

AUSTRALIAN CAPITAL TERRITORY

COMPANIES ORDINANCE 1973

EXPLANATORY MEMORANDUM

INTRODUCTION

The Companies Ordinance 1973 (referred to in this memorandum as 'the Ordinance') amends the Companies Ordinance 1962-1972 ('the Principal Ordinance') so as to give effect to the recommendations concerning accounts and audit contained in the first interim report made to the Standing Committee of Commonwealth and State Attorneys-General by the Company Law Advisory Committee ('the Eggleston Committee'). As well as making certain other amendments consequential to those relating to accounts and audit, the Ordinance effects a number of amendments of a miscellaneous nature to various provisions of the Principal Ordinance.

2. Some of the more important amendments in the area of accounts and audit are described in this memorandum, and mention is made of some of the matters dealt with in the various miscellaneous amendments. A more detailed (but not exhaustive) examination of the amending provisions is contained in the document appended to this memorandum.

Accounts and Audit

3. Legislation based on the Eggleston Committee's report on accounts and audit has been passed in New South Wales, Victoria and Queensland. It is proposed to pass similar legislation in the other States and in the Northern Territory. The amendments relating to accounts and audit are contained in section 45 of the Ordinance which repeals sections 161 to 167A of the Principal Ordinance and substitutes new sections 161 to 167C.

4. The Eggleston Committee expressed its approval of greatly expanding the information that directors are required to give to shareholders in company accounts and in their annual report. The new section 162, accordingly, requires the disclosure in a company's accounts of more information than has been given in the past. In particular, provision is made for the preparation of group accounts in the case of a holding company. Moreover, the section provides that the accounts should comply with those requirements of the Ninth Schedule that are applicable to them. The Ordinance substitutes a new Ninth Schedule requiring more detailed disclosure than the Ninth Schedule at present in force.

5. New section 162A extends considerably the matters that will be required to be contained in directors' reports. For example, the following matters will now have to be stated -

- the principal activities of the company in the course of the financial year and any significant change in the nature of those activities during that period; and
- whether the directors, before the accounts were prepared, took reasonable steps to ascertain what action had been taken in relation to the writing off of bad debts and the making of

provisions for doubtful debts, and to cause all known bad debts to be written off and adequate provision to be made for doubtful debts.

6. The Eggleston Committee recommended the establishment of a Companies Commission with power to grant relief in appropriate circumstances from compliance with the statutory requirements relating to accounts and with power also to add to or vary those requirements. The Committee made this recommendation because of its concern that the statutory requirements might in some circumstances operate harshly or prove impossible of performance. The Standing Committee of Attorneys-General agreed that there was a need for a dispensing power but decided that this should be exercised by the Registrars of Companies.

7. The dispensing power of the Registrar is granted by section 162C which provides for the directors of a company to apply to the Registrar for an order relieving them from compliance with any specific requirement of the Ordinance relating to the form and content of either the accounts or the directors' report. The section provides for an appeal to the Companies Auditors Board from a decision of the Registrar with a further appeal on the part of the directors to the Supreme Court.

8. Sections 165 to 167B deal with the qualification, appointment and duties of auditors. At present there is no obligation on an exempt proprietary company to appoint an auditor if all its members agree that such an appointment is unnecessary, nor is there any obligation on the company to lodge accounts. Under new sections 165A and 165B an exempt proprietary company may dispense with the appointment of an auditor only where the company is unlimited, or where the directors lodge certified accounts with the Registrar.

9. The Eggleston Committee took the view that an auditor should be provided with greater security of tenure than he has under the existing law. Accordingly, new section 166 provides that auditors should hold office until death, removal or resignation instead of having to be re-elected annually as at present. Section 166B provides that an auditor can be removed from office only by resolution of the company at a general meeting of which special notice has been given and makes provision for the auditor to make written representations to the members of the company prior to the meeting.

10. Section 166B provides, also, for the resignation of auditors. Henceforth an auditor will be able to resign only with the consent of the Companies Auditors Board or, on appeal, the Supreme Court. This provision will ensure that an auditor will not be able to resign in order to avoid disclosing breaches of the law. Section 167 is relevant in this regard in that it places an auditor under a duty, in certain circumstances, to report breaches of the Ordinance to the Registrar. The Eggleston Committee took the view that a requirement of this nature would strengthen the position of auditors.

11. Other important amendments to the audit provisions are section 166C which provides that the reasonable fees and expenses of an auditor are to be paid by the company - at present fees are frequently fixed before work is done and may prove to be inadequate - and section 167B which expressly declares that

an auditor has a qualified privilege in respect of a statement that he makes in the course of his duties as auditor. The Eggleston Committee regarded a provision of this nature as helpful in allaying fear on the part of auditors of actions for defamation in respect of adverse comments in their reports.

Other amendments

12. As mentioned in paragraph 1 above, the Ordinance contains a number of amendments of a miscellaneous nature that are unrelated to the accounts and audit provisions. They are similar, in the main, to amendments that have been made to the Companies legislation in New South Wales, Victoria and Queensland. The amendments give effect to proposals made over a long period and which it is convenient to incorporate in the legislation at this time.

13. Among the matters that are dealt with in the amendments are the following -

- . amendment of the fees schedule,
- . reservation of the name of an intended foreign company,
- . conversion of a limited company to unlimited and no liability company to one limited by shares,
- . exemption from keeping a register outside the place of incorporation in certain circumstances,
- . instruments of transfer,
- . registration of charges,
- . age limit for directors,
- . number of members for requisitioning extraordinary general meetings,
- . calling of meetings,
- . priorities in a winding up and in a receivership,
- . release of official manager,
- . powers of liquidators, and
- . number of directors.

APPENDIX

Section 5 of the Ordinance incorporates some additional or revised definitions for the purposes of the Principal Ordinance.

'books' - is now defined to cover every form of record whether in writing or maintained on micro-film or by electronic process.

'Company limited both by shares and guarantee' Although such a company is mentioned in the Principal Ordinance there has not, hitherto, been a definition.

'Emoluments' - A new definition is provided to make it clear that reimbursement of actual out-of-pocket expenses is not included.

'Foreign Company' - has been redefined to exclude from the scope of the Ordinance bodies incorporated outside the Australian Capital Territory but within the Commonwealth that are public authorities or Crown instrumentalities.

'Profit and Loss Account' - this definition has been extended to include operations accounts in respect of mining exploration.

'Related corporation' - is a new definition which makes no change in the law, but is included for the sake of convenience.

'Undischarged Bankrupt' - this definition makes no change in existing law, but is included to allow for the use of a short form of words in other provisions of the Ordinance.

Section 7 amends sub-section (9.) of section 7 of the Principal Ordinance by setting out more precisely the secrecy provisions of the Ordinance governing the inspection of company records by the Registrar and his officers.

Section 8. This provision clarifies the existing position that the Auditors Board has powers not specifically listed in the section, e.g. the consideration of appeals from decisions of the Registrar.

Section 9 repeals sub-sections (1.) to (6.) of the existing section 9 relating to registration of company auditors and liquidators, as the matters covered in those provisions are now included in the new audit provisions. Sub-section (7.) of section 9 of the Principal Ordinance is amended to provide that a person seeking registration as a company auditor must have practical accountancy experience as well as formal qualifications. A new sub-section (7A.) provides that an application for registration as a company auditor may be refused if the applicant is not a resident of Australia.

Section 11 contains two amendments: the first slightly expands the existing sub-section (5.) of section 12. The second amendment is necessitated by the removal of Commonwealth Archives from the National Library to the Commonwealth Archives Office.

Section 12 is designed to overcome technical difficulties in relation to the names of foreign companies.

Section 13 amends section 24 of the Principal Ordinance by extending the category of companies that may be granted a licence, to include companies formed for patriotic purposes. In addition, the automatic exemption from the requirement to file an annual return and return of directors is repealed, and an exemption is now available at the discretion of the Attorney-General.

Section 14 contains a re-enactment of section 25 of the Principal Ordinance and, whilst the form is different, the only substantial change is the provision that enables a limited company to convert to an unlimited company.

Section 15 makes minor drafting changes to section 54 of the Principal Ordinance to achieve clarity.

Section 16 effects minor drafting changes to section 62 of the Principal Ordinance.

Section 19 introduces new sub-sections into section 84 of the Principal Ordinance giving statutory exemption from the provisions of sub-section (1.) of section 84 of the Principal Ordinance in specified circumstances. At present the Attorney-General can grant this exemption to management companies upon application.

Section 21 amends section 95 of the Principal Ordinance to the extent that the section is widened to cover the transfer of interests within the meaning of section 76 and to enable personal representatives to make proof by statutory declaration instead of by affidavit.

Sections 22 to 24 effect a number of amendments to sections 96-98 of the Principal Ordinance. These amendments are necessitated by the amendment of section 95 to include interests within the meaning of Division 5 of Part IV.

Section 25 amends section 99 of the Principal Ordinance to take account of the enlargement of that section to cover interests within the meaning of Division 5 of Part IV.

Section 26 amends section 111 of the Principal Ordinance by requiring a company to have a registered office as from the date of incorporation. Previously a company was required to have an office as from the day on which it began to carry on business or as from the fourteenth day after incorporation whichever was the earlier.

Section 28 amends section 114 of the Principal Ordinance by requiring that all companies must have at least two directors. Any articles of a proprietary company containing a provision for the appointment of only one director are deemed to be amended by this section to provide for the appointment of two directors.

Section 29 of the Ordinance contains minor amendments and an amendment that will, in some circumstances, enable persons over the age of 72 years to hold office as directors.

Section 30 makes minor drafting amendments to section 122(1.) of the Principal Ordinance.

Section 31 substitutes a new sub-section (4.) in section 123 of the Principal Ordinance and broadens the existing provision in respect of disclosure by a director of an interest in any contract with the company.

Section 32 gives effect to the recommendations in the Eggleston Committee's Fourth Interim Report. The existing section 124 is re-drafted but without change in substance.

The proposed new section 124A makes an officer of a corporation liable for loss suffered by a person where he deals with the officer and the officer has inside information if, in that dealing, that person paid more for the shares than he would have paid if the inside information had been publicly known.

Section 33 re-enacts existing legislation relating to the register of director's shareholdings. Directors are obliged to give to the company the information that is necessary to maintain the register. The proposed new provision is more detailed but no policy change is involved.

Section 34 amends section 131 of the Principal Ordinance to enable shareholders to elicit information from the company concerning not only the emoluments of directors but also the 'other benefits' received by them from the company.

Section 35 makes minor consequential amendments to section 132 of the Principal Ordinance.

It also provides a specific penalty of \$100 and a default penalty for breaches of the section, whereas the general penalty section in the Principal Ordinance previously applied.

Section 36 amends section 134 of the Principal Ordinance to provide that the Register of Directors of a company shall contain the written consent of a director to his appointment as manager or secretary of the company.

Section 37 extends the power of the Registrar in relation to the extension of time for the holding of the annual general meeting of a company.

Section 38 alters the present provision in section 137 of the Principal Ordinance relating to the convening of general meetings by providing that the directors shall also convene such a meeting on the requisition of not less than two hundred members.

Section 39 amends section 138 of the Principal Ordinance by providing that, instead of seven days notice, there shall be fourteen days notice of the calling of a company meeting.

Section 41 amends section 141 of the Principal Ordinance in relation to proxy voting.

Section 42 extends the prohibition against entering notices of trust on a company register to branch registers.

Section 44 inserts a new section 159A in the Principal Ordinance the effect of which is to require an exempt proprietary company to include in its annual return a statement by the auditor as to whether a company has kept proper accounting records and whether the accounts have been duly audited, and further, whether there has been any defect or irregularity in the accounts.

Section 45 remakes, with amendments, the provision relating to accounts and audit.

New section 161 contains a series of definitions for the purposes of the accounts and audit provisions and the Ninth Schedule.

New section 161A substantially re-enacts the provisions of section 161 of the Principal Ordinance and provides for the keeping of accounting records.

New section 161B re-enacts the provisions of section 161A of the Principal Ordinance.

New section 162 remakes the provisions dealing with the laying of the accounts and group accounts before the annual general meeting of a company.

Sub-section (7.) of this section contains a significant provision which requires directors, before making out the profit and loss accounts and balance sheet, to take reasonable steps to -

- (a) ascertain what action has been taken in relation to the writing off of bad debts and the making of provisions for doubtful debts and requires them to cause "all known bad debts to be written off and adequate provision to be made for doubtful debts";
- (b) ascertain whether any current assets (apart from sundry debtors) are unlikely to realize their book values, and if so, to cause them to be written down to an amount which they might be expected to realize, or to cause adequate provision to be made for the difference in value; and
- (c) ascertain whether non-current assets are shown at a book value in excess of the amount of their acquisition value at the end of the financial year, and, unless the asset is written down, to ensure that the accounts contain notes that will prevent them from being misleading by reason of the overstatement of the value of that asset.

5.

Sub-sections (10.) and (11.) require directors to make a statement with respect to the accounts or group accounts before they are audited as to whether, in their opinion, they are drawn up so as to give a true and fair view of the profit or loss and state of affairs of the company or group of companies.

Sub-section (12.) requires a statement of the principal accounting officer of the company as to whether the accounts give a true and fair view of the affairs of the company.

Section 162A deals with the making and contents of the directors' report. The matters to be dealt with in the directors' report are considerably extended.

Paragraphs (a), (b), (c), (e), (g), (h), (i), (j), and (o) of sub-section (1.) relate to material not previously dealt with. The most important matters are contained in paragraphs (g) and (h) relating to bad and doubtful debts, paragraph (i) relating to the valuation of current assets and paragraph (o) which requires the directors to report on any material and unusual matters which have arisen since the end of the financial year that are likely to affect the results of the company's operations in the subsequent year.

Sub-section (2.) deals with the directors' report on the group accounts.

Paragraph (c) requires the directors to state the separate contribution of each company in the group to the consolidated profit and loss.

Paragraph (d) requires the report to state the name of any subsidiary acquired or disposed of during the year, the consideration for the acquisition or disposition and the net tangible assets of the subsidiary, and, where the subsidiary is not wholly-owned, the extent of the holding company's interest in the subsidiary.

Paragraph (h) requires the disclosure of dividends paid by the subsidiary between the end of the previous financial year and the date of the report.

For the purposes of sub-sections (1.) and (2.), the directors are now required to take reasonable steps to inform themselves about certain matters required to be disclosed in their report.

Sub-section (4.) exempts an exempt proprietary company from certain of the provisions relating to directors' reports.

Sub-section (5.) requires the directors to disclose the name of the corporation that they believe to be the company's ultimate holding company and, if known, the place in which that holding company is incorporated.

Sub-sections (6.) to (8.) require disclosure of options and extend the existing provisions.

Sub-section (9.) requires directors to disclose in their report any benefits received by a director under a contract with the company or a related corporation which are not included in

the disclosure of emoluments. This is designed to bring to notice contracts made between the company and individual directors.

The new section 162B requires the directors of the holding company, before they cause the group accounts and the reports thereon to be made out, to have presented to them the accounts and report by the subsidiary company's directors, and enables directors of the holding company to require the directors of the subsidiary to provide all such information as is required for the preparation of the group accounts and the report of the directors of the holding company.

The section also provides that where the directors of a holding company are unable to obtain the relevant information from a subsidiary company, they may omit the accounts of that subsidiary from the group accounts, and qualify their report accordingly.

The new section 162C gives the Registrar extensive powers to relieve directors from the particular requirements of the Ordinance relating to the form and content of accounts and reports and to substitute more appropriate requirements in particular cases.

Sub-section (5.) requires the Registrar, before determining an application as to the form and contents of accounts, to take into account the views of the Registrars in the other States and Territories of the Commonwealth. This is designed to achieve uniformity of administrative action.

The new section 163 is the offence section in relation to failure to comply with the requirements referred to in the preceding provisions of Division 2, other than section 161A. It is a defence to a charge if a director proves that the omission of information was not intentional and that the information was immaterial and did not affect the giving of a true and fair view. By sub-section (4.) it is provided that the court must not impose imprisonment for an offence unless the offence was committed wilfully.

Section 164 deals with the supply of accounts or group accounts and reports to members, and extends to 14 days the minimum period before the annual general meeting within which those accounts and reports are required to be sent to members.

The new Division 3 (sections 165-167B) deals with the qualifications and appointment and duties of auditors.

Section 165 substantially re-enacts the provisions of section 9 of the Principal Ordinance. However, any firm of auditors appointed as auditor of a company must have at least one member resident in Australia.

Section 165A permits an unlimited exempt proprietary company to dispense with the services of an auditor.

Section 165B permits an exempt proprietary company to dispense with the services of an auditor if all the members agree and the secretary records a minute to that effect, and the accounts are lodged with the Registrar.

Section 166 deals with the appointment of auditors and has the effect of making an auditor's appointment continue until he is removed, dies or resigns. There is an exception in relation to the auditor of a company that becomes a subsidiary of another company. Such an auditor will not continue as auditor unless he is re-appointed at the next annual general meeting.

Section 166A deals with the manner of nominating auditors.

Section 166B deals with the removal and resignation of auditors. An auditor can only be removed by resolution at a general meeting of which special notice has been given, and he is given the right to make representations to the members. An auditor, other than an auditor of an exempt proprietary company, may not resign without giving notice to the Companies Auditors Board, and receiving the consent of the Board.

The provisions are designed to ensure that there is no substantial period during which there is no auditor, and to protect the rights of an auditor who is to be removed under this section.

Section 166C gives an auditor a statutory right to receive reasonable fees and reimbursement of expenses.

Section 167 deals with the powers and duties of the auditor in relation to the audit report. In the case of group accounts the audit report is required to specify the names of the subsidiary companies of which the auditor of the holding company has not acted as auditor, whether the auditor's report on the subsidiary company's accounts were qualified and, if so, particulars of such qualifications. It gives the auditor of the holding company a right of access at all reasonable times to the accounting and other records of any subsidiary company and entitles him to obtain from the officers and auditors of such subsidiary companies such information and explanations as he requires for the purpose of reporting on the group accounts.

Sub-section (8.) requires the auditor to report to the Registrar any breach of the Ordinance of which he becomes aware in the course of his duties, but only if in his opinion the matter has not been or will not be adequately dealt with by comment in his report or by bringing the matter to the notice of the directors.

Sub-section (9.) provides for a penalty to be imposed on an officer or auditor of a corporation who refuses access or information to an auditor of the corporation or of its holding company.

Section 167A substantially re-enacts the provisions of section 167A of the Principal Ordinance and extends the requirements relating to an auditor of a borrowing corporation to an auditor of a guarantor corporation.

Section 167B gives express statutory recognition of the qualified privilege enjoyed by auditors in relation to any action for defamation arising out of statements made in his report.

Section 167C makes special provision with respect to banking and life insurance corporations, and grants exemptions to such corporations in relation to their accounts and reports prepared in accordance with insurance and banking legislation. The exemptions apply to a banking or insurance corporation, whether it be a holding company or a subsidiary, but do not extend to a whole group of companies of which that banking or insurance company is a member.

Section 49 deletes from section 180B of the Principal Ordinance the offence provisions contained in sub-sections (3.) and (4.) of section 180B, which are re-enacted by section 77 into the offences division of the Ordinance. The re-enacted provisions concern reciprocity in relation to offences against company law and are designed to prevent avoidance of prosecutions because of jurisdictional technicalities.

Section 50 amends section 194 of the Principal Ordinance dealing with the submission by the company of a statement of affairs upon the appointment of a receiver.

Section 51 amends section 196 of the Principal Ordinance to rectify certain deficiencies in the provisions relating to priority and the commencement date of a winding up in section 292, and by inference section 196, revealed by the decision of the High Court in Stein v. Saywell (1969) 43 A.L.J.R. 183. The operation of the section is also extended to include claims by the Crown which may, previously, have been thought to be included as priority claims.

Section 53 re-enacts section 214(3.) of the Principal Ordinance with two new sub-sections giving more detailed provision relating to the notification of the appointment and retirement of deputy official managers.

Section 54 makes a number of amendments to section 218 of the Principal Ordinance with regard to the liability of present and past members of a company. These amendments are necessitated by the amendment to section 25 referred to above.

Section 55 inserts a new sub-section (3A.) in section 225 of the Principal Ordinance to provide that a contributor's petition for winding up will not fail merely because, on the making of the winding up order, there would be no assets available for the contributories.

Section 56 widens section 227 of the Principal Ordinance to provide that the Court shall be empowered to validate a disposition of property which takes place between the date of a winding up petition and the date of a winding up order, or to sanction, in relation to the same period, the carrying on of the company's business and incidental acts.

Section 57 repeals section 231 of the Principal Ordinance and replaces it by a provision similar to the former section 11, which is itself repealed. Former section 231 becomes section 231A in substantially the same form.

Section 58 amends the time for compliance with section 233, as provided for in sub-section (3.) from seven to fourteen days.

Section 59 amends section 234 of the Principal Ordinance to enlarge the classes of persons who are authorized to submit a statement to a liquidator.

Section 60 amends section 259(4.) of the Principal Ordinance to provide for a situation where another liquidator is appointed by the creditors of a company in place of the original liquidator.

Section 61 extends the powers of a liquidator in a voluntary winding up by amending sub-section (1.) of section 269 of the Principal Ordinance to allow a liquidator to fix a time limit within which debts and claims must be filed.

Section 62 enacts a new section 277A into the Principal Ordinance providing the grounds upon which a person can be disqualified from acting as a liquidator.

Section 63 amends section 291 of the Principal Ordinance by providing for a date for the computation of debts for the purposes of a winding up.

Section 64 amends section 292 of the Principal Ordinance to take account of the deficiencies shown in the section by the decision of the High Court in Stein v. Saywell referred to previously. The amended section gives greater recognition of the rights of employees in respect of wages owing prior to the relevant date, which is defined.

Section 70 amends sub-section (5.) of section 348 of the Principal Ordinance and extends the class of foreign companies exempted from having to lodge annual returns.

Section 72 repeals and substitutes section 362 of the Principal Ordinance enlarging the provisions dealing with service of documents on a company.

Section 73 repeals and substitutes section 364 of the Principal Ordinance with an improved section dealing with the disposal of shares of a shareholder whose whereabouts are unknown.

Section 74 amends sub-section (4.)(a) of section 374 of the Principal Ordinance which restricts the offering of shares for purchase by the public. Sub-section (4.)(a) provided an exemption in the case of shares quoted on, or in respect of which permission to deal had been granted by a Stock Exchange. The exception is limited by new sub-section (4.)(a) to shares quoted only.

Section 75 repeals and substitutes sub-section (2.) of section 375 of the Principal Ordinance relating to offences for the making of false and misleading statements, extending the offence to persons who authorize the making of such statements.

Section 76 inserts a new provision, section 375A, in the Principal Ordinance making it an offence for an officer of a corporation to wilfully make, or authorize the making of, a false report to officers or members of a company or a trustee for interest holders or auditors or to an officer of a prescribed stock exchange.

Section 77 inserts a new provision, section 378A, in the Principal Ordinance which provides for reciprocity in relation to offences committed in another jurisdiction.

Section 78 repeals the existing sections 379 and 380 of the Principal Ordinance and substitutes new provisions and default penalty provisions.

New section 379 provides for an offence of non-compliance with the Ordinance under all relevant provisions other than those which specifically provide for the commission of an offence and provide a penalty.

New section 380 provides for the imposing of a default penalty where the offence continues after conviction for an offence and provides, also, the maximum penalty, on a day-to-day basis, which may be imposed upon a further conviction in respect of the continuing offence.

Section 79 makes minor amendments to the Second Schedule.

Section 80 amends the Eighth Schedule by adding to the requirement for the contents of annual returns.

Section 81 repeals and substitutes the Ninth Schedule to the Principal Ordinance. The contents of the Schedule are expanded to incorporate the additional material which must be shown in profit and loss accounts and balance sheets as a consequence of the new section 162.

Section 82 provides for a Fourth Schedule to the amending Ordinance containing a miscellaneous collection of machinery amendments to the Principal Ordinance.

Section 83 provides transitional provisions where an existing company would be in breach of the new provisions upon the Ordinance coming into force. The provisions either grant a time limit within which the company must satisfy the new provisions or grants an exemption from compliance.

Section 84 is a transitional provision in respect of the new requirements for secretaries, delaying their operation for a period of up to six months in respect of existing proprietary companies.

Section 85 sets the date from which the additional requirements affected by the revised accounts and audit provisions come into force.

Section 86 is a transitional provision in respect of the appointment of auditors by exempt proprietary companies.