



INFORMATION, ANALYSIS
AND ADVICE FOR THE PARLIAMENT

INFORMATION AND RESEARCH SERVICES

Bills Digest
No. 102 2002–03

Corporations Legislation Amendment Bill 2002

ISSN 1328-8091

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INFORMATION AND RESEARCH SERVICES

Bills Digest
Nos. 102–103 2002–03

Corporations Legislation Amendment Bill 2002

Corporations (Review Fees) Bill 2002

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Law and Bills Digest Group
14 February 2003

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Corporations Legislation Amendment Bill 2002

Corporations (Review Fees) Bill 2002

Date Introduced: 12 December 2002

House: House of Representatives

Portfolio: Treasury

Commencement: The majority of the provisions in these bills commence on 1 July 2003. One provision in Schedule 4 and the provisions in Schedule 5 commence on dates that are as set out in the Schedule.

Purpose

The purpose of these bills is to amend the Corporations Act 2001 (the Act) to give effect to the proposals contained within the Corporate Law Economic Reform Program (CLERP) consultation paper, *CLERP 7 – Simplified Lodgments and Compliance (CLERP 7)*¹ and to clarify the law relating to charges over uncertificated securities.

Background

These bills are part of a package of three Bills which implement the Government's response to CLERP 7. The other Bill in the package is the Corporations (Fees) Amendment Bill 2002.

In February 2000, the then Minister for Financial Services and Regulation, the Hon Joe Hockey MP, announced the release of CLERP 7.

The CLERP 7 consultation paper discussed five areas for reform:

- Abolition of company annual returns
- Streamlining document lodgment requirements under the Corporations Act
- Establishment of a business advisory board

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- Use of ABN's (Australian Business Numbers) and the ABR (Australian Business Register), and
- Corporations Law Fees.

In September 2001, in a joint press release between Mr Hockey and the then Minister for Small Business, Mr Ian McFarlane², the Ministers announced that the proposals that were contained within the CLERP 7 paper would be implemented.³

Mr McFarlane was reported as saying that the Government was committed to reducing the paperwork burden on small business and boosting the sectors take up of e-commerce.⁴ This would be achieved through CLERP 7 implementation. In addition, it was noted that significant cost savings to business would flow through the implementation of CLERP 7.⁵

The explanatory memorandum to the Bill reinforces the point that many of the CLERP 7 proposals are designed to improve the efficiency of corporate regulation by simplifying document lodgement and compliance procedures for companies under the Act.⁶

The Bill also gives effect to recommendations made by the Companies and Securities Advisory Committee in the *Report to the Minister for Financial Services and Regulation on Charges over uncertificated securities*, which suggested that:

charges over uncertificated securities be exempt from the charges registration provisions of the Corporations Law.⁷

Main Provisions

Current notification requirements

The Act currently contains a number of provisions requiring companies and managed investment schemes lodge information with Australian Securities and Investments Commission (ASIC) regarding characteristics of the entity.

Currently section 345 of the Act requires that a company lodge an annual return with ASIC by the 31 January each year. An annual return may be lodged either in writing or electronically.⁸

The Act sets out the information that a company needs to include in its annual return.⁹ In summary, the law states that the following details should be included in a company's annual return;

- company name
- address of registered office,

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- address of principal place of business,
- information regarding directors and company secretaries,
- information regarding issued shares and options granted over unissued shares,
- information regarding company members,
- information regarding solvency,
- information regarding the ultimate holding company, and
- the Australian Company Number (ACN).

Section 345 of the Act also states that the responsible entity of a registered scheme (that is, a managed investment scheme), must lodge an annual return for the scheme within 3 months of the end of the schemes financial year. The Act also sets out the information that the responsible entity needs to include in the return.

Generally speaking, proprietary companies are required to pay \$200 to lodge an annual return and public companies are required to pay \$900. These fees are payable when the annual return is lodged.¹⁰

Failure to lodge an annual return is an offence with a maximum penalty being five penalty units (\$550).¹¹

Historically, the annual return was required to contain financial information. For most companies, the information to be provided was 'key financial data' which contained a summary of assets, liabilities and operating profits/losses.¹² The requirement to lodge key financial data was removed pursuant to the policy contained within the *First Corporate Law Simplification Act 1995* and its amending regulations.

It has been suggested that

the purpose of the annual return is no longer (if it ever was) to inform creditors and the public of the state of the financial affairs of the company. Financial disclosure is mandated by the provisions of the Corporations Act dealing with financial statements, their distribution to members and their lodgment with ASIC. It appears that the purpose of the annual return is to provide some public reassurance that the company is still in operation and is solvent.¹³

The Corporations Law was subsequently amended in 1998 to include the requirement that directors of a company who have not lodged financial statements under Part 2M of the Act, must pass a solvency resolution in the month preceding the date when the company annual return is required to be lodged.

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Public companies and proprietary companies are required to lodge financial statements under Part 2M of the Act. Normally small proprietary companies do not lodge financial reports under Part 2M and therefore they will be required to pass a solvency resolution.

Currently, failure to pass a solvency resolution constitutes an offence with a maximum penalty of five penalty units (\$550).

Currently the law also requires that a company must notify ASIC if there is a change to;

- the registered office of the company,¹⁴
- principal place of business of the company,¹⁵
- company officers and their particulars (including appointments/cessations, changes to officers name or address).¹⁶

A company has fourteen days from the date on which these change have occurred to notify ASIC of the change. Failure to notify ASIC of these changes is a criminal offence.

Notification requirements in the Bill

The Bill proposes to remove the requirement to lodge an annual return by repealing **Part 2N.1** of the Act which contains the requirement to lodge annual returns.

The Bill also proposes to insert new provisions (**Parts 2N.1-5**) requiring companies and registered schemes respond to the following documents issued by ASIC;

- an extract of particulars
- a return of particulars, and

increasing companies ongoing reporting requirements to ASIC.

Extract of particulars

In summary, under the Bill, ASIC will on an annual basis give each company and responsible entity of a registered scheme, an 'extract of particulars'. The entity receiving the extract of particulars will be required to verify that the contents of the extract are correct and pay ASIC an annual 'review fee'.

Clause 346A states that ASIC must on an annual basis, give each company and registered scheme a copy of their extract of particulars.

Item 2 defines an 'extract of particulars' as a statement provided by ASIC that contains

- details of the particulars of the company or registered scheme as required to be kept in the registers under sub-section 1274(1), and

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- addition information required to be provided to ASIC as prescribed by the regulations (**proposed clause 346B**).

Sub-section 1274(1) of the Act states that;

‘ASIC must, subject to this Act, keep such registers as it considers necessary in such form as it thinks fit.’

In section 9 of the Act, register is defined to mean a ‘register under this Act’.

The Act does not set out what particulars of the company or registered scheme are kept in the 1274(1) registers. Therefore, it is not clear what information ASIC may include and ask an entity to verify in an extract of particulars.

The extract of particular is required to be given to the entity within two weeks of the ‘review date’. **Clause 345A** defines ‘review date’ for companies and registered schemes as being the anniversary of the entity’s registration or a date chosen and agreed upon between ASIC and the entity.

Clause 346C states that a company or registered scheme must notify ASIC if any part of the extract of particulars is incorrect, or provide ASIC with specific information if they have been asked a specific detail under **proposed clause 346B**. This response is required to be made within 28 days after the issue of the extract of particulars.

Failure to notify ASIC if any part of the extract of particulars is incorrect or respond to a request from ASIC for particular information is an offence. The maximum penalty is five penalty units (\$550).

Annual review fee – Corporations (Review Fees) Bill 2002

In addition to this, each company and registered scheme will be required to pay an annual ‘review fee’ to ASIC payable no later than two months after the review date (**clause 1351**).

The arrangements relating to ‘review fees’ is contained within the Corporations (Review Fees) Bill 2002.¹⁷ **Proposed section 5** of this bill provides that regulations may be made which will prescribe review fees.

Solvency resolution

As noted above, the Act currently imposes a requirement on company directors to pass a solvency resolution the details of which are included in the company annual return. The current requirement is repealed by **item 30** of the bill and is replaced by the proposed **Part 2N.3**.

Normally small proprietary companies do not lodge financial reports under Part 2M and therefore they will be required to pass a solvency resolution¹⁸.

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In summary, under this part, if a company has not lodged a financial report¹⁹ with ASIC under Part 2M within the twelve month period preceding the review date, the directors of the company will be required to pass a solvency resolution (as defined in **item 8**) within two months after the review date.

Failure to pass a solvency resolution in these circumstances is an offence.

In many senses, these provisions reproduce the current requirements under the Act. The following new provisions have also been included which require a company to advise ASIC if;

- they pass a resolution that they do not consider that the company will be able to pay its debts (a ‘negative solvency resolution’ as defined in **item 3**), or
- they have not passed a solvency resolution within two months of the review date (**clause 347B**).

Failure to notify ASIC in these circumstances is an offence under the Act with a maximum penalty of ten penalty units (\$1100).

Proposed section 347C has also been included in the Bill. It deems a company director to have represented to ASIC that they consider there are reasonable grounds to believe that the company will be able to pay its debts if the following conditions have been met;

- it has not lodged a Chapter 2M solvency resolution, and
- it has not passed a positive solvency resolution, and
- it has not notified ASIC that they have failed to pass a solvency resolution,

It is not clear that this provision adds any value to the operation of the solvency resolution requirements contained within the proposed Bill.

Return of particulars

Under the Bill, ASIC will be able to instigate an inquiry with the company or registered scheme to ensure that the regulators records are up to date. It is proposed that ASIC will be able to issue a ‘return of particulars’ (as defined in **item 5**) to a company or registered scheme if;

- the entity has not paid its review fee,
- ASIC suspects that the details in its register are incorrect, or
- ASIC has not received any documentation regarding the company for at least a year (**clause 348D**).

In a return of particulars, ASIC may ask the company or registered scheme for;

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- confirmation of particulars in relation to the company or scheme that are recorded in the register under subsection 1274(1) (**clause 348D** and **item 5**),
- other details regarding the company as prescribed by regulations (**proposed clause 348B**),
- that the entity pass a solvency resolution or provide it with details regarding a solvency resolution that has already been passed (**proposed clause 348C**).

As noted above, it is not entirely clear on the face of the legislation what ‘particulars in relation to the company or scheme that are recorded in the register under subsection 1274(1)’ means. Consequently it is not clear what information ASIC may ask a company or registered scheme to provide to them under this section.

Other notification requirements

The Bill also amends those parts of the Act that relate to the information to be included when a company applies for registration and the information that needs to be included on the Register of Members.

Company Registration

Section 117 of the Act states that to register a company, a person must lodge an application with ASIC. The section sets out what must be contained within an application. **Items 15-17** amend section 117 of the Act to include a number of additional pieces of information that need to be included in an application for registration, namely

- Whether or not shares held by a member will be fully paid on registration,
- Whether or not the shares will be beneficially or non-beneficially owned by the member on registration, and
- Whether, on registration, the company will have an ultimate holding company.

These additional requirements increase the information that ASIC is initially provided with by a company seeking to be registered under the Act.

Register of Members

Item 20 amends section 169 of the Act to provide that the Register of Members is required to include information regarding;

- the amount paid on the shares, and
- whether or not the shares are fully paid.

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These amendments ensure that the Register of Members provides more information regarding holding of company shares.

Ongoing reporting of changed details regarding a company

The ongoing reporting requirements currently contained within the Act (noted above) continue. The Bill does however amend the Corporations Act to impose a number of additional reporting requirements on proprietary companies so that;

- where a company makes changes to a proprietary company and amends its Register of Members so that certain parts of the Register (including names and address of top 20 members, details of shareholdings by members as well as changes to share structure) is different to the information contained within the latest extract of particulars, the company will be required to notify ASIC of those changes (**Item 18**),
- where a proprietary company amends parts of its Register of Members (including names and addresses of top 20 members, details of shareholdings by members as well as changes to share structure) it must notify ASIC of these changes (**clauses 178A, 178B and 178D**),
- where a proprietary company changes its share structure, details regarding this change of structure must be notified to ASIC (**clause 178C**), and
- where details regarding a proprietary companies' ultimate holding company change, the proprietary company must notify ASIC of these changes (**clauses 349A-349D**).

Items 25 – 28 insert notes at the end of relevant sections in the Act, which alert the reader to the fact that proprietary companies have these new additional reporting requirements.

Liabilities

Section 188 of the Act places a duty upon the company secretary (or where there is no company secretary, the directors) to meet certain reporting requirements under the Act. **Item 23** of the Bill amends section 188 to extend the secretary's duties to;

- respond to the extract of particulars,
- respond to the return of particulars,
- lodge financial reports'
- notifying ASIC if there is;
 - a change in the companies principal place of business,
 - a change to the members register, if it is a proprietary company,
 - a change to the share structure, if it is a proprietary company,

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- a notice of an issue of shares,
- a change to the ultimate holding company, if it is a proprietary company.

Update to the Small Business Guide

Part 1.5 of the Act is the Small Business Guide. The guide summarises the main rules in the Act that apply to proprietary companies limited by shares.

Item 11 – Item 14 updates the Small business guide so that it makes reference to the relevant changes proposed by the Bill.

Schedule 2 – Use of ABN

The Australian Business Number (ABN) has been described as a single business identifier that allows businesses to deal with the whole of government at one place and with one identifier.²⁰

Currently, companies and business entities that carry on business in Australia need an ABN to register for the goods and services tax and other elements of the New Tax System.

When the ABN becomes widely used by Government, businesses will be able to use one number to identify themselves in their dealings with the Commonwealth Government.²¹

Company ABN's are based on Australian Company Number (ACN) but have at least two additional digits.

The explanatory memorandum to the Bill states that

It is proposed to make a number of minor technical amendments that are intended to harmonise some lodgment requirements of the Corporations Act with similar requirements in the a New Tax System (Australian Business Register) Act 1999.

Schedule 2 of this bill contains amendments relating to displaying ACN's, ARBN's (Australian Registered Business Number) or ARSN's (Australian Registered Scheme Number). Unless otherwise stated, references to items in the following discussion will relate to items contained within Schedule 2.

Currently there are a number of provisions in the Act that require a company display its ACN, ARBN or ARSN. These provisions have been amended so that a company may display its ABN rather than its ACN, ARBN or ARSN if the last nine digits are the same as the ACN, ARBN or ARSN. The relevant amendments are as follows;

- Company with a common seal may display the ABN rather than the ACN (**item 4**),
- Company may display its ABN rather than its ACN on all public documents (**item 6**),

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- Registered Australia bodies and registered foreign bodies may set out their ABN rather than their ARBN (**item 7**), and
- Managed investment schemes documents lodged with ASIC may set out the schemes ABN's rather than the schemes ARSN. (**item 9**)
- **Item 10** inserts a new provision which states that where the ACN, ARBN or ARSN of a company, registered body or registered scheme is required to be used under a Commonwealth law administered by ASIC, the ABN may be used instead if the last nine digits are the same as the last nine digits of the ACN, ARBN or ARSN.

Schedule 3 – Electronic Lodgements

Lodgement of documents with ASIC in recent years has become more streamlined as part of the Australian Government's Online strategy. ASIC has a range of online services including the;

- EDGE lodgement system that can be used by professional bodies such as accountancy and legal practices to transmit electronic copies of company documents (such as annual returns) directly to ASIC's databases, and
- E-registers which is an interactive web-based service, designed specifically for small business, that allows companies to update their details (such as company annual returns) directly with ASIC.

Document lodgement with ASIC is currently dealt with in Part 2N.2 of the Act.

Schedule 3 of the Bill contains a number of amendments to enhance the electronic lodgement of documents with ASIC and unless otherwise stated, references to items in the following discussion will relate to items contained within Schedule 3.

Item 1 of the Bill renames the Part to Chapter 2P – Lodgments with ASIC.

Currently section 352 sets out the procedures for the electronic lodgement of documents with ASIC. At present the Act states that where a person lodges a document electronically, the person is required to keep a copy of that document for 7 years.

Under the Bill, **item 2** amends the Act to enable ASIC to accept notification of changes to particulars in the register that are lodged electronically without the company or its appointed agent retaining a paper copy.

Item 3 amends the Act so that ASIC is able to determine conditions for the lodgement of documents required to be lodged under section 205G (director of listed company required to notify market operator of shareholdings) and section 792C (provision of information to ASIC about listed disclosing entities).

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Item 3 also includes **clause 354** which provides that ASIC may accept telephone notice of changes to particulars, where the notice relates to a misspelling or other minor typographical error or it is included on a list published by ASIC on the internet.

Item 4 makes a consequential amendment to section 1311 of the Act so that the renamed chapter is still caught by the offence provisions.

Item 5 contains an amendment to section 1364 of the Act to make provisions for the making of regulations for the electronic lodgement of fees.

Schedule 4 - Lodgement Periods

Schedule 4 of the Bill contains amendments to extend the lodgement periods for notification of information under the Act. The explanatory memorandum to the Bill states that the amendments are

Intended to harmonise lodgment requirements under the Corporations Act with similar requirements in the *A New Tax System (Australian Business Register) Act 1999*.²²

Schedule 5 - Miscellaneous Amendments

Schedule 5 of the Bill contains a number of miscellaneous amendments to the Corporations Act and the *Australian Securities and Investments Commission Act 2001*.

Item 1 amends the Act so that ASIC is able to enter into contracts up to the value of \$1 million without seeking Ministerial approval.

Item 2 provides that the Chairperson can nominate a person to attend meetings of the Corporations and Markets Advisory Committee on his or her behalf.

Item 3 deletes the term 'prescribed interest' (a term made obsolete when the *Managed Investment Act 1998* became operational) and replaces it with the term that is now in use 'interest in a managed investment scheme'.

Item 4-6 corrects a number of minor drafting errors in the Act.

Age limit on election and re-election of public company directors

Under section 201C of the Act, directors of public companies and their subsidiaries may only hold office until the next Annual General Meeting following the day they turn 72. Persons over 72 may act as directors of public companies and their subsidiaries only if they are appointed by special resolution²³ at an Annual General Meeting of the company, and the notice of the meeting states the person's age.

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During the most recent election campaign, the Prime Minister undertook to amend the Corporations Act by removing the age restriction in s.201C for directors of public companies. The Prime Minister described the provisions as 'an unwarranted discrimination against older Australians'.²⁴

In accordance with this policy commitment, **item 7** removes the upper age limit on election or re-election of directors of a public company and their subsidiaries.

Charges over uncertificated securities

Item 8 amends the Act to make it clear that charges over uncertificated securities held by companies [for example shares registered in the Clearing House Electronic Subregister System (CHES) and Bonds] are not subject to the requirements of Chapter 2K.

The effect of this is to make it clear that a company is not required to notify ASIC that a charge is held over the uncertificated securities.

Concluding Comments

By removing the requirement to lodge an annual return, the amendments contained within this Bill decrease the annual document lodgement requirements under the Act. The Act is however augmented with an arrangement that requires annual verification of an 'extract of particulars' which is produced by ASIC. Companies and registered schemes may also be required to respond to a 'return of particulars' that may be issued by ASIC on an ad hoc basis.

In addition to this the bill imposes increased ongoing reporting requirements on companies to ensure that the information that ASIC holds in relation to the company is current.

Therefore, whilst the Act does to an extent reduce the document lodgement requirements of companies and registered schemes, the requirement to lodge an annual return is replaced with other annual reporting requirements which will continue to make reporting to ASIC under the Corporations Act a matter that will consume company resources.

Endnotes

- 1 Simplified Lodgement and Compliance: Streamlining paperwork under the Corporations Law; Corporate Law Economic Reform Program, Proposals for reform, Paper number 7 [<http://www.treasury.gov.au/contentitem.asp?pageId=013&ContentID=287>], 29 January 2003.

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- 2 'Red Tape Cut for Small Business', Media Release, The Hon Joe Hockey MP Minister for Financial Services and Regulation and The Hon Ian MacFarlane MP Minister for Small Business, [<http://www.minfsr.treasury.gov.au/content/pressreleases/2001/073.asp>], 29 January 2003.
- 3 This Bill contains the legislative provisions that are needed to give effect to the CLERP 7 proposals. Some aspects of the CLERP 7 paper will be implemented by way of administrative change. Other aspects of CLERP 7 will be implemented by way of regulations that will be made under the Act.
- 4 'Government cuts red tape for small business', The Canberra Times, September 25 2001.
- 5 'Red Tape Cut for Small Business', Media Release, The Hon Joe Hockey MP Minister for Financial Services and Regulation and The Hon Ian MacFarlane MP Minister for Small Business, [<http://www.minfsr.treasury.gov.au/content/pressreleases/2001/073.asp>], 29 January 2003.
- 6 *Explanatory Memorandum, Corporations Legislation Amendment Bill 2002*, p.1.
- 7 Companies and Securities Advisory Committee, *Report to the Minister for Financial Services and Regulation on Charges over uncertificated securities*, April 2001 [[http://www.camac.gov.au/camac/camac.nsf/byHeadline/PDFFinal+Reports+2001/\\$file/Charges_over_uncertified_securities_April_2001.pdf](http://www.camac.gov.au/camac/camac.nsf/byHeadline/PDFFinal+Reports+2001/$file/Charges_over_uncertified_securities_April_2001.pdf)], 29 January 2003.
- 8 Section 347.
- 9 Section 348.
- 10 *Corporations (Fees) Regulations 2001*, Schedule 1, Item 7A.
- 11 Corporations Act 2001, Schedule 3.
- 12 HAJ Ford, RP Austin and IM Ramsay, *Fords Principles of Corporations Law*, Butterworths Australia, 2000, p. 10,351.
- 13 HAJ Ford, RP Austin and IM Ramsay, *Fords Principles of Corporations Law*, Butterworths Australia, 2000, p. 10,351.
- 14 Section 142.
- 15 Section 146.
- 16 Section 205B.
- 17 Payment of a review fee is regarded as a tax [proposed clause 5 of the Corporations (Review Fees) Bill 2002] and hence a separate bill is needed to ensure that there is compliance with section 55 of the Commonwealth Constitution.
- 18 Section 292.
- 19 'financial report' is defined in section 9 of the Act to mean an annual financial report or a half-year financial report prepared under Chapter 2M.
- 20 Crowley, Melinda et al, *Australian Master Tax Guide 2002*, CCH Australia Limited, Sydney, 2002, p.10.

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- 21 Australian Securities and Investments Commission ,*Australian Business Number*, [http://www.asic.gov.au/asic/ASIC_PUB.NSF/byid/CA256AF60076AF11CA256AF6007EE/CDE?opendocument]. 29 January 2003.
- 22 *Explanatory Memorandum*, Corporations Legislation Amendment Bill 2002, p. 24–25.
- 23 Special resolution is defined in section 9 of the Act as a resolution that has been passed by at least 75% of the votes cast.
- 24 Coalition rewards active seniors, Media Release, The Hon John Howard, Prime Minister, [http://www.pm.gov.au/news/media_releases/2001/media_release1353.htm], 29 January 2003.

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