Parliament of Australia
Department of Parliamentary Services

Parliamentary Library
Information, analysis and advice for the Parliament

BILLS DIGEST

www.aph.gov.au/library

27 January 2009, no. 75, 2008–09, ISSN 1328-8091

Corporations Amendment (No. 1) Bill 2008

Morag Donaldson
Law and Bills Digest Section

Contents

Corporations Amendment (No. 1) Bill 2008

Date introduced: 3 December 2008

House: Senate

Portfolio: Treasury

Commencement: Royal Assent

Links: The relevant links to the Bill, Explanatory Memorandum and second reading speech can be accessed via BillsNet, which is at http://www.aph.gov.au/bills/. When Bills have been passed they can be found at ComLaw, which is at http://www.comlaw.gov.au/.

Purpose

The Bill amends the *Corporations Act 2001* (Cth) (the Act) to disqualify a person from managing corporations in Australia if the person is currently disqualified by a court of 'foreign jurisdiction' from being a director of a foreign company.[1]

While the amendment is not specifically limited to orders made by a New Zealand court, it arises in the context of the Memorandum of Understanding on Coordination of Business Law (MOU), signed by Australia and New Zealand on 31 August 2000 and revised on 22 February 2006.[2] Specifically, paragraph (h) of the work programme annexed to the revised (2006) MOU identifies the need to '[e]xplore the desirability of adopting a mechanism which would allow for the disqualification of persons from managing corporations in one jurisdiction to apply in the other jurisdiction'.[3]

1. See Schedule 1 to the Bill.
2. For the original (2000) text of the MOU, see http://www.dfat.gov.au/geo/new_zealand/anz_cer/memorandum_of_understanding_business_law.html, accessed on 9 December 2008.
3. For the revised (2006) text, see http://www.treasury.gov.au/documents/1073/PDF/Business_law_MOU.pdf, accessed on 9 December 2008.

Background

Basis of policy commitment

Memorandum of Understanding on Coordination of Business Law

The MOU was signed in 2000 in furtherance of the 'Australia New Zealand Closer Economic Relations Trade Agreement' (ANZCERTA) of 1983.[4] Article 1 of the ANZCERTA contains the parties' objectives in concluding the Agreement:

> (a) to strengthen the broader relationship between Australia and New Zealand;
>
> (b) to develop closer economic relations between the Member States through a mutually beneficial expansion of free trade between New Zealand and Australia;
>
> (c) to eliminate barriers to trade between Australia and New Zealand in a gradual and progressive manner under an agreed timetable and with a minimum of disruption; and
>
> (d) to develop trade between New Zealand and Australia under conditions of fair competition.

The MOU is intended to create closer economic relations between Australia and New Zealand through the coordination of business law in the two nations. The laws need not be identical in both countries, but they should not act as a barrier to trade or investment. The coordination measures should also involve the reduction of transaction and compliance costs for businesses.

The MOU provides for a review every five years. In July 2005, the Governments of Australia and New Zealand initiated the first review. Some 30 submissions were received on the operation of the MOU, achievements to date, and suggestions for changing/updating work priorities.[5] Following the review, the text of the MOU was slightly revised and a new MOU was signed on 22 February 2006.[6]

The mutual benefits arising from the MOU are stated in the revised text as follows:

---

4. See http://www.austlii.edu.au/au/other/dfat/treaties/1983/2.html, accessed on 9 December 2008.
5. The review report is available at http://www.treasury.gov.au/documents/1073/PDF/MOU_review_joint_report.pdf, accessed on 9 December 2008.
6. For the revised (2006) text, see http://www.treasury.gov.au/documents/1073/PDF/Business_law_MOU.pdf, accessed on 9 December 2008.

> 1. The Governments of New Zealand and Australia recognise the importance of accelerating, deepening and widening the relationship that has developed through the growth of trans-Tasman trade, particularly since the commencement of the Australia New Zealand Closer Economic Relations Trade Agreement in 1983. Both Governments consider that further coordination of significant areas of business law (including consumer law but not taxation) can facilitate the achievement of this goal.
>
> 2. Both Governments also acknowledge the importance of a global approach to business law issues (particularly in light of the increasing prevalence of electronic commerce) and the significance of the trans-Tasman relationship in that approach.
>
> 3. Both Governments have committed to the objective of a single economic market. The Australian Productivity Commission has defined this as a geographic area comprising two or more countries in which there is no significant discrimination in the markets of each country arising from differences in the policies and regulations of both countries.
>
> 4. Both Governments are aware that some existing laws and regulatory practices relating to business within each economy may impede the development of trans-Tasman business activity. Through the development of increased coordination and dialogue, both parties Governments will endeavour to minimise such impediments.
>
> 5. An array of approaches exists to achieve the goal of increased coordination in business law. Both Governments recognise that one single approach would not be suitable for every area, that coordination is multi-faceted and does not necessarily mean the adoption of identical laws, but rather finding a way to deal with any differences so they do not create barriers to trade and investment. In working towards greater coordination, the efforts of both Governments will focus on reducing transaction costs, lessening compliance costs and uncertainty, and increasing competition.
>
> 6. This Memorandum of Understanding reflects our desire to deepen the trans-Tasman relationship within a global market, through increased coordination of business law, thereby creating a mutually beneficial trans-Tasman commercial environment. Such an environment will allow New Zealand and Australia to share a common outward focus in commercial activities within the greater global market.
>
> 7. Both Governments recognise the trend towards increasing international convergence of financial market and business regulation and the need to comply with international standards. Both Governments acknowledge the benefit of coordination in efforts to influence evolving international regulatory standards and regimes.

The revised (2006) MOU contains the following provisions dealing with consultation:

> 15. In addition to the items specified in the work programme (see Annex), when either Government considers that a difference between their respective business laws or regulatory practices gives rise to an impediment to the development of the trans-Tasman relationship, the two Governments will consult with a view to resolving the

> impediment, whether or not the area of law is already included in the programme and regardless of the priority accorded to the matter at the time.
>
> 16. Each Government will keep the other Government informed of proposed reforms in the business law area. Further, each Government will give the other the opportunity to be involved in the other's reform process at an early stage. Early consultation is particularly important where a policy proposal has extra-territorial application that impacts on the other country or would have the potential to result in the removal of any right or benefit that the other country currently enjoys.
>
> 17. Each Government will take the necessary steps to facilitate early examination of the areas of business law and regulatory practices contained in the programme.
>
> 18. Both countries also place great value on cooperation between regulators, and between regulators and policy officers. The work programme has been varied to reflect this and it is hoped that Australian and New Zealand officers and regulators in each sphere will meet together annually to discuss issues of mutual interest.

Ministerial Council for Corporations (MINCO)

In his second reading speech, Senator the Hon Nick Sherry, Minister for Superannuation and Corporate Law, stated that the Ministerial Council for Corporations (MINCO) 'was consulted in relation to these amendments to the laws in the national corporate regulation scheme, and has approved them as required under the Corporations Agreement'.[7] He also said that he had commenced consultation with MINCO 'on the accompanying regulations' and was hopeful that they would commence at the same time as the proposed revisions to the Act.[8] (The Corporations Regulations 2001 will prescribe the foreign jurisdictions to which the amendments will apply.)

MINCO currently comprises the Minister for Superannuation and Corporate Law (Senator the Hon Nick Sherry) and the Attorneys-General of the Australian states and territories. Its secretariat is based in the Treasury. According to the Government Online Directory, MINCO was:

> Established by the Heads of Agreement of June 1990 between Australian Government, State and Northern Territory Ministers on future corporate regulation in Australia and the subsequent Corporations Agreements. The Council's principal

---

7. Senator the Hon Nick Sherry, Minister for Superannuation and Corporate Law, 'Corporations Amendment (No. 1) Bill 2008', Second reading speech, *Debates*, Senate, 3 December 2008, p. 2, http://www.aph.gov.au/hansard/senate/dailys/ds031208.pdf, accessed on 9 December 2008. (Note that the speech was not in fact made by the Minister in the Chamber, but was incorporated into Hansard on the motion of Senator the Hon Joe Ludwig.)

8. ibid.

> function is the consideration of amendments to the legislation governing corporations and financial services, and the Australian Securities and Investments Commission.[9]

Press Release No. 9 of 26 February 2008

The measure was announced in 'the Minister for Superannuation and Corporate Law's Press Release No. 9 of 26 February 2008'.[10] That press release reads as follows:

> Senator the Hon Nick Sherry, Minister for Superannuation and Corporate Law, today announced that the Government will introduce legislation to ensure that persons who are disqualified from managing companies in New Zealand will also be disqualified in Australia.
>
> "The Government is focused on taking practical steps that reinforce and improve the integrity of Australia's corporations and our financial markets.
>
> "This legislation will directly address a loophole in the existing law whereby people can effectively avoid disqualification by simply moving across the Tasman. That's not good enough, so we'll be closing the loophole", said Minister Sherry.
>
> The amendments to the Corporations Act 2001 will further progress common regulatory frameworks across the Tasman. The legislation will be modelled on the existing New Zealand provisions to ensure cross-border consistency.
>
> The amendments will mean that persons disqualified from managing companies by the New Zealand Registrar or a New Zealand court will be automatically disqualified in Australia.
>
> Additionally, disqualification in another country will constitute a ground for the Australian Securities and Investment Commission to apply to an Australian court for an order that that person be disqualified in Australia.
>
> "These are important pieces of the regulatory framework that the Government will be correcting", said Minister Sherry.
>
> Draft legislation will be developed over the coming months.[11]

---

9. 'Ministerial Council for Corporations' entry, Government Online Directory, http://www.directory.gov.au/osearch.php?ou%3DMinisterial%20Council%20for%20Corporations%2Cou%3DOther%20Portfolio%20Bodies%5C%2C%20Committees%5C%2C%20Boards%20and%20Councils%2Co%3DTreasury%2Co%3DPortfolios%2Co%3DCommonwealth%20of%20Australia%2Cc%3DAU&changebase, accessed on 9 December 2008.
10. Explanatory Memorandum, Corporations Amendment (No. 1) Bill 2008, p. 3.
11. Senator the Hon Nick Sherry, Minister for Superannuation and Corporate Law, 'Trans-Tasman Disqualification of Disqualified Directors', Press Release No. 9, 26 February 2008,

Position of the Australian Institute of Company Directors (AICD)

The Australian Institute of Company Directors (AICD) is the membership institute for Australian company directors. It is 'dedicated to making a positive impact on the economy and society by promoting professional directorship and good governance'. [12] In its Position Paper No. 14 (December 2008), the AICD supports the Bill:

> The Australian Institute of Company Directors (AICD) supports the Corporations Amendment (No 1) Bill 2008 in principle. That is, a person disqualified by a court from being involved in the management of a company in their home (a foreign) jurisdiction (New Zealand in the first instance) is also automatically disqualified in Australia. AICD supports this mutuality where the foreign jurisdiction observes the rule of law in relation to disqualification proceedings including a system of appeals.
>
> As a national membership organisation for directors, AICD excludes directors who are disqualified in Australia. It would assist us to be able to rely on such an assumption in relation to directors governed under New Zealand law (and other jurisdictions as may be added in the future).
>
> Without a detailed analysis it is not easy to understand the full impact of such harmonisation in relation to New Zealand. However, even if the disqualification criteria are more onerous in New Zealand, with the proposed change, AICD will be in a better position to judge the suitability of applicants for membership. We also note that New Zealand has recently extended the grounds for disqualification for directors to include disqualified directors under Australian law.
>
> Disqualification under New Zealand law should, in our view, constitute a ground for automatic disqualification under the current section 206B Corporations Act 2001 and as such, automatically act as a bar to the disqualified person becoming a director of another company, pursuant to section 201B of the Act.
>
> AICD supports the automatic disqualification initiative and looks forward to its further development.[13]

Committee consideration

The Senate Selection of Bills Committee met on 4 December 2008 and resolved to recommend that the Bill not be referred to a committee.[14]

---

http://minscl.treasurer.gov.au/DisplayDocs.aspx?doc=pressreleases/2008/009.htm&pageID=003&min=njs&Year=&DocType=0, accessed on 9 December 2008.

12. AICD, 'About AICD: AICD Mission', http://www.companydirectors.com.au/About, accessed on 22 December 2008.

13. AICD, 'Director Disqualification in Foreign Countries', Position Paper No. 14, December 2008, http://www.companydirectors.com.au/Policy/Policies+And+Papers/2008/, accessed on 27 January 2009.

Financial implications

According to the Explanatory Memorandum for the Bill, the financial impact will be 'Nil'.[15] Further, the compliance cost impact on business will be 'very low' and will result only 'from the need to keep abreast of new regulatory requirements'.[16]

Main provisions

Item 1 of **Schedule 1** amends note 1 to subsection 199A(3) of the Act by adding reference to proposed section 206EAA (see **item 3** below). Subsection 199A(3) sets out the circumstances when a company or related body corporate cannot indemnify a person against legal costs:

> (3) A company or related body corporate must not indemnify a person (whether by agreement or by making a payment and whether directly or through an interposed entity) against legal costs incurred in defending an action for a liability incurred as an officer or auditor of the company if the costs are incurred:
>
> (c) in defending or resisting proceedings brought by ASIC or a liquidator for a court order if the grounds for making the order are found by the court to have been established;

The effect of the amendment is that the term 'proceedings' in paragraph 199A(3)(c) will include proceedings brought by the Australian Securities and Investments Commission (ASIC) to have a person disqualified from managing corporations in Australia where the person is disqualified by an order made by a court of 'foreign jurisdiction' from being a director, or being concerned in the management of a foreign company, or from carrying on activities that are 'substantially similar to being a director' (see **item 3** below).

Item 2 inserts **proposed subsections 206B(6) and (7)**. Section 206B sets out the circumstances when a person is *automatically* disqualified from managing corporations. **Proposed subsection 206B(6)** provides that a person is disqualified from managing corporations if the person is currently *disqualified by a court* of 'foreign jurisdiction' from being a director of a foreign company or being concerned in the management of a foreign company. **Proposed subsection 206B(7)** defines 'foreign jurisdiction' as 'a foreign country, or part of a foreign country, prescribed by the regulations as a foreign jurisdiction for the purposes of this section'. At this stage, the Government proposes to prescribe only

---

14. Selection of Bills Committee, Report No. 17 of 2008, 4 December 2008, http://www.aph.gov.au/Senate/committee/selectionbills_ctte/reports/2008/rep1708.pdf, accessed on 9 December 2008.
15. Explanatory Memorandum, Corporations Amendment (No. 1) Bill 2008, p. 3.
16. ibid.

New Zealand as a 'foreign jurisdiction', but in reality any country could be prescribed for the purposes of section 206B, particularly 'if it is considered that there is sufficient similarity with Australia's regulatory regime'.[17]

Item 3 inserts new **proposed section 206EAA**, which deals with the Court's power (on application by ASIC) to disqualify a person from managing corporations if the person is currently disqualified under a law of a foreign jurisdiction from being a company director or being concerned in the management of a foreign company, or carrying activities that are 'substantially similar to being a director'. The power is a discretionary one. That is, the Court is not obliged to disqualify the person from managing corporations in Australia. The person need not be disqualified by an order made by a court of foreign jurisdiction; the person need only be disqualified under the law of the foreign jurisdiction (for example, he or she may have been disqualified by a regulatory body). (This situation is to be contrasted with **proposed subsection 206B(6)**, where the person must be disqualified by a *court order* in the foreign jurisdiction.).

Proposed subsection 206EAA(2) provides that in determining the period of disqualification, the Court 'may have regard to the period for which the person is disqualified under the law of the foreign jurisdiction', with the word 'may' indicating that the Court has a discretion to disqualify the person for a different period than that imposed under the law of the foreign jurisdiction.

Item 4 inserts reference to **proposed sections 206B(6) and 206EAA** in existing section 206H, which deals with the territorial application of Part 2D.6 of the Act (which deals with disqualification from managing corporations). Section 206H currently provides:

> This Part does not apply in respect of an act or omission by a person while they are managing a corporation that is a foreign company unless the act or omission occurred in connection with:
>
> (a) the foreign company carrying on business in this jurisdiction; or
>
> (b) an act that the foreign company does, or proposes to do, in this jurisdiction; or
>
> (c) a decision by the foreign company whether or not to do, or refrain from doing, an act in this jurisdiction.

The effect of the proposed amendment is that the situations mentioned in paragraphs 206H(a) to (c) do not need to exist in the case of disqualification under **proposed sections 206B(6) and 206EAA**.

---

17. See Senator the Hon Nick Sherry, Minister for Superannuation and Corporate Law, 'Corporations Amendment (No. 1) Bill 2008', Second reading speech, *Debates*, Senate, 3 December 2008, p. 2, http://www.aph.gov.au/hansard/senate/dailys/ds031208.pdf, accessed on 9 December 2008.

Items 5 and 6 insert reference to **proposed section 206EAA** in existing paragraphs 1274AA(1)(a) and 1274AA(2)(aa). Section 1274AA currently provides for the keeping of a register of disqualified company directors and other officers:

> (1) ASIC must keep a register of persons who have been disqualified from managing corporations under:
> (a) section 206C, 206D, 206E, 206EA or 206F of this Act; or
> (b) a provision of a law of a State or Territory that:
> (i) was in force at any time before the commencement of this Act; and
> (ii) corresponds, in whole or in part, to one of the provisions referred to in paragraph (a).
> (2) The register must contain a copy of:
> (a) every order made by the Court under section 206C, 206D or 206E; and
> (aa) every court order referred to in section 206EA; and
> (b) every notice that was served under subsection 206F(3); and
> (c) each permission given under subsection 206F(5); and
> (d) every order lodged under subsection 206G(4); and
> (e) every order, notice or permission that was made, served, given or lodged under a provision of a law of a State or Territory that:
> (i) was in force at any time before the commencement of this Act; and
> (ii) corresponds, in whole or in part, to one of the provisions referred to in paragraph (a), (b), (c) or (d).
>
> (3) Subsections 1274(2) and (5) apply to a copy of an order, notice or permission referred to in subsection (2) as if that copy were a document lodged with ASIC.
> (4) A reference in this section to a provision of a law of a State or Territory includes a provision as applied as a law of that State or Territory.

Item 6 may raise an issue of inappropriate drafting. It proposes to insert **new paragraph 1274AA(2)(ab)**: 'every court order referred to in section 206EAA'. The difficulty is that **proposed section 206EAA** does not *refer* to any court order. By implication, an Australian court may make its own order disqualifying a person from managing corporations in Australia under **proposed section 206EAA**, but, as mentioned above, there does not need to be an order of a court of foreign jurisdiction disqualifying the person from being the director of a foreign company for an Australian court to make an order under this provision—the person need only be disqualified 'under the law of a foreign company'. (If such a foreign order exists, the person would be automatically disqualified under **proposed subsection 206B(6)**—see **item 2** above.) The proposed paragraph may thus be better worded as 'every court order made under section 206EAA'.

Item 7 inserts **proposed Part 10.11** of the Act, dealing with transitional arrangements following the enactment of the Bill. It contains two proposed sections: **section 1485**,

dealing with the application of **proposed subsection 206B(6)**, and **section 1486**, dealing with the application of **proposed section 206EAA**. The new substantive provisions will apply to orders made by a court of foreign jurisdiction, or disqualification under a law of a foreign jurisdiction, 'on or after the commencement' of **items 2 and 3** of **Schedule 1**.

Concluding comments

The measures contained in the Bill have been modelled on New Zealand law in 'the interests of cross-border consistency'.[18]

Where a person has been disqualified from being a company director by an order made by a court of 'foreign jurisdiction' (that is, New Zealand), the person will be *automatically* disqualified from managing corporations (etc) in Australia. However, where the person has been disqualified under 'the law of a foreign jurisdiction', rather than a court order, an Australian court *may* disqualify the person from managing corporations if the Court is satisfied that disqualification (under **proposed section 206EAA**) is justified. Thus, a person who is disqualified from managing corporations under New Zealand law (but not a New Zealand court order) is not automatically disqualified under Australian law.

It is not clear why this distinction is made, particularly as the Bill is intended to prevent disqualified directors from simply moving from one country (namely, New Zealand) to Australia and managing companies here. The distinction seems to cast doubt on the integrity of New Zealand's regulatory bodies, which may not have the status of a court but still have the power to disqualify a person from being a director in New Zealand. It also seems to dilute the desire to 'enhance protection for investors and the integrity of Australia's markets'.[19] It may, however, be that the distinction is made on the basis that the Government could prescribe other foreign jurisdictions in due course.

There may, of course, be circumstances where a person is not disqualified by a New Zealand (or other country's) court order but is disqualified under the foreign law, and it may be appropriate that the person be disqualified by an Australian court order from managing corporations in Australia.

Interestingly, an Australian court order under **proposed section 206EAA** would create a ground for a New Zealand court to disqualify the person from being a director under section 383 of the *Companies Act 1993* (NZ), which currently provides (emphasis added):

> **Where**—
>
> (a) A person has been convicted on indictment of an offence in connection with the promotion, formation, or management of a company, or has been convicted of a crime involving dishonesty as defined in section 2(1) of the Crimes Act 1961; or

18. ibid.

19. ibid.

(b) A person has committed an offence for which the person is liable (whether convicted or not) under this Part of this Act; or

(c) A person has, while a director of a company and whether convicted or not,—

(i) persistently failed to comply with this Act or the Companies Act 1955, the Securities Act 1978, the Securities Markets Act 1988, the Takeovers Act 1993, or the takeovers code in force under that Act or, if the company has failed to so comply, persistently failed to take reasonable steps to obtain compliance with those Acts or the code; or

(ii) Been guilty of fraud in relation to the company or of a breach of duty to the company or a shareholder; or

(iii) Acted in a reckless or incompetent manner in the performance of his or her duties as director; or

(ca) a person has been prohibited in a country, State, or territory outside New Zealand from carrying on activities that the Court is satisfied are substantially similar to being a director or promoter of or being concerned or taking part in the management of a body corporate; or

(d) [Repealed]

(e) A person has become of unsound mind,—

the Court may make an order that the person must not, without the leave of the Court, be a director or promoter of, or in any way, whether directly or indirectly, be concerned or take part in the management of, a company for such period not exceeding 10 years as may be specified in the order.[20]

In a circular fashion, the making of a New Zealand court order under this provision (predicated upon the making of an Australian court order under **proposed section 206EAA**) would become a ground for automatic disqualification of the person under **proposed section 206B(6)** of the Australian Act.

20. See http://www.legislation.govt.nz/act/public/1993/0105/latest/DLM323252.html?search=sw_096be8ed802b45a6_disqualify&sr=1, accessed on 10 December 2008. The *Companies Act 1993* (NZ) is current as at 17 September 2008.

Members, Senators and Parliamentary staff can obtain further information from the Parliamentary Library on (02) 6277 2795.