




Corporate Law Reform

Introduction







This Information Package briefly outlines a number of the changes being made to the Corporations Law and changes to rename the Australian Securities Commission as the Australian Securities and Investments Commission.

These changes are the result of passage by the Federal Parliament of the:

-  Company Law Review Act 1998;
-  Managed Investments Act 1998; and
-  Australian Securities and Investments Commission Act 1998.

Company Law Review Act

The Company Law Review Act makes some fundamental changes to the Corporations Law. Some of the main changes include:

-  Changes to some basic features of companies such as constitutions and registered office;
-  An updated process for the registration and maintenance of companies;
-  Simpler annual returns and reforms to financial reporting;
-  A simplified process for the deregistration and reinstatement of defunct companies;
-  Changes relating to share capital and share transactions; and
-  Reforms to improve the lodgement of information and to support modern practices in electronic commerce.

Managed Investments Act

The Managed Investments Act substantially reforms the Law relating to managed investments (presently called prescribed interests). It introduces a new regime for the registration, regulation and management of registrable schemes, including the introduction of the concept of a 'single responsible entity'.

Australian Securities and Investments Commission Act

Finally, the Australian Securities and Investments Commission Act implements a number of the recommendations to the government by the Wallis inquiry into financial systems. This Act renames the ASC, as the Australian Securities & Investments Commission, ("ASIC")

Part 1: Basic Features of a Company

A number of changes have been made to simplify the Law and the basic features, or characteristics of a company. These changes have been designed to assist companies and users of the Law to interpret and comply with the Law and reduce unnecessary administrative burden on companies.

- ✓ Rules and constitution of companies;
- ✓ Registered office and principal place of business;
- ✓ Office holders;
- ✓ Common seal;
- ✓ Types of companies; and
- ✓ Members' rights and meetings.

Replaceable Rules and Constitution

Companies will no longer have memorandums of association and articles of association, but may have a single set of rules known as a "constitution".

Alternatively, a company may opt to have no constitution at all, but instead may rely on basic rules of internal management that are set out in the law and known as "replaceable rules". As their name suggests, these rules are replaceable, and a company may adopt a constitution to replace part or all of them. One of the replaceable rules (Section 249X) is mandatory for public companies.

A number of the regulations of the previous Tables 'A' and 'B' have been used to create the replaceable rules, while other Table 'A' and 'B' provisions have been embodied in the text of the legislation. For the same reason that the provisions of these Tables were inadequate or undesirable in certain areas, we believe that it would be prudent for most proprietary companies to adopt a constitution. Primary areas of concern in this regard include: -

- ✓ the definition of share class rights;
- ✓ rights of pre-emption on transfer of shares;
- ✓ avoiding 'hidden' powers, such as an unwanted casting vote for a chairman in the event of a voting deadlock at a company meeting;
- ✓ the ability to appoint directors to make up a quorum;
- ✓ the ability of the company to act as a sole-purpose superannuation fund trustee company and qualify for concessional rates on annual returns; and
- ✓ expanded indemnity provisions.

Clearly, many "special purpose" companies will require a constitution eg. Those defined under the Law as "special purpose companies" and those companies used by such professionals as accountants, architects, engineers etc.

Existing companies having a memorandum and articles of association will be taken to have a constitution in the same form under the new Law. Many companies are choosing to adopt a new constitution that better reflects the changes brought about by the new Law. It would, however, be prudent to seek professional advice before implementing such a change.

Replaceable rules are not necessary, and do not apply, for companies that have the same person as the only director and member. The mechanisms for operation of a company of this type are defined by its constitution, which we would recommend, or, in the absence of a constitution, by Section 224B of the Law.

Registered Office

All companies are required to have a registered office, however, proprietary companies are no longer required to have a registered office that is open to the public. A proprietary company must, however, have any statutory registers available to the public for inspection.

Companies are required to display their name prominently at every place at which they carry on business and which is open to the public. The sign will no longer be required to be outside the premises. A sign within the premises will be sufficient.

Principal Place of Business

Every company has a principal place of business within Australia. That place may also be the company's registered office. Changes in address of the principal place of business must now be notified to the Commission.

Office Holders

The appointment and cessation of alternate directors are now notifiable in the same way as other office holders. The term of the appointment of an alternate may be for a specified period not exceeding the duration of the appointment of the director for whom the alternate is acting.

Common Seal

It is no longer necessary for companies have a common seal. The law provides that it can be assumed that a document is correctly executed by the company if it is signed by two directors, or a director and secretary, or by a single director where they are the only director and secretary.

The *Superannuation Industry (Supervision) Act 1993* creates a notable exception, in that its Section 19 compulsorily requires any corporate trustee of a regulated superannuation fund to use a common seal when submitting a certain election under the Act.

ACIS will not supply a common seal upon the registration of a company, unless specifically requested to do so. An additional fee will apply in this circumstance as our seal supplier has indicated that, due to greatly decreased volume, costs will be increased.

Types of Companies

New companies will not be permitted to register, and existing companies cannot change to a type, limited by both shares and guarantee.

Existing companies of this type will continue until they resolve to change to another allowable type.

It is now permissible for companies limited by guarantee to convert to a company limited by shares.

Changes to company type are now to be notified by the Commission in the Gazette and the change takes effect one month after that notification, unless aggrieved members or creditors have challenged the change.

Members and Meetings

The Law confirms that directors may hold telephone and other electronic meetings to which they all agree.

Members may hold their meetings at several venues simultaneously, using any technology that gives the members as a whole the reasonable opportunity to participate.

Members may pass any resolution by circulating and signing it, except for a resolution to remove the auditor where an actual meeting must be held for this purpose. Subject to certain exceptions, 21 days notice is required for all meetings of members.

Members have the statutory right to ask questions or comment upon the management of the company and to ask questions of the auditor about matters contained in the auditor's report.

The obligation to hold an annual general meeting will fall only upon public companies rather than upon all companies.

There are various amendments to the Law that streamline the process whereby a member can appoint a proxy to represent them at meetings of members.

Part 2: Registering a Company

A number of reforms have been made to the Law dealing with: - Reserving proposed company names; and - Registering companies.

Availability of Company Names

The criteria for determining the availability of company names will remain much the same. However in addition to the existing criteria, the Commission will now be required to regard singular and plural words as equivalent. For example

- ✓ Reserving proposed company names; and
- ✓ Registering companies.

Availability of Company Names

The criteria for determining the availability of company names will remain much the same.

However in addition to the existing criteria, the Commission will now be required to regard singular and plural words as equivalent. For example:

- ✓ The proposed name "Great Western Hotel Limited", would not be available against an existing name "Great Western Hotels Limited".
- ✓ The proposed name "Pie Bakers Industries Limited" would not be available against an existing name "Pie Bakers Industry Limited".
- ✓ The proposed name "Mice Exterminators Limited" would not be available against an existing name "Mouse exterminators Limited".

A word in a proposed name that is the indefinite article, basically "a" and "an", will not be sufficient to distinguish the name from another registered name. The same rule continues to apply to the definite article, that is "the".

Additionally, the word "Corp" will be regarded as identical to the word "Corporation" and the word "Inc" will be regarded as identical to the word "Incorporated".

Registering a Company

The provisions of the Law for registering a company have been altered and a number of unnecessary and duplicated procedures have been removed.

An application form to register a company must now contain full particulars of the proposed members and shares to be issued, the first office holders, the address of the registered office and the principal place of business.

An independent applicant (ie. another party not being a proposed member or office holder) will be able to act on behalf of a proposed company to apply to register that company. However, that party cannot act without the written consent of all of the proposed company's office holders and members. Where necessary, prior written consent must also be obtained as regards use of the proposed company registered office and a constitution must be executed by the initial members. It is required that these documents be returned to the company after it is registered.

These requirements present obvious logistical difficulties and as a result ACIS will continue to register companies in the 'Shelf Company' format. That is, we will provide an initial office holder (who will resign) and an initial member (whose share will be redeemed) prior to the appointment of the incoming parties and ensuing share issue.

Unless otherwise advised when ordering your company we will assume a cash consideration in the amount of \$1.00 per share has been paid on the share issue subsequent to redemption.

It is now permissible for both proprietary and public companies to be registered and exist as sole member companies.

A company's registration will have effect from the beginning of the day of registration

A public company is no longer required to hold a statutory meeting after the issue of its first prospectus.

It will not be possible for the Commission to accept an old application for registration (Form 201) beyond the commencement date of the new laws.

Part 3: Annual Returns and Financial Reports

Annual Returns

All companies are required to lodge an annual return with the Commission by 31 January each year. The annual return form has been simplified by eliminating a number of unnecessary items. In fact the amount of information has been reduced by some 32 items down to 10 standard items that relate to all types of companies.

The annual return will contain additional information in one respect. It will be required to list the top 20 members in each class of membership. The previous requirement was to list the top 10. Of course, the vast majority of companies have fewer than 10 members in any event.

There is no connection between the lodging of an annual return and the financial year financial reporting requirements, and holding an annual general meeting. Companies that have not lodged a financial report in the previous 12 months, will be required to provide a statement in their annual return whether the directors have passed a resolution within the last month that, in their opinion, there are reasonable grounds to believe that the company will be able to pay its debts as and when they become due and payable.

Financial Reports and Audit

Disclosing entities, including registered schemes, are required to lodge their financial reports with the Commission within 3 months after the end of the financial year. Non-disclosing entities that are required to lodge financial reports must do so within 4 months after the end of the financial year.

Disclosing entities are still required to lodge half-yearly reports with the Commission.

A company is able to vary the length of the financial year balance date by 7 days to allow flexibility in setting a balance date on a non-trading day.

An auditor who has reasonable grounds to suspect a breach by a company of the Law and who believes that it cannot be adequately dealt with by commenting upon it in their report, or bringing it to the attention of the directors, is required to notify the Commission.

Part 4: Defunct Companies

Deregistration of defunct Companies

It is now easier for defunct companies to be voluntarily deregistered. The previous requirement for defunct companies to place an advertisement in a newspaper notifying creditors and interested parties of its intention to apply for deregistration has been removed, relieving the company of this administrative burden.

The commission may deregister a defunct company if all of the following conditions are met:

- ✓ All members agree to the deregistration;
- ✓ The company is not carrying on business;
- ✓ The company's assets are worth less than \$1,000;
- ✓ The company has paid all fees and penalties payable under this Law;
- ✓ The company has no outstanding liabilities; and
- ✓ The company is not a party to any legal proceedings.

The Commission will give notice of the intended deregistration in the Gazette and may deregister the company after the expiration of two months of that notice.

Reinstatement of Deregistered Companies

The process of reinstating a deregistered company has been simplified. It is not necessary to seek a Court order for the Commission to reinstate a company. The law also allows for third parties to claim against the insurer of a deregistered company without the need for reinstatement.

Part 5: Shares and Share Transactions

Share Capital

The Law generally no longer requires a company to have an authorised share capital. Consequently, the provisions of the Law relating to the increase and decrease of the authorised capital have been repealed. However, a company may include in its constitution a numerical limit on the number of shares that can be issued.

Shares will no longer have a par value, only a nominal value, and this will include shares already issued. The nominal value is the amount due to be paid on the share and a company can provide that unpaid share capital may be called up only if the company becomes an externally administered body corporate. The Law makes transitional provision for existing contracts relating to shares that rely on the concept of par value.

Companies are required to notify the Commission of all issues or cancellations of shares within one month. That notice may include all the issued and cancellations that occur during that month. Notices are not required to disclose the particulars of the members who have been issued shares.

Transactions Affecting Share Capital

The process for a company to reduce its issued capital has been simplified. Companies are no longer required to seek confirmation by the Court for reductions and it is not necessary for the constitution or rules of the company to authorise the reduction.

The company must still receive the approval of members, either in the form of a special resolution or any ordinary resolution, depending upon the nature of the reduction. The company must also ensure that creditors are not prejudiced by any reduction and ensure that the company can pay its debts.

Members and creditors of the company may have a right to seek an injunction against the reduction. Where members or creditors seek an injunction, the Court will be required to confirm the reduction.

Note that some of the changes relating to share capital in the Company Law Review Act are contained in a separate schedule to the Act and possibly may commence some time after the main body of the Act. This is because various changes to related taxation legislation would also have to be made at the same time as those share capital changes.

Part 6: Lodgement with the Commission

Standardised Lodgment Periods

Many of the lodgment periods for notifying the Commission of changes in company particulars have been standardised. For examples, previously, the period to advise a change of particulars of office holders was one month. This period is now 14 days. The period to notify a change relating to a company's registered office was 7 days. This period is now 14 days. And the period to notify changes in the address of the principal place of business is also 14 days.

Prescribed Forms

Many of the forms that have in the past been prescribed in the regulations will now be forms approved by the Commission. This will allow for these forms to be easily updated to meet changes in the Law and to keep them as current as possible. The Commission will negotiate with major publishing houses to include these forms in their publications of the Corporations Law.

Various commonly lodged ASC forms have been affected by introduction of the new Act. These include Forms 203, 205, 206, 207, 304, 388, 410, 902 and 6010.

Please contact the ASIC should you require copies of the new forms or have any queries about the lodgment of existing documents.

Electronic Commerce

The Law has also been amended to support electronic lodgment of documents with the Commission. This should allow for the expansion of the electronic lodgment program to other types of documents, eventually including applications for registration of companies.

Disclaimer

This paper is intended as a brief overview of the proposed changes to the legislation only. Whilst care has been taken in preparing this paper, ACIS takes no responsibility for the accuracy or content of it. Readers should refer to the legislation or their professional advisers for clarification of issues raised.