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THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

HOUSE OF REPRESENTATIVES

FIRST CORPORATE LAW SIMPLIFICATION BILL 1994

EXPLANATORY MEMORANDUM

(Circulated by authority of the Attorney-General,
the Honourable Michael Lavarch, MP)

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First Corporate Law Simplification Bill

Outline

1.1 This Bill simplifies the provisions in the Corporations Law on:

- share buy-backs
- proprietary companies
- company registers.

1.2 In each area, the Bill achieves significant simplification of the text of the Law. It also simplifies the substance of the rules, eliminating unnecessary or redundant regulation.

1.3 This is the first Bill in the Corporations Law Simplification Program. Background on how the Bill simplifies the Law is provided at page 4.

Financial impact statement

2.1 The Bill will financially benefit business by reducing the complexity of the rules and simplifying their expression. It will not have any impact on Government expenditure.

2.2 The amendments proposed in Schedules 1 and 2 of the Bill dealing with share buy-backs will ease the regulatory burden on companies undertaking a share buy-back. Unnecessary and costly procedures have been eliminated, such as the need to obtain auditor and other expert reports, or to obtain a solvency declaration. The rules will be more clearly expressed, more uniform and fewer in number.

2.3 The amendments proposed in Schedules 3 and 4 concerning proprietary companies will assist small business operators. Companies will be able to be established more easily by incorporating with only 1 member and 1 director. Proprietary companies will no longer have to hold annual general meetings. Nor will small proprietary companies have to prepare annual accounts, unless required to by the Australian Securities Commission (the 'ASC') or members holding 5% of their shares. A guide to the parts of the Corporations Law relevant to small business is included in the Law to assist small business operators in understanding and acting on their legal rights and obligations.

2.4 The amendments relating to company registers proposed in Schedules 5, 6 and 7 will benefit business by:

- removing the need to retain 5 obsolete or unnecessary registers, and
- bringing together and simplifying the remaining rules concerning company registers.

Highlights

Share buy-backs

- ✳ Unnecessary procedures and hurdles removed
- ✳ Essential safeguards provided for shareholders and creditors
- ✳ One-stop table to apply all provisions relevant to a particular buy-back

Proprietary companies

- ✳ Single director companies allowed
- ✳ Comprehensive guide for small business
- ✳ Reduced accounting and financial reporting
- ✳ Annual general meeting optional

Company registers

- ✳ 5 company registers abolished
- ✳ Uniform rules in one place for registers of members, option holders and debenture holders
- ✳ No unauthorised use of registers for junk mail

Plain English drafting

- ✳ Easier to understand provisions presented in improved layout
- ✳ Provisions organised the way users want them
- ✳ Signposts to related areas of the Law

How the Law has been simplified

3.1 This Bill simplifies the provisions of the Corporations Law relating to share buy-backs, proprietary companies and company registers, as the first stage in the Corporations Law Simplification Program.

3.2 In simplifying these 3 areas of the Law, the Bill will streamline the Law, achieve greater consistency and remove unnecessary complexities. The Bill has been prepared after extensive consultation and testing with users of the Law. Proposals for change were published in March and April 1994. A draft Bill was exposed for public comment in July 1994. The draft Bill was subsequently discussed at public seminars held in September 1994 in most capital cities.

The simplification program

3.3 The Government announced in 1993 that it would undertake a program to simplify the Law. The aim is to simplify policy and clarify wording so that users can understand and act on their rights and obligations under the Law. In October 1993 the Attorney General appointed a 4-person Task Force to have day-to-day carriage of the simplification program. It comprises an experienced commercial lawyer from the private sector, an expert in plain language, a senior legislative drafter and a senior policy adviser from the Attorney-General's Department.

3.4 The Task Force is assisted in its work by a Consultative Group of private sector representatives of the investor and business communities, including officers from large companies, representatives of small business organisations and senior legal and accounting professionals. The Task Force meets with the Consultative Group about once a month to discuss the program, to identify priorities and to seek the reaction of Group members to draft proposals, before they are released to the public for comment.

A Law that works

3.5 A constant complaint about the current Law is that companies cannot use the Law efficiently because of its unnecessarily complicated rules. Sometimes, parts of the Law which were intended to offer a facility to companies are seldom used.

3.6 The current rules on share buy-backs are a good example. They run to over 40 pages and are so elaborate and demanding that

many companies refrain from carrying out buy-backs because of the cost and time involved in understanding and complying with the rules.

3.7 A much higher degree of uniformity will be achieved in the new buy-back rules. They are set out in the chronological order that a company must follow, so that the Law can be used almost as a procedural manual. The relevant provisions are identified in easy-to-follow tables, which can be used as indexes to the rules.

3.8 The 89 sections in the current law will come down to 11 in the simplified version.

A more accessible Law

3.9 The Law needs to be more accessible, particularly to those who are not professionally qualified in law or accountancy. They should be able to have a grasp of the general principles of the Law and an appreciation of their rights and responsibilities.

3.10 One notable step towards making the Law more accessible is the small business guide that forms part of the proprietary companies amendments. It offers directors and shareholders an overview of the central rules that affect them in a way that is readily understandable. It is an introduction rather than a statement of the Law and it points readers to the operative sections.

3.11 Those who have been asked to comment on the guide have responded favourably. The guide reflects many of their useful suggestions to improve its scope and clarity. Professional advisers involved in this process have suggested that the guide could be used as a bridge between client and adviser, especially if it were also published separately. It is intended to publish the guide separately.

Lightening the regulatory burden

3.12 As well as making the Law more accessible, it is important to ensure that its content is as easy as possible to comply with.

3.13 Company registers have been an area where the regulatory burden has been too heavy. The new rules strip away duplication and abandon the need either to collect or supply information that is without real value. Rules on registers are brought together and made more uniform.

3.14 The concentration on essential matters will make it easier for companies to comply with the remaining requirements.

Catering for small business

3.15 Numerous requests to consider the needs of small business led the Task Force to place small business structures high in its first priorities. The new provisions respond in positive and significant ways to the numerous requests for change to the Law as it affects small companies.

- Financial reporting requirements under the Law have been reduced for most proprietary companies, but strengthened for companies which have a significant economic impact.
- Proprietary companies now only need one director, so avoiding the need to ask family members or friends to assume the role and responsibilities of a director without having any real involvement in the company's operations.
- Annual general meetings for proprietary companies are optional.

Elimination of irrelevant requirements

3.16 The Task Force considered 8 registers which companies are currently required to keep. In future, companies will be required to keep registers of:

- members
- option holders
- debenture holders.

3.17 The other 5 registers can be safely abandoned without affecting the rights of shareholders, creditors or others because the information will be available from the ASC and in some cases the ASX (Australian Stock Exchange Limited). The ASC records contain the essential information in these registers, but are easier to consult and offer more immediate access.

Plain drafting and improved layout

3.18 A vital factor in making the law accessible is the approach to drafting and layout. The text in the Bill has been written in line with the principles of plain English. The material has been arranged in the way that readers look for information. Long, convoluted sentences and unfamiliar structures have been avoided.

3.19 At the same time, the material is not broken up too much. Disjointed or fractured provisions can be almost as difficult to use as a cumbersome block of unbroken text. In the Bill, greater use has also been made of the technique of including more than one sentence in a subsection where that makes the section easier to follow as a whole.

3.20 Removing verbiage and unnecessary procedures has allowed the text to be trimmed significantly. Only about 2 000 words are used to cover the buy-back provisions (as against about 15 000 at present). The Task Force has sought to make the Law more comprehensible, without sacrificing precision.

3.21 However, the Task Force has not been obsessed with length. Sometimes, extra text can be useful for readers. The small business guide, which summarises and provides signposts to provisions scattered all over the Law, is a good example of extra pages easing the reader's task.

3.22 Laws are essentially reference books: users are continually dipping into them. Consequently, they need to be able to find sections quickly and to know what topic area they are reading. The new page layout used in the Bill seeks to respond to these needs of readers. It departs from the traditional layout in several ways. Section and clause numbers are on the same line as their headings, the left margin is wider and the new Parts and Divisions in Schedules 1, 3 and 5 have informative headers on each page giving instant indicators of Chapter, Part and Division topics. The pages have also been given a more open appearance to improve readability. This avoids cramped and cluttered pages and makes the text easier to use.

3.23 The Bill marks an important stage in the development of an improved layout for Commonwealth Acts. The Office of Parliamentary Counsel is exploring this matter further, including with some States which are also looking at the layout used in their legislation (the New South Wales Parliamentary Counsel's Office released a discussion paper in June this year). It is hoped that new layouts can be developed for Commonwealth and State legislation which have much in common.

Consultation and testing

3.24 The proposals prepared by the Task Force in March and April 1994 on each of the 3 main elements of the Bill were distributed widely for public comment. Over 150 submissions were

received which made it possible to refine the proposals and on occasions to remove or rework items.

3.25 Equally important was the close testing of the text at its various stages of development with people drawn from a wide spectrum of users of the Law. In all, 23 testing sessions were held. The tests were initially conducted before any writing began – to uncover points of difficulty, confusion, or misinterpretation in the current law.

3.26 Various ways of organising the new material were shown to groups of users to select the one that would most nearly match the approach they would take when consulting the Law. This led to the preparation of a preliminary text, which was itself tested with users. A revised text, reflecting the results of testing, formed the exposure draft of the Bill. The exposure draft was itself retested with users.

3.27 In the testing sessions, alternative versions of particular sections were put to users to see which one they found easier to understand. Several test groups were also asked to solve practical problems, to see how quickly they could find the answers in the new text and whether reading it led them to find the right answers. This was invaluable in achieving a text that is readable, comprehensible and, most importantly, useable.

3.28 Seminars on the exposure draft of the Bill were held in 5 cities. Over 100 submissions on the Bill were received and analysed. The large number of submissions reflected the continuing interest in and support for the program. The submissions were strongly supportive of the general directions in the Bill and of the degree of consultation involved in the Program. They included useful suggestions for change to the detail of the Bill, which have been taken up in the Bill being introduced into the Parliament.

Clause-by-clause commentary

Clause 1 – Short title etc.

4.1 On commencement, the short title of the Bill will be *First Corporate Law Simplification Act 1994.*

Clause 2 – Commencement

4.2 The Bill will commence on the day 6 months after it receives Royal Assent. The deferred commencement is necessary to allow the business community time to prepare for the changes, and to allow regulations to be made supporting some of the amendments. However, some or all of the Bill may be commenced early by proclamation.

Clause 3 – Share buy-back amendments – Schedules 1 and 2

4.3 The provisions in Schedule 1 will replace the existing share buy-back rules in Division 4B of Part 2.4 of the Corporations Law. Schedule 2 will make a number of consequential amendments to other provisions of the Law.

Clause 4 – Proprietary company amendments – Schedules 3 and 4

4.4 Schedule 3 inserts the small business guide into Chapter 1 of the Law.

4.5 Schedule 4 simplifies the provisions in the Law dealing with proprietary companies.

Clause 5 – Company register amendments – Schedules 5, 6 and 7

4.6 Schedule 5 gathers key register provisions in the Law together in Chapter 2, and simplifies the register keeping requirements. Schedules 6 and 7 will make a number of consequential amendments to other provisions of the Law and the *Australian Securities Commission Act 1989.*

Clause 6 – Repeals

4.7 The *Close Corporations Act 1989* has not commenced. It is affected by constitutional difficulties similar to those found to affect the *Corporations Act 1989* in the High Court case of *New South Wales v Commonwealth* (1990) 169 CLR 482. The *Close*

Corporations Act was designed to enable the adoption of simpler corporate rules for small business by reducing the financial and other reporting requirements imposed on small companies. This will instead be achieved by the amendments to the Law set out in Schedules 3 and 4.

4.8 The *Close Corporations Act* will therefore be repealed, together with a number of associated Acts.

Share buy-backs Schedules 1 and 2

Outline

5.1 Division 4B of Part 2.4 of the Corporations Law (sections 206AA – 206VF) sets out the existing rules concerning share buy-backs. Schedule 1 replaces the existing Division 4B of Part 2.4 of the Law with a new share buy-backs Division comprising sections 206A – 206K.

5.2 Schedule 2 makes a number of consequential and related amendments to other provisions in the Law which concern share buy-backs. The table at paragraph 5.24 indicates the relevant paragraph in this explanatory memorandum for each item in Schedule 2.

The new rules

5.3 Since 1989 Australian companies have been able to buy back their own shares. However, few companies have done so because the existing provisions involve expensive and unnecessary procedural steps and are complicated.

5.4 The new Division 4B of Part 2.4:

- allows a company to buy back its own shares (other than redeemable preference shares) if it follows the procedures it lays down **(Schedule 1, proposed section 206B)**
- makes the rules the same for all types of companies
- makes innovative use of a table to apply the various procedural sections to the different types of buy-backs **(Schedule 1, proposed section 206C(1))** – in addition to its operative purpose, reference to the table enables easy access to the applicable rules
- replaces mandatory procedures involving auditors, experts, advertisements and declarations, which are not required in most overseas jurisdictions, with new safeguards for creditors and shareholders that focus on continuing company solvency, fairness among shareholders and disclosure of all material information.

5.5 The new Division continues to operate as an exception to the existing prohibition in section 205 of the Law against a company acquiring an interest in its own shares. A buy-back not carried out as required by the new Division will constitute a breach of section 205 **(Schedule 2, item 5)**, but will not affect the validity of the buy-back agreement **(Schedule 2, item 6)**.

Equal access scheme

5.6 A buy-back made as a part of a scheme which allows equal access to all ordinary shareholders (called an 'equal access scheme') is subject to less stringent rules than a buy-back that favours some shareholders over others (called 'selective' buy-backs). An equal access scheme may include some marginal differences between offers **(Schedule 1, proposed subsections 206C(2) and (3))**.

5.7 All ordinary shareholders must have 'a reasonable opportunity' to accept the offers made to them under an equal access scheme **(Schedule 1, proposed paragraph 206C(2)(c))**. This approach allows companies to devise their own timetable to suit their particular circumstances, if no shareholders are unfairly disadvantaged. It is not necessary that all shareholders have an equal opportunity to consider the offer, only that they all have at least a reasonable opportunity. If, for example, the company is aware that a shareholder will not be able to consider the offer before a certain date, then it should take this into account in fixing the time by which offers must be accepted.

5.8 A company might not be able to bring a buy-back proposal within the rules for an equal access scheme because, for example, it has some shareholders living in a country which prohibits buy-back offers. The ASC will be able to exempt the company from the more stringent requirements for selective buy-backs, subject to conditions **(Schedule 1, proposed subsection 206E(4))**. An example of a possible condition would be that the company complies with the less stringent, but still significant, rules for an equal access scheme.

Selective buy-backs

5.9 Selective buy-backs can only proceed if they are approved by all shareholders, or by a special resolution of the company on which no vote is cast by selling shareholders or their associates **(Schedule 1, proposed subsection 206E(1))**.

5.10 Selling shareholders and their associates may not vote in favour of a special resolution to approve a selective buy-back **(Schedule 1, proposed paragraph 206E(1)(a))**.

On-market, employee and odd lot buy-backs

5.11 A company may also buy back shares held by or for the benefit of employees or executive directors of the company or a related body corporate. However, the buy-back must be undertaken as

part of a scheme (called an 'employee share scheme') that has been approved by the company in general meeting. A listed company may also buy back shares that are unmarketable parcels (called an 'odd lot' buy-back) or in the ordinary course of trading on the stock exchange (called an 'on-market' buy-back).

Solvency

5.12 Directors will need to ensure that a share buy-back does not cause their company to become insolvent. If it does, the Bill makes directors personally liable for the company's loss, in the same way that they can already be liable for allowing the company to trade while it is insolvent **(Schedule 2, item 11)**.

5.13 If a buy-back does cause a company to become insolvent, the liquidator may be able to recover compensation from the selling shareholders (existing section 588FF).

5.14 Where a company is placed into liquidation before the company has discharged its obligations under the buy-back agreement, selling shareholders will be able to claim in a winding up **(Schedule 2, item 7)**. However, their claim against the company will rank after claims made by other creditors **(Schedule 2, items 8 and 9)**. The liquidator of a company which has entered into a buy-back agreement will not be able to disclaim the agreement **(Schedule 2, item 10)**.

5.15 Companies will continue to be able to apply their share premium account in providing for consideration payable by a company on a buy-back of its shares **(Schedule 2, item 4)**.

Changes in control

5.16 To avoid duplication of regulation, the main takeover rules in Chapter 6 of the Law will not apply to a buy-back **(Schedule 2, items 3 and 13)**. However, if the effect of the buy-back on the control of the company would be unreasonable, the ASC will be able to ask the Corporations and Securities Panel to declare that the buy-back is unacceptable **(Schedule 2, item 14)**.

5.17 If an equal access, employee share scheme or on market buy-back would result in the company having bought back more than 10 percent of its shares in the last 12 months, the buy-back must be approved by an ordinary resolution of the company **(Schedule 1, proposed subsection 206D(1))**. This is to allow members to consider the potential implications for control of the company in the case of substantial buy-backs.

5.18 Substantial shareholders will not be required to update their substantial shareholder notices as shares are bought back under a buy-back proposal **(Schedule 2, item 3)**. However, once the buy-back is complete and the shares have been cancelled, then the usual notification requirements will revive.

5.19 A buy-back will be defined to be a 'prescribed occurrence'. This means, for example, that a person making a takeover announcement concerning a company will be able to withdraw the announcement if the target company carries out a buy-back **(Schedule 2, item 12)**.

Disclosure

5.20 The ASC must be given at least 14 business days' notice of any significant share buy-back **(Schedule 1, proposed section 206G)**. This enables creditors and shareholders to become aware of the proposed buy-back, giving them an opportunity to try to stop it if, for example, it might lead to the company's insolvency **(Schedule 2, item 15)**.

5.21 Whenever a shareholder meeting is required to approve a buy-back proposal, the company will have to give each shareholder a statement setting out all the information known to the company that is material to the decision to approve the proposal. However, a company need not disclose information if it would be unreasonable to require it to do so, having regard to any previous disclosure of the information by the company to its shareholders **(Schedule 1, proposed subsections 206D(2) and 206E(2))**. For example, a company which had previously disclosed material information in its last annual report would have to include the information in its disclosure statement if its relevance to the buy-back would not be apparent to shareholders.

5.22 All documents sent to shareholders for the meeting will have to be lodged with the ASC **(Schedule 1, proposed subsections 206D(3) and 206E(3))**.

5.23 When the company makes an offer for a selective buy-back or an offer under an equal access scheme, the company will have to give the shareholder all information known to the company that is material to the decision whether to accept the offer **(Schedule 1, proposed section 206H)**. Copies of the offer documents will have to be lodged with the ASC **(Schedule 1, proposed section 206F)**.

5.24 The following table indicates the relevant paragraph in this explanatory memorandum for each item in Schedule 2.

Item	Para.	Item	Para.	Item	Para.
Item 1	–	Item 6	5.5	Item 11	5.12
Item 2	–	Item 7	5.14	Item 12	5.19
Item 3	5.16, 5.18	Item 8	5.14	Item 13	5.16
Item 4	5.15	Item 9	5.14	Item 14	5.16
Item 5	5.5	Item 10	5.14	Item 15	5.20

Proprietary companies Schedules 3 and 4

Outline

6.1 The changes to the Corporations Law covering proprietary companies are set out in Schedules 3 and 4.

6.2 Schedule 3 inserts a small business guide, which summarises the rules of key significance for smaller companies and provides signposts to the key operative provisions in the Law.

6.3 Schedule 4 makes a number of individual amendments to various provisions spread throughout the Law that flow from decisions to:

- reduce the minimum number of directors for proprietary companies from 2 to 1
- reduce the minimum number of members for proprietary companies from 2 to 1
- simplify the process of establishing a proprietary company by:
  - removing rules that require the articles of association of a proprietary company to contain certain restrictions
  - making it optional to reserve a company name
- replace the distinction between exempt and non-exempt proprietary companies with a distinction between small and large proprietary companies
- focus financial reporting obligations on public companies and large proprietary companies
- remove the requirement that proprietary companies hold an annual general meeting.

6.4 The commentary on Schedule 4 contains cross-references to the various items in the Schedule. An index to those items appears in paragraph 6.33.

Small business guide - Schedule 3

6.5 A major initiative in the draft legislation is the introduction in the Law of the small business guide **(Schedule 3)**.

6.6 The guide summarises the main provisions of the Law that are likely to be relevant to small companies. The guide does not, itself, contain operative provisions.

6.7 The guide is designed for the people who operate small businesses and aims to help them understand their rights and responsibilities if they choose to incorporate their businesses. It gives an overview and provides short answers to basic questions about the Law, and then directs the reader to the relevant part of the Law if more detail is required.

6.8 The guide is included in response to calls that the Law should give special attention to the needs of small businesses.

6.9 The main areas covered in the guide are:

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

6.10 Because the contents of the guide can be affected by changes outside the Law itself, the guide will be able to be amended by regulations to reflect changes in the regulations or in instruments issued by the ASC under the Law. However, any changes to the guide resulting from changes to the Law will be required to be made by an amendment to the Law.

The simplified rules for proprietary companies - Schedule 4

6.11 The Bill streamlines the regulation of all proprietary companies. Under the new rules, small proprietary companies face a regulatory burden that is no greater, and in significant respects less, than the burden currently faced by exempt proprietary companies.

6.12 The Bill replaces the distinction between exempt and non-exempt proprietary companies with a distinction between small and large proprietary companies **(Schedule 4, items 4 and 6)**. Large proprietary companies are those which meet at least 2 of the following criteria – gross operating revenue ($10m a year), assets ($5m) and number of employees (50).

6.13 The Bill makes a number of amendments to the Law to take account of the removal of the concept of an exempt proprietary company **(Schedule 4, items 33, 34, 36, 38, 43, 44, 45, 48, 49, 59, 60, 61, 62, 63, 78, 79, 80, 81 and 82).** Some examples of these changes are:

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

6.14 The minimum number of members and directors for a proprietary company will be reduced from 2 to 1 **(Schedule 4, items 7 and 25).** The Bill makes a number of amendments to the Law to take account of these changes **(Schedule 4, items 16, 22, 23, 24, 26, 31, 32, 37, 39, 40, 42, 47, 50, 51, 70, 76 and 77).**

6.15 Proprietary companies will no longer have to hold an annual general meeting **(Schedule 4, item 35).**

6.16 As a result, the requirement for proprietary companies to lodge annual returns is no longer be linked to the holding of an annual general meeting. Lodgment will be required for each calendar year before 31 January in the next calendar year. However, the ASC will be able to extend this period and thus deal with any transitional problems for companies which would presently lodge their accounts after that date **(Schedule 4, item 66).**

6.17 In addition, the requirements for financial statements and reports to be laid before annual general meetings are confined to public companies **(Schedule 4, item 56).**

6.18 The removal of the annual general meeting requirement results in the need for a number of consequential amendments **(Schedule 4, items 27, 28, 29, 30, 36, 52, 55, 65, 67 and 68).**

6.19 The Bill inserts a new Division 1A in Part 3.6 of the Law which sets out the application of the accounts provisions to various companies **(Schedule 4, item 41).**

6.20 Small proprietary companies will generally not have to prepare annual financial statements, apply accounting standards in the preparation of the statements or have them audited unless required to do so by members holding 5% of the shares or the ASC **(Schedule 4, item 41, proposed section 283C).**

Consequential changes to take account of this are made in the Bill **(Schedule 4, items 46 and 61).**

6.21 As a complement to the Bill abolishing the automatic compilation of annual accounts by small proprietary companies, it is proposed to amend the Corporations Regulations to eliminate the requirement that companies lodge key financial data in their annual returns.

6.22 The Bill requires the accounts of large proprietary companies to be prepared, audited and lodged with the ASC within 4 months after the end of the financial year. The Bill also sets out the deadlines that apply for the preparation of the accounts of other companies **(Schedule 4, items 41 and 5).**

6.23 To avoid disrupting established commercial arrangements, those existing exempt proprietary companies which have their annual accounts audited, which are large and which elect to continue operating under the existing rules will not need to lodge their accounts with the ASC **(Schedule 4, item 58).**

6.24 The Bill also sets out the circumstances in which financial statements must be sent to members **(Schedule 4, items 53, 54 and 64).** Large proprietary companies are required to do this, as are small proprietary companies which prepare accounts following a request from shareholders, or small proprietary companies which are foreign controlled and not covered by consolidated accounts.

6.25 Lodgment of accounts with the ASC and the ASC's power to require companies to prepare or lodge accounts are also dealt with in the Bill **(Schedule 4, items 57 and 58).** Large proprietary companies and small proprietary companies which are foreign controlled and not covered by consolidated accounts are required to lodge company accounts and reports with the ASC. The ASC may ask a company to lodge accounts and may ask a small proprietary company to prepare or lodge accounts.

6.26 The amendments dealing with company accounts will apply to each financial year of a company that ends on or after the commencement of proposed section 1408 **(Schedule 4, item 83).**

6.27 Reservation of company names will be optional **(Schedule 4, items 10, 11, 12, 13, 69, 71, 72, 73, 74 and 75).**

6.28 Proprietary companies will be able to choose whether to have restrictions on the right to transfer shares in their articles **(Schedule 4, items 8, 9, 14, 15, 17, 19, 20 and 21).**

6.29 The 'offer to the public' test will be eliminated. The prohibition on proprietary companies making offers of securities to the public is replaced by a prohibition on them doing anything that would require the lodgment of a prospectus. Exceptions will be allowed for offers to shareholders and employees so that the new rules do not alter the present position for proprietary companies in this respect. Proprietary companies will also have the benefit of the current exemptions to the prospectus provisions **(Schedule 4, items 8, 9, 14, 15, 17, 19, 20 and 21)**.

6.30 Currently there are complex rules which can lead to a court retrospectively deeming a company which has breached the proprietary company provisions to have been a public company since a particular date. The Bill provides a simpler procedure if a proprietary company breaches the new rules, by giving the ASC the power to order it to convert to a public company. Where a proprietary company does not comply with the order, the ASC will be able to determine that the company is a public company **(Schedule 4, item 18)**.

6.31 The Bill contains a savings provision dealing with existing companies limited by both shares and guarantee **(Schedule 4, item 83)**. These companies will be able to remain registered as proprietary companies until they cease to be limited by shares and guarantee or cease to be proprietary companies.

6.32 The Bill also amends Schedule 3 of the Law to insert new penalties for a contravention of proposed subsection 116(2) and proposed sections 170 and 317 **(Schedule 4, item 84)**.

6.33 The following table indicates the relevant paragraph in this explanatory memorandum for each item in Schedule 4.

Item	Para.	Item	Para.	Item	Para.
Item 1	–	Item 9	6.28, 6.29	Item 17	6.28, 6.29
Item 2	–	Item 10	6.27	Item 18	6.30
Item 3	–	Item 11	6.27	Item 19	6.28, 6.29
Item 4	6.12	Item 12	6.27	Item 20	6.28, 6.29
Item 5	6.22	Item 13	6.27	Item 21	6.28, 6.29
Item 6	6.12	Item 14	6.28, 6.29	Item 22	6.14
Item 7	6.14	Item 15	6.28, 6.29	Item 23	6.14
Item 8	6.28, 6.29	Item 16	6.14	Item 24	6.14

Item	Para.	Item	Para.	Item	Para.
Item 25	6.14	Item 45	6.13, 6.20	Item 65	6.18
Item 26	6.14	Item 46	6.20	Item 66	6.16
Item 27	6.18	Item 47	6.14	Item 67	6.18
Item 28	6.18	Item 48	6.13	Item 68	6.18
Item 29	6.18	Item 49	6.13	Item 69	6.27
Item 30	6.18	Item 50	6.14	Item 70	6.14
Item 31	6.14	Item 51	6.14	Item 71	6.27
Item 32	6.14	Item 52	6.18	Item 72	6.27
Item 33	6.13	Item 53	6.24	Item 73	6.27
Item 34	6.13	Item 54	6.24	Item 74	6.27
Item 35	6.15	Item 55	6.18	Item 75	6.27
Item 36	6.13, 6.18	Item 56	6.17	Item 76	6.14
Item 37	6.14	Item 57	6.25	Item 77	6.14
Item 38	6.13	Item 58	6.23, 6.25	Item 78	6.13
Item 39	6.14	Item 59	6.13	Item 79	6.13
Item 40	6.14	Item 60	6.13	Item 80	6.13
Item 41	6.19, 6.20	Item 61	6.13, 6.20	Item 81	6.13
	6.22	Item 62	6.13	Item 82	6.13
Item 42	6.14	Item 63	6.13	Item 83	6.26, 6.31
Item 43	6.13, 6.20	Item 64	6.24	Item 84	6.32
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Company registers Schedules 5, 6 and 7

Outline

7.1 Schedules 5, 6 and 7 contain the amendments on company registers.

7.2 Schedule 5 brings together (in proposed new sections 216A – 216K) the rules on the registers of :

- members
- option holders
- debenture holders.

7.3 Schedule 6 contains a number of amendments that:

- eliminate the requirements to keep the registers of:
  - directors, principal executive officers and secretaries
  - directors' shareholdings
  - substantial shareholders in listed companies
  - notices of beneficial ownership in listed companies, and
  - buy-backs
- require directors of listed companies to notify the relevant securities exchange of their dealings in the shares of their own company or a related company
- allowing directors and secretaries to have their residential addresses not publicly available on the ASC's database in cases involving personal safety
- abolish branch registers in Australia for Australian companies.

7.4 Schedule 7 contains an amendment to the *Australian Securities Commission Act 1989* which is consequential upon allowing directors and secretaries to have their residential addresses not publicly available on the ASC's database.

7.5 The following commentary contains cross-references to the various items in Schedules 5 and 6. An index to those items appears in paragraph 7.32.

Members, option holders and debenture holders

7.6 The Bill inserts a new Part 2.5 to deal with registers of members, option holders and debenture holders (**Schedule 5,**

proposed sections 216A - 216D) and repeals the existing provisions dealing with these registers **(Schedule 6, items 16, 22, 60)**. It brings together and makes uniform the various requirements for these registers dealing with location, access, agents' obligations, court correction and evidentiary value **(Schedule 5, proposed sections 216E to 216I)**. The Bill also imposes new penalties for a failure to comply with the registers provisions, for example, for a failure to maintain a register as required under proposed section 216B, 216C or 216D **(Schedule 6, item 72)**.

7.7 The register of options currently records information about grants of options, but does not indicate the identity of the current holder of an option. Proposed section 216C requires companies to maintain a register of option holders, which will be required to be kept up to date. This register will be a more useful record for those interested in the company **(Schedule 5, proposed section 216C)**.

7.8 A number of consequential amendments follow on from the rearrangement and bringing together of the registers provisions. For example, references in the Corporations Law to the existing registers of members, options and debenture holders are amended to reflect the new sections within the new Part 2.5 **(Schedule 6, items 7, 8, 9, 15, 19, 21, 47, 51, 62, 63, 67 and 71)**.

7.9 The heading to Division 5 of Part 2.4 is amended to reflect the fact that the Division will no longer deal with the register of members **(Schedule 6, item 13)**.

7.10 The Law will no longer exempt companies governed by section 140 of the *Life Insurance Act 1945* from the obligation to comply with the Law's requirements to maintain a register of members **(Schedule 6, item 14)**.

7.11 Australian company branch registers within Australia are abolished because they no longer serve a useful purpose **(Schedule 6, item 22)**. A number of amendments in the Bill follow as a consequence **(Schedule 6, items 1, 2, 17, 18, 20, 40, 43, 44, 45, 46, 48, 49, 50, 52, 61, 64, 65, 68, 69 and 70)**. Provision for overseas branch registers will be maintained **(Schedule 5, proposed section 216K)**.

7.12 The Bill recognises the role of computers in keeping registers by providing for access by computer where this is agreed and enabling a person to obtain a copy of a register in a form

generated by the computer system on which the register is kept **(Schedule 5, proposed section 216F)**.

7.13 The period within which a copy of a register must be given to a person who requests it and pays any applicable fee is reduced to 7 days **(Schedule 5, proposed section 216F)**. There is a penalty for failure to comply with this provision **(Schedule 6, item 72)**.

7.14 A person is prohibited from using information in the registers of members, option holders or debenture holders to contact or send material to a person. Disclosure of such information, knowing that the information is likely to be used to contact or send material to a person, is also prohibited. The rules apply whether the use is for profit or otherwise. Most significantly, the rules prohibit the use or disclosure of information from these registers in connection with the sale and use of commercial mailing lists (including where the information is combined with information from other sources). There are civil and criminal remedies for breaches of this rule **(Schedule 5, proposed section 216J; Schedule 6, item 72)**.

7.15 However, the prohibition does not operate if the use or disclosure of the information is relevant to the holding of the securities concerned. It does not interfere with the use of the information for purposes such as contacting shareholders in relation to takeovers or in order to influence company management about the operation of the company. In addition, the prohibition does not operate if the use or disclosure of the information is approved by the company **(Schedule 5, proposed section 216J)**. Shareholders may be expected to hold the company's management accountable for any approval given.

Register of directors, principal executive officers and secretaries

7.16 Companies will no longer have to keep a register of directors, principal executive officers and secretaries **(Schedule 6, item 35)**. Information on directors and secretaries of companies will be available through the ASC. Consequential amendments in the Bill reflect the abolition of this register **(Schedule 6, items 41, 42)**.

7.17 Information about directors and secretaries will have to be lodged with the ASC, so that it is publicly available **(Schedule 6, item 35 and 72)**. The ASC will have the power to require a

company to supply it with information about the officers of the company.

7.18 The ASC will also be able to certify that a particular person was an officer of the company at a particular time **(Schedule 6, item 35)**.

7.19 The position of principal executive officer is not required for Corporations Law purposes and will no longer be recognised under the Law. A number of amendments in the Bill follow as a consequence **(Schedule 6, items 10, 11, 12, 29, 30, 32, 33, 34, 35, 36, 37 and 38)**

7.20 The company will be required to obtain each director's and secretary's signed consent to act before the appointment, and will have to retain that consent **(Schedule 6, items 25 and 72)**.

7.21 A director or secretary who resigns or retires will be able to notify the ASC of their resignation or retirement. This will enable the ASC to correct the public record. The company will still have an obligation to notify the ASC of the resignation or retirement **(Schedule 6, item 35)**.

7.22 Directors are not required to have their residential address available on-line from the ASC database where their safety or that of their family might be at risk (but the ASC will continue to hold these addresses). This facility is based on the present system for the electoral roll under the *Commonwealth Electoral Act 1918*. Where directors satisfy the requirements of this Act for removal of their address from the electoral roll, they will be able to inform the ASC and provide an alternative address for service of legal process to be shown on ASC records. A similar procedure will be provided for the ASC to grant an exemption for directors who are not included on the electoral roll **(Schedule 6, item 35)**. There are a number of amendments in the Bill which follow as a consequence **(Schedule 6, items 5, 6 and 66)**.

7.23 The Bill also removes the requirement for:

- directors' consents to be lodged with the ASC in certain cases **(Schedule 6, items 23 and 24)**.
- companies to lodge with the ASC a list of continuing directors when providing details of a change in directors **(Schedule 6, item 35)**.

Register of directors' shareholdings

7.24 Companies will no longer have to keep this register **(Schedule 6, item 26)**. A number of amendments in the Bill follow as a consequence **(Schedule 6, items 3, 4, 27, 28, 31 and 39)**.

7.25 Directors of listed companies will have to disclose to the ASX the same information within the same time frame as they are currently required to disclose to their companies **(Schedule 6, items 26 and 72)**.

7.26 Initially, directors of listed companies will be required to notify the ASX of the information which is currently required to be on the company's register **(Schedule 6, item 26)**.

7.27 Under section 776(2B) of the Law, the information provided to the ASX and released to the market will be given to the ASC and accessible as part of the ASC records.

Other registers

7.28 Companies will no longer be required to keep registers of:

- substantial shareholders **(Schedule 6, items 53 and 54)**
- notices of beneficial ownership **(Schedule 6, items 55, 56, 57, 58 and 59)**
- buy-backs.

7.29 Substantial shareholders will still be required to lodge notices with the company and with the ASX.

7.30 A company will still be able to send a notice to a person requiring that they give details of their beneficial ownership of the company's shares.

7.31 Where a buy-back occurs, the share transfers will be recorded in the register of members.

7.32 The following table indicates the relevant paragraph in this explanatory memorandum for each item in Schedule 6.

Item	Para.	Item	Para.	Item	Para.
Item 1	7.11	Item 4	7.24	Item 7	7.8
Item 2	7.11	Item 5	7.22	Item 8	7.8
Item 3	7.24	Item 6	7.22	Item 9	7.8

Item	Para.	Item	Para.	Item	Para.
Item 10	7.19	Item 32	7.19	Item 52	7.11
Item 11	7.19	Item 33	7.19	Item 53	7.28
Item 12	7.19	Item 34	7.19	Item 54	7.28
Item 13	7.9	Item 35	7.16, 7.17	Item 55	7.28
Item 14	7.10		7.18, 7.19,	Item 56	7.28
Item 15	7.8		7.21, 7.22,	Item 57	7.28
Item 16	7.6		7.23	Item 58	7.28
Item 17	7.11	Item 36	7.19	Item 59	7.28
Item 18	7.11	Item 37	7.19	Item 60	7.6
Item 19	7.8	Item 38	7.19	Item 61	7.11
Item 20	7.11	Item 39	7.24	Item 62	7.8
Item 21	7.8	Item 40	7.11	Item 63	7.8
Item 22	7.6, 7.11	Item 41	7.16	Item 64	7.11
Item 23	7.23	Item 42	7.16	Item 65	7.11
Item 24	7.23	Item 43	7.11	Item 66	7.22
Item 25	7.20	Item 44	7.11	Item 67	7.8
Item 26	7.24, 7.25,	Item 45	7.11	Item 68	7.11
	7.26	Item 46	7.11	Item 69	7.11
Item 27	7.24	Item 47	7.8	Item 70	7.11
Item 28	7.24	Item 48	7.11	Item 71	7.8
Item 29	7.19	Item 49	7.11	Item 72	7.6, 7.13,
Item 30	7.19	Item 50	7.11		7.14, 7.17,
Item 31	7.24	Item 51	7.8		7.20, 7.25

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1995

THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

HOUSE OF REPRESENTATIVES

FIRST CORPORATE LAW SIMPLIFICATION BILL 1994

SUPPLEMENTARY EXPLANATORY MEMORANDUM

Amendments and New Clauses to be Moved on Behalf of the Government

(Circulated by authority of the Attorney-General, the Honourable Michael Lavarch, MP)

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First Corporate Law Simplification Bill 1995

Outline

The amendments and new clause to be added to the Bill:

- bring forward the introduction of the concept of penalty units into the Corporations Law
- correct a cross-reference which has been overtaken by recent legislation
- give the ASC a power to restrict access to debenture registers.

Financial impact statement

2. The amendments and new clause will not have any significant financial impact.

Clause-by-clause commentary

Amendments 1 & 2

3. These amendments are technical amendments concerning the commencement of Schedule 6 of the *Corporations Legislation Amendment Act 1994*. This Schedule introduces the concept of 'penalty units' into the Corporations Law.

4. Under subsection 2(2) of the *Corporations Legislation Amendment Act 1994*, Schedule 6 to that Act is scheduled to commence after all of the other provisions of that Act have commenced. However, Schedule 1 of that Act is yet to commence, as its commencement depends on certain State legislation being in place prior to commencement. Schedules 1 and 6 deal with unrelated topics, and Schedule 1 would not be affected by the early commencement of Schedule 6.

5. Amendments 1 and 2 will enable Schedule 6 of the *Corporations Legislation Amendment Act 1994* to commence on the day on which the *First Corporate Law Simplification Act 1995* receives Royal Assent. This will ensure that the concept of 'penalty units' exists in the Law when the *First Corporate Law Simplification Act 1995* commences. This will enable the effective operation of those provisions in Schedules 4 and 6 of the First Corporate Law Simplification Bill 1994 which are expressed in terms of 'penalty units'.

Amendment 3

6. Amendment 3 arises because of a changed section reference in the Law. The *Corporations Legislation Amendment Act 1994* omitted a reference to section 126 of the Corporations Law in Schedule 3 of the Law.

7. The First Corporate Law Simplification Bill 1994 amends Schedule 3 of the Law, and refers to section 126 as part of the amendment to the Schedule. Amendment 3 will correct this.

Amendment 4

8. This amendment will amend the provisions in the Bill dealing with access to the register of debenture holders. Proposed section 216F of the Bill provides that any person may have access to the register of the debenture holders of a company and may require the company to supply a copy of the register to them.

9. The Parliamentary Joint Committee on Corporations and Securities has recommended that this provision be amended, insofar as it allows access to the details of investors whose debentures are not convertible into shares. The

Parliamentary Joint Committee considers that the ASC should have a power to exempt a company from the requirement to supply these details.

10. Amendment 4 will add proposed subsections (6) – (10) to proposed section 216F of the Bill. Proposed subsection 216F(6) will allow the ASC to exempt a company from the requirements in proposed subsections 216F(1) – (3) to allow access to its register of debenture holders and to provide copies of that register. The ASC's power will only extend to the details of debenture holders whose debentures are not convertible into shares or options over unissued shares. The limitation of the ASC's power in this way will mean that where the debenture is of a kind that could be used to affect the control of the company, the details of the debenture holder will not be able to be withheld from the public register.

11. Proposed subsections (7) and (8) set out the practical details of how the exemption power will operate and give the ASC a specific power to impose conditions on any exemption it grants. Proposed subsections (9) and (10) deal with contraventions of any conditions imposed on the exemption by the ASC.

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