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THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

THE HOUSE OF REPRESENTATIVES

COMPANIES (TRANSITIONAL PROVISIONS) BILL 1981

EXPLANATORY MEMORANDUM

(Circulated by the Minister
for Business and Consumer Affairs,
the Honourable John Moore, M.P.)

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OUTLINE

Companies (Transitional Provisions) Bill 1981

The Companies (Transitional Provisions) Bill 1981 contains the transitional provisions for the A.C.T. consequent upon the coming into operation of the proposed new Australian companies code under the co-operative companies and securities scheme.

2. This explanatory memorandum:-

- (a) contains an introduction to the co-operative companies and securities scheme and the Bill's relationship to the scheme (paras 4 to 13); and then
- (b) deals sequentially with each clause of the Bill (paras 14 to 93).

3. This Bill will come into operation on the same day on which the Companies Bill 1981 comes into operation.

CO-OPERATIVE COMPANIES AND SECURITIES SCHEME

4. The remainder of this explanatory memorandum contains a brief outline of the co-operative companies and securities scheme and the proposed new Australian companies code and then deals sequentially with each clause of the Companies (Transitional Provisions) Bill 1981 (hereafter referred to as the 'Bill').

Formal Agreement

5. On 22 December 1978 the Commonwealth and the six States executed a Formal Agreement that provides the framework for a co-operative Commonwealth/State scheme for a uniform system of law and administration in relation to company law and the regulation of the securities industry in the six States and the Australian Capital Territory.

6. Additional background material on the Formal Agreement and on the four basic elements of the co-operative companies and securities scheme is contained in paras 7 to 36 of the explanatory memorandum on the Companies Bill 1981.

Initial Commonwealth legislation

7. The initial Commonwealth legislation under the scheme can be divided into five groups:-

- the NCSC Act;
- the interpretation code;
- the new Australian code to regulate the acquisition of shares, etc. in companies;
- the new Australian securities industry code; and
- the new Australian companies code.

8. All the initial Commonwealth Acts have now been passed except for the Bills relating to, or consequential upon, the proposed new Australian companies code.

Proposed new Australian companies code

9. The substantive provisions of the proposed new Australian companies code are set out in the Companies Bill 1981 which also applies those provisions in the A.C.T. The substantive provisions of the code are in an appropriate form so that any State or Territory covered by the co-operative scheme can apply the code in that jurisdiction by appropriate application of laws legislation.

10. The new companies code will be administered by the NCSC which, so far as is practicable, will delegate its administrative responsibilities to the relevant corporate affairs office in each jurisdiction.

Special transitional provisions

11. The object of the Bill is to set out the transitional provisions that will be required in the A.C.T. consequent upon the coming into operation in the ACT of the proposed new Australian companies code. The Bill will enact the transitional provisions consequent upon the coming into operation in the ACT of the Companies Bill 1981 (hereafter referred to as the 'CB') under the co-operative scheme and the repeal of the A.C.T. Companies Ordinance 1962 (hereafter referred to as the 'Ordinance' or 'Ord.').

12. Each State or other Territory that is applying the proposed new companies code will require similar transitional provisions for the purposes of the introduction of the new companies code in its jurisdiction. It is envisaged that these provisions will be set out in a separate Part of the Companies (Application of Laws) Bill of each jurisdiction.

13. The remainder of the explanatory memorandum deals, sequentially, with each clause of the Bill.

COMPANIES (TRANSITIONAL PROVISIONS) BILL 1981

Cl. 1 : Short title

14. When enacted, the Bill will be cited as the Companies (Transitional Provisions) Act 1981 (Bill cl. 1).

Cl. 2 : Commencement

15. The Bill will come into operation on the day on which the Companies Act comes into operation (Bill cl. 2).

Cl. 3 : Object

16. The object of the Bill is to enact transitional provisions consequent upon the enactment of the Companies Act, and the Bill is to be construed accordingly (Bill cl. 3). The object of the CB is to make provision for the government of the A.C.T. in relation to the formation of companies, the regulation of companies formed in the A.C.T., the registration of certain other bodies and certain other matters - that Act is to be construed accordingly (see CB s-cl 3(1)).

Cl. 4 : Interpretation

17. Expressions defined in cl.5 of the CB and in the Companies and Securities (Interpretation and Miscellaneous Provisions) Act 1980 (hereafter C & S (I & MP). A) have the same meaning in the Bill, unless the

contrary intention appears (Bill cl 4). Cl.5 of the CB contains a series of definitions and interpretative provisions for the purposes of the proposed new Australian companies code and the C & S (I & MP)A provides an interpretation code for the whole co-operative scheme.

Cl. 5 : This Bill additional to other saving provisions

18. The provisions of the Bill are in addition to and not in derogation of the provisions of s-sec. 29(2) of the Companies and Securities (Interpretation and Miscellaneous Provisions) Act 1980 (Bill cl 5). S-sec 29(2) of that Act (which is based on s. 8 of the Commonwealth Acts Interpretation Act 1901) ensures that repeal of the Ordinance does not affect its previous operation, unless the contrary intention appears.

Cl. 6 : General provisions

19. Persons, things and circumstances appointed or created under the Ordinance continue to have the same status, operation and effect under the CB, subject to this Bill and to the CB (Bill cl 6 - based on Ord. para 4(4)(a)).

Cl. 7 : Particular provisions

20. Without affecting the general savings provisions (see Bill cl 6), and subject again to this Bill and to the CB, the status operation or effect of

various specified matters will not be disturbed by the CB : these matters include, inter alia, any order, rule, deed, agreement, instrument, licence, notice, thing that was made, done, effected, acquired by or under the Ordinance before the commencement of the CB (Bill cl 7 - based on Ord para 4(4)(b)).

Cl. 8 : Saving of certain provisions

21. Notwithstanding the repeal of the Ordinance (CB cl 4) the following provisions of the Ordinance remain in force as if it had not been repealed:-

- s. 7 (which deals with the appointment of the Registrar of Companies, etc; judicial notice to be accorded to the signature or seal of the Registrar and any Acting or Deputy Registrar the inspection of records; and the payment of fees);
- the Second Schedule listing fees payable pursuant to s. 7;
- any regulation prescribing fees for the purposes of para. 7(12)(b);
- any other provisions of the Ordinance necessary for the effectual operation of the provisions of the Ordinance mentioned above; and
- appointments in force under s. 7.

(Bill cl 8).

22. It will not be a contravention of s-sec 7(9) of the Ordinance for information to be given to the NCSC or an authorized person (Bill cl 8). Para. 7(a)(b) of the Ordinance prohibits a person from recording, divulging or communicating information obtained as a result of an inspection otherwise than in accordance with his duties.

Cl. 9 : Proceedings by or against Registrar to be
proceedings by or against Commission

23. A proceeding which had been commenced under the Ordinance by or against the Registrar may be continued by or against the National Companies and Securities Commission (hereafter referred to as the 'NCSC') (Bill s-cl. 9(1)). However, it is envisaged that the NCSC will, so far as is practicable, delegate its functions under the proposed new Australian companies code as it applies in relation to the A.C.T. to the A.C.T. Corporate Affairs Commission.

24. Where, but for the enactment of the CB, a proceeding could have been commenced by or against the Registrar of Companies under the Ordinance, it may be commenced by or against the NCSC (Bill s-cl. 9(2)).

Cl. 10 : Property vested in Registrar vests in

NCSC

25. Property vested in the Registrar of Companies immediately before the commencement of the Companies Act under s. 310 of the Ordinance will vest in the NCSC, and cls. 462, 463 and 464 of the CB will apply to such property as if it had vested in the NCSC pursuant to cl. 461 of the CB (Bill cl 10).

26. The provisions of the CB referred to in Bill cl 10 deal with the following matters:-

- s. 461 : outstanding property of defunct company to vest in NCSC (cf Ord s. 310);
- s. 462 : outstanding interests in property, how disposed of (cf Ord s. 311);
- s. 463 : liability of NCSC and Commonwealth as to property vested in NCSC (cf Ord s. 312); and
- s. 464 : accounts to be kept by NCSC of property vested in it under these provisions (cf Ord s. 313).

Cl. 11 : Registers, funds and accounts

27. A register, fund or account kept under the Ordinance immediately before the commencement of the Companies Act will be deemed part of a register, fund or account kept under the corresponding provision of the CB (Bill cl 11 - based on Ord s-sec 4(6)).

Cl. 12 : Companies Auditors Board to continue in
existence

28. The Companies Auditors Board established by the Ordinance will continue in existence for the purpose of completing any inquiry into the conduct of an auditor or liquidator pursuant to Ord. s-sec 9(10) (Bill cl. 12).

Cl. 13 : Acts of Minister under Companies Ordinance
deemed to be acts of Ministerial Council or
NCSC, etc.

29. A number of acts of the Minister under the Ordinance will be deemed to be an act of the Ministerial Council or NCSC, as the case requires, under the Companies Act (Bill cl 13). The basis on which the acts are deemed to be acts of the Ministerial Council or of the NCSC is the same as the basis on which the current discretions are vested in the Ministerial Council or the NCSC by the CB. This, in turn, is based on cl 25 of, s-cl 32(3) of, and the First Schedule to, the Formal Agreement.

30. The following Table sets these out with
references to the Bill.

Provision of the Ordinance

- consent under s-sec 22(1) to registration of a company or intended company by a specified name where the company has not been so registered:

- licence in force issued under s. 24, or under a previous corresponding provision to omit the word 'limited' from the name of a company:

- declaration in force made under paras 38(7)(b) or (c):

Provision under the Companies Act

consent deemed to be consent by the Ministerial Council under s-sec 38(2) (Bill s-cl. 13(2)).

licence continues in force as if issued by the NCSC under s. 66 (Bill para. 13(3)(a)) and where a licence exempted a company from complying with provisions of the Ordinance, the licence applies as if exempting the company from complying with corresponding provisions of the Companies Act (Bill para. 13(3)(b)).

declaration deemed to be notice by the NCSC published under para 97(7)(b) or (c) as the case may be (Bill s-cl. 13(4)).

- notice in force
published under s-sec
38(8) specifying terms
and conditions which
may apply to a
corporation declared
under s-sec 38(7):

notice deemed to be
notice by the NCSC
published under
s-sec 97(9). (Bill
s-cl. 13(5)).

- exemption in force
under s-sec 44(3) of
an allotment of shares
or debentures from
s 44 (which deals with
an allotment of shares or
debentures where the
prospectus indicates
that an application
will be made for stock
exchange listing):

exemption deemed to be
an exemption by the NCSC
of allotment of shares or
debentures from s 105 under
s-sec 105(3). (Bill s-cl
13(6)).

- declaration in force
published in the
Gazette under para
69A(2)(b) or (c):

declaration deemed to be
a declaration by the
Ministerial Council
published in the
Gazette under para.
134(2)(b) or (c) as the
case may be. (Bill s-cl.
13(7)).

- approval in force under para 74(1)(e) of a corporation to act as a trustee for debenture holders: approval deemed to be an approval by the NCSC under para 152(1)(g) (Bill s-cl 13(8)).
- order in force under s-sec 74D(2): order deemed to be an order by the NCSC under s-sec 156(2) (Bill s-cl 13(9)).
- direction in force under s-sec 74D(2) to a debenture trustee to apply for a court order under s-sec 74D(4): direction deemed to be a direction by the NCSC under s-sec 156(2) to apply for a court order under s-sec 156(4) (Bill s-cl 13(10)).
- declaration in force under s-sec 74F(7): declaration deemed to be a declaration by the NCSC under s-sec 158(10) (Bill s-cl 13(11)).
- notice in force under s-sec 74F(8): notice deemed to be a notice by the NCSC under para 158(11)(a) (Bill s-cl 13(12)).

- direction in force under s-sec 84(3) that a management company need not lodge a list of interest holders with the Registrar annually:

direction deemed to be a direction by the NCSC under s-sec 172(5) (Bill s-cl 13 (13)).

- notice in force under s. 88 exempting a company from complying with specified provisions of Division 5 of Part IV:

company exempted from compliance with the corresponding provisions of Division 6 of Part IV as specified in notice (s-cl. 13(14)).

- notice in force under s-sec 160(2) in relation to certain public companies with more than 500 members:

notice deemed to be an order by the NCSC under s-sec 265(2) (Bill s-cl 13(15)).

- declaration in force published in the Gazette, under s-sec 334(2), or para 339(b) or para 348(5)(b) or (c):

declaration deemed to be a declaration by the NCSC published in the Gazette under s-sec 490(3) (Bill s-cl 13(16)), s-sec 495(2) (Bill s-cl 13(17)),

or para 516 (7)(b) or (c)
(Bill s-cl. 13(18)), as the
case may be.

- consent under s-sec
353(1) to the
registration of a
foreign company by
a specified name
or consent under
s-sec 353(2) to a
change of name where
such registration
or change of name
has been effected:

consent deemed to be a
consent by the Ministerial
Council under s-sec 38(2)
(Bill s-cl. 13(19) and
(20)).

- exemption in force
para 374(2)(b) of
a corporation from
the provisions of
s-sec 374(1):

exemption deemed to be
an exemption by the
NCSC under para 552(2)
(b) from the provisions
of s-sec 552(1) (Bill
s-cl. 13(21)).

31. No transitional provisions have been made preserving declarations with respect to the size of professional partnerships or associations (see Ord. para. 14(3)(a)), or as to prohibited names (see Ord. s-cl. 22(1)). It is intended that the Ministerial Council will make a declaration under CB s-cl. 33(4), and a direction under CB para. 38(1)(c) to operate from the commencement of the proposed new Australian companies code.

Cl. 14 : Names

32. A name under which a company was registered under the Ordinance will for the purposes of Division 2 of Part III of the CB be deemed to be registered under that Division in respect of the company until the registration of the name is cancelled or ceases to be in force (Bill s-cl. 14(1)). Division 2 of Part III of the Companies Bill (CB cls 38 to 66) contains the provisions governing the names of companies. The Division seeks to give effect to Part V of the Formal Agreement so far as that Part relates to company names. Additional material is contained in the ex memo on the CB.

33. A similar deeming provision will apply to the names of foreign companies registered under the Ordinance: a reference to a company in s-cl 14(1) will include a corporation that immediately before the commencement of the CB was registered under the Ordinance as a foreign company whether such corporation will be a foreign company or a recognized company for the purposes of the CB (Bill s-cl 14(2)). A registered foreign company under the Ordinance will, after the commencement of the Companies Act, fall under the definition of either a recognized company or a foreign company in s-cl 5(1) of the CB, depending on whether it has been formed in an Australian jurisdiction that is a party to the co-operative scheme (a recognized company) or outside the Territory in any jurisdiction that is not a party to the co-operative scheme (a foreign company).

34. Where within a period of 2 months immediately preceding the commencement of the proposed new Australian companies code a name was either reserved under s-sec 22(8) of the Ordinance or the period for which a name was reserved was extended under s-sec 22(9) of the Ordinance, the name shall be deemed to be reserved under Division 2 of Part III of the CB until the date on which the reservation of that name under the Ordinance would have ceased (Bill s-cl. 14(3)).

35. This provision will be relevant to the following provisions of the CB:-

- s-cl. 40(1) : reservation of name of intended company.
- cl. 41 : reservation of name of intended recognized company (would apply to a body that under the A.C.T. Companies Ordinance would be an intended foreign company to be incorporated as a company in an Australian jurisdiction that is a party to the Formal Agreement).
- s-cl. 43(1) : reservation of proposed new name of company.
- cl. 44 : reservation of proposed new name of recognized company (would apply to a body that under the A.C.T. Companies Ordinance was a registered foreign company incorporated as a company in an Australian jurisdiction that is a party to the Formal Agreement).

- s-cl. 46(3) : reservation of name of intended foreign company or foreign company (will apply to a foreign company that has been or intended foreign company that will be formed in a jurisdiction outside the A.C.T. which is not a party to the co-operative scheme).

Cl. 15: Continued application of Table A and Table B in certain circumstances

36. Nothing in the Bill or the proposed new Australian companies code will affect Table A or Table B of the Fourth Schedule to the Ordinance or corresponding previous Tables in their application to a company existing immediately before the commencement of the proposed new Australian companies code (Bill s-cl 15(1) - based on Ord. s-sec 4(5)).

37. However, this does not prevent company articles adopting, in accordance with s-cl 75(1) of the proposed new Australian companies code, regulations in Table A or Table B of Schedule 3 to the Companies Act (Bill s-cl. 15(2)).

Cl. 16 : Existing prospectuses and section 82
statements

38. A prospectus registered under the Ordinance within six months of the commencement of the proposed new Australian companies code will be deemed to be registered under the proposed new Australian companies code until the expiration of six months from the date of registration (Bill s-cl. 16(1) - cf Ord. s-sec 4(9)).

39. A similar transitional provision applies to a statement under s. 82 of the Ordinance registered as a prospectus within six months of the commencement of the CB (Bill s-cl. 16(2) - CB cl 170 is the equivalent provision to Ord s. 82). This specific provision will overcome any doubts as to whether CB s-cl 170(2) (which deems such a statement to be a prospectus for all purposes) would bring such a s. 82 statement within the general transitional provision in Bill s-cl 16(1).

Cl. 17 : Interests in partnership agreements

40. The prohibition (in CB cl 169) on the issue of prescribed interests other than by a company or its agent will not apply to any interest in a partnership agreement that was subscribed for or first purchased before the date of commencement of the CB (Bill cl 17).

The definition of "prescribed interest" in CB s-cl 5(1) covers interests in certain types of partnership agreements. Under para 76(1)(f) of the Ordinance an interest in a partnership agreement was excluded from the meaning of "interest".

Cl. 18 : Registration of charges

41. There are transitional provisions in relation to charges created by a company prior to the commencement of the CB and to property subject to a charge that was acquired by a company prior to the commencement of the CB (Bill cl 18). Division 9 of Part IV of the CB will deal with the registration of company charges. This Division:

- (a) substitutes a priority system for the existing provisions making charges invalid in certain circumstances if not registered within 30 days; and
- (b) provides for a charge given by an Australian company to be registered only in that company's jurisdiction of incorporation.

42. Additional background on this Division is contained in the relevant paragraphs of the ex memo on the CB.

43. The transitional provisions also apply to a foreign company registered as a foreign company under the CB (Bill s-cl. 18(1)).

44. A charge registered (under Division 7 of Part IV of the Ordinance) immediately before the commencement of the CB will be deemed to be registered under Division 9 of Part IV of the CB if it would have had to be registered if created after the commencement of the CB (Bill s-para 18(2)(a)(i)). The NCSC will be required to enter certain particulars of the charge in the Register of Company Charges (Bill s-para. 18(2)(a)(ii)). The particulars that are to be entered are set out in cl.203 of the CB which deals with the registration of documents relating to charges.

45. Similar transitional provisions apply in relation to a charge registered under the provisions of a law of a State or another Territory corresponding to Division 7 of Part IV of the Ordinance and the NCSC will be required to enter certain particulars of the charge in the Register of Company Charges (Bill para 18(2)(b)). See also Bill s-cl 18(4) which defines "relevant charge" for the purposes of s-cl 18(2)).

46. A charge which was lodged for registration up to 30 days before the commencement of the CB which was not registered, and which has not been refused registration, will be deemed to be registered under the Companies Act from its commencement (Bill para 18(3)(a)). The NCSC will be required to enter certain particulars of the charge in the Register of Company Charges (Bill para 18(3)(b)). (See also s-cl 18(4) which defines "relevant charge" for the purposes of s-cl 18(3)).

47. Where 2 or more charges on the same property of a company are deemed by the transitional provisions (see Bill s-cl 18(2) and (3)) to be duly registered under Division 9 of Part IV of the CB as from the commencement of the CB, those charges shall as between themselves have the respective priorities they would have had if the Bill had not been enacted (Bill s-cl. 18(5)).

48. Under the proposed new Australian companies code, where particulars in respect of a charge are entered by the NCSC in the Register of Company Charges, the charge is then deemed to be registered, and to have been registered from and including the time and date entered in the Register as the time and date when the notice of the charge was lodged (CB s-cl 203(3)). The

time and date to be entered in the Register of Company Charges in relation to a charge registered under these transitional provisions (see Bills cls. 18(2) and (3)) will be 9 a.m. on the date of commencement of the proposed new Australian companies code (Bill s-cl. 18(6)).

49. The fact that there are different time-zones in Australia will not present any problems for the purposes of sub-clause 18(6) because the time and date in relation to all registered charges on the property of a company will be entered in the Register of Company Charges as 9.00 a.m. on the date of commencement of the Companies Bill in the jurisdiction in which the company is incorporated notwithstanding that the location of the property in Australia might be in different time-zones.

50. The provision in the CB dealing with charges which are void against a liquidator or an official manager will not apply to charges which are deemed to be registered under Bill s-cl 18(2) and (3) (Bill s-cl 18(7)). If this new provision had not been included these charges would have become void against a liquidator or official manager if the relevant company had gone into liquidation within 6 months of the commencement of the CB. (CB cl. 205).

51. Where a charge was able to be registered under Division 7 of Part IV of the Ordinance but was not lodged for registration, then provided it has not become void under Ord s-sec 100(1), Division 9 of Part IV of, and Schedule 5 to, the CB will apply as if the company had created the charge, or had acquired the property, at the commencement of the proposed new Australian companies code. Where there are two or more such charges those charges will as between themselves have the same priorities they would have had if the CB had not been enacted. (Bill s-cl. 18(8)).

52. Where there is a charge that was required to be registered under the Ordinance but which had not been so registered and this charge would not have been required to be registered under the Companies Act, provided it had not become void (under Ord s-sec 100(1)), then the charge will be deemed not to have been required to be registered under the Ordinance (Bill s-cl 18(9)). The effect of s-cl 18(9) will be that the charge can never be voided by a liquidator or creditor under sub-section 100(1) of the A.C.T. Companies Ordinance. The registrable charge would be able to be voided up to the time the A.C.T. Companies Ordinance is repealed.

53. Where a charge had become void before the commencement of the CB, because of non-registration within the period allowed by the Ordinance, then the Court will be able, if it is satisfied that it would be just and equitable to do so, to make an order that Bill s-cl. 18(8) will apply in relation to that charge, whereupon s-cl. 18(8) will have effect as if the charge had not become void and the charge will be deemed not to have been rendered void under Ord. s-sec 100(1)) (Bill s-cl 18(10)). The purpose of the provision is similar to s. 106 of the A.C.T. Companies Ordinance whereby the Court is basically able to "avoid" the avoidance of a registrable charge that has not been registered within the required time limit.

Cl. 19 : Certificate that person is an executive officer of a company

54. The proposed new Australian companies code will contain provisions in relation to the principal executive officer of a company, a concept which is defined in similar terms to that of a manager in the existing companies legislation (see CB s-sec 5(1)). The NCSC will be able to certify (under CB s-cl 238(10)) that a person was at a particular time principal executive officer of a company where it appears from a return lodged with the Registrar of Companies under the Ordinance that such person was at that time a manager of a company (Bill cl 19).

Cl. 20.: Application of Companies Act to financial
years ending before commencement of Act

55. Background Under the proposed new Australian companies code there will be a new definition of "financial year" which will enable each financial year of a company to be determined independently (see CB s-cl 5(1)). This new definition takes account of the Victorian Supreme Court decision in Jensen v. Viney [1979] VR 597 which identified serious defects in the existing provisions relating to the preparation and laying of accounts, caused by the interdependence of these provisions.

56. This definition, so far as it relates to a company incorporated under the Ordinance or a corresponding previous law of the A.C.T. is as follows:

- (a) a period of 12 months, or such other period (whether longer or shorter than 12 months) not exceeding 18 months as the directors (subject to the requirements of CB cl 240 as to the holding of annual general meetings of the company) resolve, commencing at the expiration of the period in respect of which the last profit and loss account laid before the company at an annual general meeting before the commencement of the CB was made out or,

if no profit and loss account was made out and laid before the company at an annual general meeting before the commencement of the CB on the date of incorporation of the company; and

- (b) each period of 12 months, or such other period (whether longer or shorter than 12 months) not exceeding 18 months as the directors (subject to the requirements of CB cl 240 as to the holding of annual general meetings of the company) resolve, commencing at the expiration of the previous financial year of the company.

57. This definition is particularly relevant in a transitional context to the following provisions of

CB cl 240 : annual general meeting (cf Ord s. 136).

CB Part VI: Division 2 : accounts;

CB cl 267 : accounts to be kept (cf Ord s.161A);

CB cl 268 : financial years of grouped companies (cf Ord s. 161B);

CB cl 269 : profit and loss account, balance sheet and group accounts (cf Ord. s.162).

CB cl 270 : directors' reports (cf Ord. s.162A);

CB cl 274 : members of company entitled to balance sheet etc (cf Ord s. 164);

CB cl 275 : accounts and reports to be laid before annual general meeting (this is a new provision in the sense that the obligations to lay all these documents before an annual general meeting have been placed together in one clause).

CB cl 276 : failure to comply with Division 2 of Part VI (cf Ord. 163).

58. The accounts provisions of the proposed new Australian companies code other than the provisions relating to the accounts to be kept (see CB cl 267), the financial years of grouped companies (see CB cl 268) and the documents to be laid before an annual general meeting (see CB cl 275) will apply to a company incorporated under the Ordinance and to its directors, in relation to a financial year or financial years ending

before the commencement of the CB (Bill s-cl. 20(1)). A "financial year" will have the same meaning as it has in para. (a) of the definition in CB s-cl 5(1) (see Bill s-cl. 20(4)).

59. Directors will now be obliged to prepare accounts for each "financial year" of the company within 5 months (or within 6 months in the case of exempt proprietary companies) of the commencement of the CB and to lay them before the company at its next annual general meeting thereafter (Bill s-cl. 20(2)). These accounts will also have to be distributed to shareholders and lodged with the NCSC in the same manner as accounts prepared for financial years ending after the commencement of the new companies code (see Bill para 20(1)(c)). This provision is of particular relevance to directors who have consistently failed to fulfil their obligations to lay annual accounts before the company in general meeting.

Cl. 21 : Annual general meeting held before commencement of Companies Act

60. Where a company has failed to comply with its obligations (under Ord. ss. 158 or 159) to lodge an annual return in relation to an annual return in relation to an annual general meeting held before the commencement of the proposed new Australian companies code then the

obligations (under Ord ss 158 or 159) to lodge that return will continue to apply in relation to that company as if the CB had not been enacted (Bill cl 21).

Cl. 22 : Special investigations

61. Part VII of the proposed new Australian companies code (CB cls 289 to 313) deals with special investigations by a duly appointed inspector. While the Part is based generally on Part VIA of the ICAC Companies Acts those provisions have been substantially re-drafted to incorporate the system of control and the allocation of powers set out in Part VI of the First Schedule to the Formal Agreement.

62. These new provisions (CB Part VII) apply to an investigation to which Part VIA of the Ordinance applied immediately before the commencement of the proposed new Australian companies code, other than for an investigation under s. 170 of the Ordinance (Bill s-cl. 22(1) - cf Ord s-sec 4(12) which took the opposite approach and s. 18 of the ACT Companies Amendment (No. 2) Ordinance 1980 which took the same approach). S. 170 of the Ordinance deals with an investigation by an inspector appointed by a special resolution of the company. The new code will contain no similar provision (see, however, Bill cl 23).

63. All matters and things in the course of an investigation under Part VIA of the Ordinance will have the same effect and operation as if done under the proposed new Australian companies code (Bill s-cl. 22(2)). This will particularly be the case for any order, application, examination, deposition, writ, summons, proceeding, record, note or report made, effected, issued or given in relation to an investigation (Bill s-cl. 22(3)).

Cl. 23 : Investigation by resolution of company

64. An investigation by an inspector appointed by special resolution of a company under Ord. s. 170 will be able to be continued as if the Ordinance had not been repealed (Bill cl 23). The proposed new companies code contains no provisions for such an investigation.

Cl. 24 : Lodging of accounts by person administering
compromise or arrangement

65. Under the proposed new Australian companies code, a person appointed to administer a compromise or arrangement (under CB Part VIII) will have the same obligations in relation to the lodgement of accounts as a receiver has (see CB s-cl 315(11)). Those obligations are to lodge with the NCSC an account in

the prescribed form within one month after the expiration of the period of 6 months or such lesser period as the receiver determines from the date of his appointment and for every subsequent period of 6 months during which he acts as a receiver and within 1 month after he ceases to act as a receiver (see CB s-cl. 330(1)). There is no corresponding obligation under the existing State and Territory companies legislation imposed upon a person appointed to administer a compromise or arrangement.

66. Where a person was appointed to administer a compromise or arrangement before the proposed new Australian companies code comes into operation, then the obligation to file accounts with the NCSC will apply as if the person had been appointed to administer the compromise or arrangement on the day on which the proposed new Australian companies code comes into operation (Bill cl. 24).

Cl. 25 : Winding up

67. The provisions of the proposed new Australian companies code with respect to winding up, other than Sub-division F of Division 4 of Part XII, will not apply to a winding up of a company which was commenced prior to the commencement of the proposed new Australian companies code : such a winding up will continue as if the Ordinance remained in force (Bill s-cl. 25(1) -cf Ord s-sec 4(13)) Sub-division F of Division 4 of Part XII of the proposed new Australian companies code deals with dissolution (CB cls 458 to 464).

68. A similar transitional provision will apply in relation to a body that is "an unregistered company" within the meaning of Division 5 of Part X of the Ordinance (Bill s-cl. 25(2)).

69. Under the proposed new Australian companies code, auditors, liquidators and official liquidators will be able to register on an Australia-wide basis (CB cls. 17 to 30). Details of the proposed new scheme are set out in the relevant paragraphs of the explanatory memorandum on the CB.

Cl. 26 : Registered auditors and liquidators

70. A person registered as an auditor or liquidator, or appointed as an official liquidator under the Ordinance will be deemed registered under the proposed new Australian companies code for a period of 6 months after its commencement subject to the cancellation or suspension provisions in cl 27 of that code (Bill s-cl. 26(1) - see also Bill s-cl 26(4)).

71. Where such a person has then applied for registration under Division 2 of Part II of the proposed new Australian companies code within that 6 months and has not been notified of the results of his application at the end of that period, his registration will be deemed to be extended:-

- (a) in the case of an auditor, until the day on which the application is granted or refused;
and
- (b) in the case of a liquidator, until the day on which the person is notified of the results of his application

(Bill s-cl. 26(2)).

72. A successful applicant for registration as a liquidator will be deemed to have been registered as a liquidator under Division 2 of Part II of the proposed new Australian companies code from the day on which the person is notified of the results of his application until the day before the day when the registration comes into force (Bill s-cl. 26(3)). A liquidator's registration will only come into force after he has lodged the required security with the NCSC (see CB cl 22).

73. Where a person is deemed registered as an auditor or liquidator or official liquidator under a provision of a State or Territory law that corresponds to the initial transitional provision referred to above (see Bill s-cl 26(1)), that person will be deemed registered under the proposed new Australian companies code (Bill s-cl. 26(4)). This will give that person the benefits of registration for the purposes of the proposed code, in the A.C.T.

Cl. 27 : Power of Minister to consent to institution
of proceeding

74. Under s-sec 29(2) of the Interpretation Act, any legal proceeding may be instituted, continued or enforced as if the Ordinance had not been repealed. Where proceedings under the Ordinance could not be brought without the consent of the Minister under Ord. s-

secs 381(3) or (4) and such consent had not been obtained before the Ordinance was repealed, the power of the Minister to give consent will be preserved in relation to any proceedings which could then be instituted by virtue of s-sec 29(2) of the Companies and Securities (Interpretation and Miscellaneous Provisions) Act 1980 (Bill cl 27)..

Cl. 28 : Recognized companies

75. Under the proposed new Australian companies code a recognized company or a recognized foreign company that has established a place of business or commenced to carry on business within a jurisdiction covered by the scheme will be required to have a principal office within that jurisdiction to which all communications and notices may be addressed (see CB s-cl. 507(1)). Once the proposed new code comes into operation, certain corporations that are currently registered as foreign companies in a particular jurisdiction will become recognized companies.

76. Where a corporation that is a recognized company (in the A.C.T.) for the purposes of the proposed new Australian companies code was immediately before the commencement of the proposed new Australian companies code, registered as a foreign company under the Ordinance then the registered office of the corporation in the A.C.T. will be deemed to be the principal office of the corporation within the A.C.T. for the purposes of cl. 507 of the proposed code (Bill s-cl 28(1)).

77. Any act, matter or thing done or commenced under the Ordinance in relation to a foreign company that is a recognized company under the proposed new Australian companies code shall be deemed to have been done or commenced under the proposed code in relation to the recognized company provided such things or matters could be done or commenced under the proposed code in relation to a recognized company (Bill s-cl. 28(2)).

Cl. 29 : Recognized companies under corresponding laws

78. Under the proposed new Australian companies code a company that has established a place of business or commenced to carry on business within another jurisdiction covered by the co-operative scheme will be required to lodge with the NCSC a notice in the prescribed form setting out the situation of its principal office in that other jurisdiction (CB s-cl. 501(1)). This notification will be lodged with the corporate affairs office in its home jurisdiction (see s. 14 of the Companies and Securities (Interpretation and Miscellaneous Provisions) Act 1980).

79. Where a company, incorporated under the Ordinance, had before the commencement of the CB, been registered in another jurisdiction as a foreign company, and in compliance with the companies legislation of the other jurisdiction relating to registered foreign companies, had lodged certain notices and maintained a branch register, then by virtue of cl 29 of the Bill:-

- (a) the notice lodged concerning the hours during which the registered office would be open is deemed to be compliance by the company with CB s-cl 501(2) (Bill s. cl. 29(2)); and
- (b) the branch register will be deemed to be a branch register kept by the company under s. 262 of the CB (Bill s-cl 29(3)).

80. The proposed new Australian companies code will distinguish between three different categories of foreign companies (in addition to excluding from its definition of a "foreign company" any corporation that is "a recognized foreign company"):-

- (a) companies formed outside Australia that are not registered as a foreign company in another participating jurisdiction under Division 5 of Part XIII of the code as it operates in that jurisdiction);
- (b) companies incorporated as companies in a non-participating Australian jurisdiction; and
- (c) bodies formed anywhere in Australia that are not companies in their place of formation.

81. Although all three categories of foreign company will be required to register as a foreign company if otherwise caught by the provisions of the code (see CB cl. 512) only the first category will be accorded the benefits of the co-operative scheme. A company formed outside Australia which is registered as a foreign company under the proposed new Australian companies code will be entitled to carry on business in other participating jurisdictions simply by notifying the NCSC in the jurisdiction where it is registered of its principal place of business in the other participating jurisdictions where it will be carrying on business (see CB cls 500 and 505).

Cl. 30 : Foreign companies

82. A foreign company registered under the Ordinance will be deemed to be registered as a foreign company under the proposed new Australian companies code unless it is a recognized company (Bill s-cl. 30(1)).

83. A corporation formed outside Australia and the external Territories and registered under the Ordinance will be able within one month after the commencement of the proposed new Australian companies code to lodge a notice with the NCSC stating whether it wishes to continue to be registered as a foreign company in the A.C.T., and if not, specifying another

participating State or Territory that it was registered in before the commencement of the Companies Act as the jurisdiction in which it wishes to be registered as a foreign company (Bill s-cl. 30(2)). A corporation is not entitled to specify different jurisdictions under a corresponding law of a participating State or Territory (Bill s-cl. 30(3)).

84. Where a corporation lodges a notice under Bill s-cl. 30(2) to the effect that it no longer wishes to remain registered as a foreign company in the A.C.T., then it will cease to be so registered as from the date on which the notice is lodged and its registered office in the A.C.T. will become its principal office in the ACT (Bill s-cl 30(4)).

Cl. 31 : Commission may destroy or dispose of documents

85. The NCSC will be able, if it considers it appropriate to do so, to destroy or dispose of any documents lodged by a foreign company under the A.C.T. Companies Ordinance if that company becomes a foreign or a recognized foreign company under the CB.

Cl. 32 : Certain provisions of Companies Ordinance 1931 to continue to apply

86. S. 15 of the A.C.T. Companies Ordinance 1931 provides that:-

"15 - (1) The Governor - General may arrange with the Governor of the State of New South Wales for the handing over to the Attorney-General of all instruments and documents required by the Companies Acts or by the Companies (Registration of Securities) Act, 1918 to be registered, enrolled, recorded, filed or deposited by or with the Registrar-General of the State in respect of companies the registered offices of which are situate in the Territory or for the delivery to the Attorney-General of certified copies thereof duly certified by the Registrar-General of the State as correct copies.

(2) All instruments or documents, or certified copies thereof, handed over in pursuance of the last preceding sub-section shall be as valid and effectual for all purposes as if they, or in the case of certified copies, the originals thereof, had been registered enrolled, recorded, filed or deposited by or with the Registrar under this Ordinance.

(3) All instruments, documents, or certified copies received by the Attorney-General under this section shall be handed over to the Registrar.

(4) Any reference in any instrument, document or certified copy thereof handed over in pursuance of this section, or in the memorandum or articles of association or in any resolution or instrument of any company to which this section applies, to any person, authority, place or thing shall be read subject to such modifications as are specified in section eight of this Ordinance or as are prescribed."

87. The provisions of s-secs 15(2) and (4) of the Companies Ordinance 1931 will continue to apply in relation to the validity and interpretation of company documents that were handed over by the N.S.W. authorities to A.C.T. authorities (Bill cl 32 - based on Ord. s-sec 4(16)).

Cl. 33 : Marketable Securities Ordinance

88. Division 8 of Part IV of the CB now contains provisions relating to the transfer of marketable securities (CB cls 189 to 198).

89. The A.C.T. Marketable Securities Ordinance 1971 will be repealed when the proposed new Australian companies code comes into operation (see CB cl 4 and Schedule 1). A transfer instrument under the Marketable Securities Ordinance 1971 that was completed before the commencement of the CB has the same effect and may be dealt with as if the Marketable Securities Ordinance 1971 had not been repealed (Bill s-cl. 33(1) -based on A.C.T. Marketable Securities Ordinance 1971 para 3(2) (a)). Similarly an agreement, application, acceptance, warranty or indemnity deemed to have been given has the same force and effect as if the Marketable Securities Ordinance had not been repealed (Bill s-cl. 33(2)).

Cl. 34 : Court may resolve difficulties

90. The A.C.T. Supreme Court will be given power to resolve any difficulty that may arise in the application to a particular matter of any of the provisions of the CB, the Ordinance, the Marketable Securities Ordinance 1971 or the Bill (Bill s-cl. 34(1)). Orders made under this provision will have effect notwithstanding anything in the foregoing legislation (Bill s-cl. 34(2)).

91. A similar provision is contained in s. 300 of the Bankruptcy Act 1966 (and in s. 176 of the Bankruptcy Amendment Act 1980). Two judicial decisions on s. 300 of the Bankruptcy Act 1966 are:

- Re Marc : ex p. Stapleton (1968) 12 FLR 48, where it was held that the intendment of this section is that the court may not merely construe the Act but may make an order resolving difficulty arising out of the operation of the transitional provisions of the Act where the Act itself does not resolve such difficulty.
- Re McDonald (1969) 14 FLR 262 where it was held that it is not possible by an order under s. 300 to supply a power that does not exist.

Cl. 35 : Regulations

92. The Governor-General will be able to make any necessary regulations in accordance with advice that is consistent with resolutions of the Ministerial Council (Bill cl 35).

93. This same formula as to the advice for the making of these regulations is used in all the Commonwealth Acts that form part of the co-operative scheme legislation and that contain a regulation making power (see, e.g., NCSC Act s-sec 53(4)).

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