

# **ANOMALIES RESULTING FROM THE CORPORATE LAW ECONOMIC REFORM PROGRAM ACT 1999**

## **CORPORATIONS LAW COMMITTEE, BUSINESS LAW SECTION, LAW COUNCIL OF AUSTRALIA**

A number of anomalies have been introduced into the Corporations Law as a result of the Corporate Law Economic Reform Program Act 1999 that commenced operation on 13 March 2000. These anomalies have created uncertainty in the market place. The Corporations Law Committee of the Law Council of Australia has prepared a list of these anomalies in order to assist practitioners. The objective is to add to the list of anomalies as more are identified. Please email any identified anomalies to [cclsr@law.unimelb.edu.au](mailto:cclsr@law.unimelb.edu.au).

### **Takeovers**

1. Section 9 – definition of "associate" – drafting errors: -
  - "substantial holder" is not defined;
  - "takeover offer" should be "takeover bid";
  - "bidder making a takeover offer" – this duplicates reference in paragraph (b) of definition of "substantial holding";
  - reference to "body" in paragraph (a) is unclear;
  - application in Chapter 6 and 6A is unclear;
  - application of section 16 exclusions is unclear.
2. Section 110D – does not apply Chapters 6A and 6C extraterritorially.
3. Section 608(9) – relevant interests and pre-emptive rights. The reference to "all members" does not contemplate preference or deferred shares without pre-emptive rights.
4. Section 611, item 4(b) – exception for acceptance of scrip offer as takeover consideration – reference is to non-existent "item 5".
5. Section 621 – 4 month rule – determination of value when consideration is scrip is not clear (ie, how to determine) – time for determination of value is impractical (time of making offers).
6. Section 661A(1) – compulsory acquisition – 75% threshold may include shares held by the bidder's associates.
7. Sections 664A(3), 664E(4) and 664F(1) – compulsory acquisition – 10% by value is anomalous in comparison with 10% of securities covered by notice.

### **Fundraising**

1. Section 92(3) – definition of "securities" for the purpose of Chapters 6 to 6D – excludes unregistered securities from Chapter 6D (except for section 726 – as to which, see point 5 below).
2. Section 701 – application to managed investment schemes – drafting is unclear (especially section 921(3) definition)
3. Section 707(5) – indirect sale by controller – can singular include plural so that several (joint) controllers would be caught by this provision - contrast section 50AA(3) (control definition).

4. Section 708(12)(a) - exemption from disclosure for offer of securities to people associated with offeror. This section refers to a "related body". This should be a "related body corporate" as defined in section 9. This makes clear that the section refers to a related body corporate of the offeror and not a related body of the executive officer.
5. Section 711 – specific disclosures – unclear how this provision applies to managed investment schemes.
6. Section 726 – offering securities in a body that does not exist – reference to "securities" does not make sense – section 92(3) definition excludes interests in unregistered managed investment schemes yet that is what paragraph (b) purports to apply to. However, section 601ED(2) exempts a scheme from registration if disclosure was not required. No disclosure will ever be required because interests in unregistered schemes are never "securities". The only consequence would be a breach of section 726, but the scheme would still not require registration under Chapter 5C.
7. Section 729 – persons liable – in the case of a secondary sale includes proposed directors of the body named with their consent, but does not include incumbent directors. Neither should be included for a secondary sale.
8. Section 734(1) advertising of small scale offering – given width of the definition of "publish" in section 9, this provision seems to reduce the utility of section 708(1) (small scale offerings).
9. Section 740 – Anti-avoidance determinations – contrast the equivalent provisions in Chapter 5C (section 601ED(3)) does not permit ASIC to aggregate schemes and companies, meaning that a determination under section 740 could have unintended effect under section 601ED(2).

#### **OTHER ANOMALIES**

1. Section 9 – definition of "member" – reference in paragraph (c) to non-existent section 246A (should be section 231).
2. Section 92(3) - definition of "securities". A new definition of securities for the purposes of Chapters 6 to 6D was inserted in section 92(3). Chapters 6 to 6D deal with matters such as takeovers, compulsory acquisitions and buy-outs, and fundraising. While the main definition of securities in sections 92(1) and (3) excludes interests in retirement villages, this is not the case for the new definition in section 92(3). The result is that it would appear that the definition of securities for the purposes of Chapters 6 to 6D includes interests in retirement villages. The consequences are significant given that, for example, Chapter 6D imposes prospectus obligations on those who issue securities as defined in section 92(3).
3. Section 109Y(b) – it is now not clear whether this provision overrides the company constitution.
4. Sections 127(1) and (2) and 129(5) and (6) - assumptions that can be made by a person dealing with a company in relation to execution of documents. Sections 129(5) and (6) provide that a person dealing with a company is entitled to assume that a document has been duly executed by the company if the document appears to have been signed in accordance with section 127(1) or if the company's common seal appears to have been fixed to the document in accordance with section 127(2) and the fixing of the common seal appears to have been witnessed in accordance with section 127(2). Section 127 provides for the signing of documents and the witnessing of seals fixed to documents by (i) two directors of the company; (ii) a director and secretary of the company; or (iii) a person who is the sole director and also the sole secretary of the company. A change introduced by the Corporate Law Economic Reform Program Act was that proprietary companies are no longer required to have a company secretary: s 204A. There now appears to be an anomaly in section 127 in that there is no provision for an assumption of due execution of documents in the case of a document signed by a sole director of a proprietary company without a company secretary. This means that whenever a document is signed by (or a seal on a document witnessed by) a sole director

of a proprietary company where no company secretary is appointed, the assumptions in section 129(5) and (6) of due execution cannot be relied upon.

5. Section 169 - there are two sections numbered 169(5).
6. Section 180(2)(b) states that a prerequisite to obtaining the protection of the new statutory business judgment rule is that the director must not have a material personal interest in the subject-matter of the judgment. It does not refer to an "undisclosed" material personal interest. Consequently, even if a director has made disclosure as required by section 191, the business judgment rule will not apply to the director. Whether this is intended is not clear.
7. Section 198F is a new provision which authorises directors and former directors to inspect company books for certain purposes. Section 247A(1) is a longstanding provision which empowers the court to authorise inspection of books by a member, or another person, on behalf of the member. It would seem appropriate that a director's right to inspect company books should also be exercisable not only personally but through the agency of another person. Whether this is an anomaly or rather a matter of legislative intent is not clear.
8. Division 2 of Part 2J.1 – share buybacks – there is no provision making a contravention of these provisions a civil penalty (the cross-reference in section 251J is incorrect).
9. Sections 250B(3) and 252Z(3) – proxies – are not consistent with sections 250A and 252Y that require the document to be signed.
10. Section 1096A(9) – notices of non-beneficial ownership – refers to non-existent section 216B – (should be section 163).
11. Section 1475 – fundraising – transitional provisions refer to "this Chapter" – should be reference to Chapter 6D.
12. Section 249B – does not contain a provision equivalent to section 249A(b).
13. Section 327(10) – voting threshold is ambiguous.
14. Section 300A – not clear whether disclosures apply to company only or extend to schemes.
15. Section 601CD(2) - states that for the purposes of Division 2 of Part 5B.2 (which deals with foreign companies), a foreign company carries on business in this jurisdiction if it:
  - (a) offers debentures in this jurisdiction; or
  - (b) is guarantor body for the debentures offered in this jurisdiction;and Part 2L.1 applies to the debentures.

Section 601CD(2) was introduced by the CLERP Act. Section 601CD(1), which is a long-standing provision, provides that a foreign company must not carry on business in this jurisdiction unless it is registered under Division 2 of Part 5B.2 or it has applied to be so registered and the application has not yet been dealt with. On one interpretation of section 601CD(2), a foreign company only carries on business in this jurisdiction and therefore is only required to be registered if sub-section (2) is satisfied ie, it offers debentures in the jurisdiction or is a guarantor body for debentures offered in this jurisdiction and Part 2L.1 applies to the debentures. However, the preferred interpretation is that a company carries on business in this jurisdiction if it does any of the things referred to in the definition of "carrying on business" in section 21 or it satisfies the requirements of section 601CD(2). Yet the fact that an alternative interpretation is open on the literal words of section 601CD(2) means that this anomaly should be corrected.

16. Section 601FD(2) - duties of officers of responsible entity of a managed investment scheme - refers to non-existent section 232 - should be sections 180 to 184.