in certain other circumstances (new section 374A as applied by new section 374E).

57. This offence provision replaces section 300 of the original uniform companies legislation. The major differences are as follows :-

- . While s. 300 only applied to a company in liquidation s. 374A also applies to the other situations listed in s. 374E;
- . Some of the offences under s. 300 are limited to acts and omissions occurring within 12 months of the commencement of the winding up. That period is extended by s. 374A to within 5 years from the 'relevant day' as defined in s. 374E; and
- . In s. 300(1) and (3) the penalty is imprisonment for 2 years in each case. In s. 374A(1) the penalty is \$5,000 or imprisonment for 2 years. In s. 374A(3) the penalty is \$2,500 or imprisonment for 1 year.

Liability where Proper Accounts not Kept

58. It is an offence to fail to keep proper books of account for a period of two years before the 'relevant day' (new section 374B). A company under section 161A of the Ordinance is required to keep accounting records that correctly record and explain the transactions and financial position of the company.

Offences

59. New section 374C deals with the contracting of debts where there is no expectation that the company will be able to pay them and the carrying on of business with the intent to defraud creditors. An officer of a company is guilty of an offence where he was a party to the contracting of a debt by the company and had no reasonable grounds for expecting that the company would be able to pay the debt (new sub-section 374C(1) - as applied by new section 374E).

60. A person who is knowingly a party to the carrying on of any business with the intent to defraud creditors is guilty of an offence (new sub-section 374C(2)).

Powers of Court

61. The Court may order a person convicted of certain offences (created by sub-sections 303(3), 304(4) or 374C(1) or (2)) in connection with the trading of the company to be personally responsible for specified debts of the company without limitation of liability (new section 374D). (Cf. s. 21B of the Commonwealth Crimes Act).

Application : New Sections 374A - 374D

62. New section 374E(1) will provide that sections 374A to 374D inclusive apply to a company -

- (i) that is in the course of being wound up;
- (ii) that is under official management;
- (iii) where an inspector has been appointed;
- (iv) where a receiver or manager has been appointed;
or
- (v) that has ceased to carry on business or is unable to pay its debts.

Inducement to Secure Appointments

63. It is an offence for a person to offer an inducement to secure his own appointment as a liquidator or as an official manager (new sub-section 374F(1)).

Falsification of Books

64. It is an offence to destroy or falsify books with intent to deceive (new sub-section 374F(2)). This sub-section will apply to 'any company', whereas its predecessor, sub-section 301(2), only applies in the case of 'a company being wound up'.

65. A person who commits a fraud against creditors of a company while an officer of a company is guilty of an offence (new section 374G). This new section applies to an officer of any company, whilst the former provision (section 302) applied to officers of a company which was subsequently ordered to be wound up or which subsequently passed a resolution for winding up.

Disqualification by Court of Directors, etc.

66. The Court can make an order prohibiting certain persons from acting as directors or from being concerned with the management of the company in certain circumstances (new section 374H). The Minister can apply to the Court for an order that a person be prohibited from taking part in the management of a company for a period of up to five years. The Minister may make the application if the person concerned is involved during a period of seven years, with the management of two or more companies which become insolvent. Before an order may be made it must be proved in each case that the management of the company contributed to the insolvency.

MISCELLANEOUS AMENDMENTS

Delegations

67. The Minister is now able to delegate any of his powers or functions to a person holding or performing the duties of an officer included in the First or Second Division of the Australian Public Service, except the power of delegation and the power to make Regulations under the Ordinance. The power or function delegated is to be exercised in accordance with the instrument of delegation (cl. 16 - new section 385).

Inspection of Books

68. The provisions relating to the inspection of books in section 7 of the Principal Ordinance have been amended to overcome administrative difficulties encountered by the Registrar and enables the Registrar, with the Minister's consent, to also inspect bankers' records which relate to a corporation (cl. 5).

69. Following these amendments, the provisions relating to the inspection of books are as follows :

- . for the purpose of ascertaining whether the provisions of the Ordinance are being or have been complied with the Registrar or a person authorised by him may inspect -
 - (a) any books required to be kept under the Ordinance by a corporation or a person in respect of a corporation
 - (b) books that relate to a corporation, being books kept by a banker where Ministerial consent has been given (new sub-section 7(7)).
- . a person who holds books of a corporation may be required to produce them (new sub-section 7(7A));

- . a person who has any information as to where the books are situated may be required to give that information (new sub-section 7(7B));
- . a person requiring another person to produce books must furnish evidence that he is so authorised (new sub-section 7(10)).

Other Amendments

70. Limits on the length of imprisonment and the amount of a fine for one offence that can be imposed by a Court of summary jurisdiction are introduced by clause 15.

71. Transitional provisions are included to cover existing investigations under Part VIA of the Principal Ordinance (cl. 18).

72. The Ordinance was considered by the A.C.T. Legislative Assembly, which recommended that whenever the Registrar inspects a banker's books in relation to a corporation, the corporation in question should be notified. The introduction of such an obligation would, in many cases, hamper the course of the Registrar's enquiries by prematurely disclosing that the Registrar was enquiring into the affairs of the company, and the recommendation has not been accepted. There is no similar provision in the legislation of the I.C.A.C. States.

Ord. No. 69/80