

Corporations

First Corporate Law Simplification Act 1995

- Robert Tobias, Partner,
Phillips Fox, Solicitors, Sydney.

Introduction

The *First Corporate Law Simplification Act 1995* ("Act") is the first stage of the Commonwealth Government's proposals to simplify the Corporations Law ("Law"). The Act came into force on 9 December 1995.

The three principal areas affected by the Act are:

1. Share buy-backs;
2. Proprietary company governance, incorporating the division of proprietary companies into small and large and the introduction of a small business guide;
3. The number and types of company registers.

SHARE BUY-BACKS

A company is allowed to buy back its own shares (other than redeemable preference shares) as follows:

Type of buy-back	Procedure
Equal access Scheme	Up to 10% within 12 months without shareholder approval
	More than 10% within 12 months with an ordinary resolution of shareholders
On-market	Up to 10% within 12 months without shareholder approval
	More than 10% within 12 months with an ordinary resolution of shareholders
Selective	Any amount with a special resolution of shareholders
Odd lot	Any amount without shareholder approval
Employee share scheme	Scheme must be approved by shareholders
	Up to 10% within 12 months without additional shareholder approval
	More than 10% within 12 months with an additional ordinary resolution of shareholders

The old procedures involving auditors, experts, advertisements and declarations have been replaced with new provisions which focus on solvency and consequent directors' liability.

Once the buy-back has occurred the shares must be cancelled and the ASC notified of their cancellation. 14 days prior notice to the ASC of the intended buy back is also required in most cases.

What are the different types of buy-backs?

Equal access buy-back scheme

An equal access scheme is a buy-back:

- which relates only to ordinary shares;
- where offers are made to every person who holds ordinary shares to buy back the same percentage of their holding;
- where all persons have a reasonable opportunity to accept the offer made to them;
- where buy-back agreements are not entered into until the specified time for acceptance of offers has closed;
- where the terms of the offers are the same.

The Act allows for minor differences to exist between the offers so that the buy-back scheme will still qualify as an equal access scheme.

In addition, the ASC has some powers to exempt companies which are unable to bring a buy-back proposal within the rules for an equal access scheme from the more stringent requirements for selective buy-backs.

On-market buy-backs

An on market buy-back is the buy back of shares in the ordinary course of trading on the ASX by a listed company.

Selective buy-backs

A selective buy-back is a buy-back which is not an equal access, on-market, employee share scheme or odd lot buy-back.

Odd lot buy-back

An odd lot buy-back is a buy-back of unmarketable parcels of shares by a listed company (odd lot buy-back).

Employee share scheme buy-backs

An employee share scheme buy-back is the buy-back of shares held by or for the benefit of employees or executive directors of the company or a related body corporate under an employee share scheme.

Disclosure of relevant information

Whenever a shareholder meeting is required to approve a buy-back proposal, the company is required to give each shareholder a statement setting out all the information known to the company that is material to a decision to approve the proposal.

Solvency

In the event that a share buy-back causes the company to become insolvent the *Act* makes the directors personally liable for the company's loss. In addition, if a buy-back does cause a company to become insolvent the liquidator may be able to recover compensation from the selling shareholders.

Changes in Control

The main takeover rules in the Law do not apply to a buy-back. However, if the ASC feels that the effect of a buy-back on the control of the company would be unreasonable, it may ask the Corporations and Securities Panel to declare that the buy-back is unacceptable.

Takeovers

A buy-back is defined to be a 'prescribed occurrence' such that a person making a takeover is permitted to withdraw it if the target company carries out a buy-back.

General

The buy-back provisions do not exclude some provisions of the Corporations Law including, for example, Part 3.2A (financial benefits to directors and their associates). Accordingly if a buy-back gives a financial benefit of the type caught by Part 3.2A, that Part must be complied with as well.

Comment

It is likely that these changes to the buy-back procedures will result in share buy-backs being utilised more often and by more medium and small sized companies, which had previously been largely excluded from the process because of the complexity of the previous rules and the consequent compliance costs.

PROPRIETARY COMPANIES

Small and large proprietary companies

The *Act* replaces the distinction between exempt and non-exempt proprietary companies with the concepts of small and large proprietary companies. Large proprietary companies are those which meet at least **two** of the following **three** criteria, which are measured in relation to the company and any entities the company controls:

- (a) consolidated gross operating revenue of \$10 million or more a year;
- (b) assets of \$5 million or more;
- (c) 50 or more employees.

A small proprietary company is a company which is not a large proprietary company.

The time for judging whether or not the tests are satisfied is at the end of each financial year for each company.

Particular benefits of the amendments to small proprietary companies are that:

- they generally are not required to prepare annual financial statements, apply accounting standards in the preparation of the statements or have them audited unless required to do so by members holding 5% of its shares or by the ASC;
- financial statements are generally not required to be sent to members, except for such companies which prepare accounts following a request from shareholders or those which are foreign controlled and not covered by consolidated accounts.

Requirements for large proprietary companies include:

- accounts to be prepared, audited and lodged with the ASC within 4 months after the end of the financial year;
- those which are presently exempt proprietary companies which have their annual accounts audited and which elect to continue operating under the existing rules will not need to lodge their accounts with the ASC;
- the ASC may, having regard to various criteria, grant relief from the audit requirements for large proprietary companies if the requirements would impose an unreasonable burden on the company or companies. Late changes were made to the *Act* to specify the criteria on which the ASC is to base its decision as to whether to grant relief;
- financial statements must be sent to members;
- company accounts and reports must be lodged with the ASC.

Amendments affecting all proprietary companies

Changes in the *Act* which will affect all proprietary companies are:

- the minimum number of directors is reduced from 2 to 1, and a sole director may also be the company secretary;
- the minimum number of shareholders is reduced from 2 to 1;
- removal of the requirement to hold an annual general meeting;
- lodgement of annual returns is no longer linked to the holding of an annual general meeting. Instead, lodgement will be required for each calendar year before 31 January in the next calendar year. Annual returns for the 1995 year will therefore be required to be lodged by 31 January 1996;
- annual returns for the 1996 year will not require key financial data to be included;
- simplification of the process of establishing a proprietary company by removing rules requiring the articles of association of a proprietary company to contain certain restrictions and making it optional to reserve a company name;

- the prohibition on proprietary companies making offers of securities to the public is replaced by a prohibition on them doing anything that would require the lodgement of a prospectus;
- if a company breaches the proprietary company provisions, the ASC has the power to order it to convert to a public company and if the company does not comply with the order the ASC is able to determine that the company is a public company.

Consequential amendments

The *Act* makes a number of consequential amendments to the Law to accommodate the removal of the concept of an exempt proprietary company and the abolition of the requirement to hold an annual general meeting. Some examples include:

- provisions relating to deemed annual general meetings of exempt proprietary companies are omitted;
- the provision allowing exempt proprietary companies to pass a resolution without holding an actual meeting is extended to all proprietary companies;
- provisions applicable to the qualifications of auditors of exempt proprietary companies is extended to all proprietary companies.

Small business guide

The *Act* introduces a small business guide which summarises the main provisions of the Law that are likely to be applicable to small companies. The guide does not contain operative provisions but is designed to give an overview to people who operate small businesses about the application of the Law and to direct them to the relevant part of the Law if more detail is required.

The main areas covered in the guide are:

- what incorporation means;
- the company structure for small businesses;
- setting up a new company;
- continuing obligations after the company is set up;
- company directors and company secretaries;
- shares and shareholders;
- funding the company's operations;
- returns to shareholders;
- accounts and audit for small proprietary companies;
- disagreements within the company;
- companies in trouble.

Comment

The amendment of the audit guidelines and the provision of the grounds on which the ASC may exempt a large proprietary company's compliance with the new audit requirements resulted from the comments by industry bodies as to the perceived burden for large proprietary companies which were previously exempt proprietary companies.

It has been said that there are approximately 18,000 proprietary companies which will be classified as "large" under the *Act*. Of these allegedly 75% were not previously required to have audited accounts.

COMPANY REGISTERS

Elimination of some registers

There is now no requirement to keep registers of:

- directors, principal executive officers and secretaries;
- directors' shareholdings;
- substantial shareholders in listed companies;
- notices of beneficial ownership in listed companies;
- buy-backs.

Consequential amendments include:

- directors of listed companies are required to notify the ASX of their dealings in the shares of their own company or a related company;
- directors and secretaries are allowed to have their residential addresses not publicly available on the ASC's data base in cases involving personal safety;
- branch registers in Australia for Australian companies are abolished.

Requirements in relation to registers

The *Act* requires that registers be kept only for:

- members;
- option holders;
- debenture holders.

The requirements in relation to the location, access, agents' obligations, correction and evidentiary value for each of these three registers have been standardised. The *Act* imposes new penalties for failure to comply with the register provisions.

In addition, the *Act* requires that directors and secretaries give the company signed consents to act, which must be retained by the company.

The *Act* recognises the role of computers in keeping registers by allowing for inspection of a hard copy of information on the register or direct access to the information on the computer itself. It also accommodates the provision of copies of register data on floppy disk.

Comment

The simplification and standardisation of the register requirements will reduce administrative and compliance costs for companies and eliminate the need for companies to maintain registers of information which is available to the public from the ASC and, in the case of listed companies, the ASX.

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