

1988

THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

SENATE

CLOSE CORPORATIONS BILL 1988

SUPPLEMENTARY EXPLANATORY MEMORANDUM

Amendments and New Clauses Passed By The House of
Representatives To The Bill As Introduced

(Circulated by Authority of the Honourable Lionel Bowen, MP,
Deputy Prime Minister and Attorney-General).

CLOSE CORPORATIONS BILL 1988 -
AMENDMENTS AND INSERTION OF NEW CLAUSES

OUTLINE

The Attorney-General introduced the Close Corporations Bill 1988 ('the Bill') into the House of Representatives on 25 May 1988. The purpose of the Bill is to introduce a new corporate entity to be known as the close corporation. It aims to simplify the corporate rules for small business by reducing financial and other reporting requirements and by abandoning the company law distinctions between directors and shareholders in favour of simple principles based on partnership laws.

2. The amendments to the Bill to be moved on behalf of the Government provide for the Administrative Appeals Tribunal ('AAT') to review certain decisions of the Australian Securities Commission ('ASC') and the Minister and seek to make clear that the right of the ASC to begin proceedings for offences against the Bill does not prejudice the statutory powers and functions of the Director of Public Prosecutions ('DPP') to institute and carry on proceedings in relation to Commonwealth offences in general. Similar amendments are proposed to be made to the Australian Securities Commission Bill and to the Corporations Bill.

Financial Impact Statement

3. The amendments will not have a significant financial impact. Some additional resources will be required in the AAT. Whilst the simpler procedures of the AAT may give rise to more applications for review of administrative decisions than at present, there have been very few appeals to the

Supreme Courts against decisions of either the NCSC or its delegates.

4. So far as prosecutions are concerned, in accordance with Commonwealth prosecution policy the ASC will have to send the DPP a brief of evidence if as a result of an investigation an offence appears to have been committed. Although the ASC will be able to make an initial decision to prosecute, the DPP has the responsibility to determine whether a prosecution should proceed.

NOTES ON CLAUSES - AMENDMENTS
TO CLOSE CORPORATIONS BILL

Amendment (1) : Insertion of New Division 1A - Review by
Administrative Appeals Tribunal of certain decisions

5. Because of judicial power constraints in the Constitution, under Commonwealth legislation full merits review is not available before a court. For this reason Division 1A of Part 18 of the Bill provides for AAT review of certain administrative decisions made under the Bill.

6. Similar amendments are proposed to be made in the Corporations Bill and the Australian Securities Commission Bill.

New cl.130A - Interpretation

7. The amendment provides that in new Division 1A of Part 18 of the Bill 'decision' will have the same meaning as in the AAT Act. The relevant provision of that Act is sub-s.3(3) which defines 'decision' widely to include:

- a) making, suspending, revoking or refusing to make an order or determination;
- b) giving, suspending, revoking or refusing to give a certificate, direction, approval, consent or permission;
- c) issuing, suspending, revoking or refusing to issue a licence, authority or other instrument;
- d) imposing a condition or restriction;

- e) making a declaration, demand or requirement;
- f) retaining, or refusing to deliver up, an article; or
- g) doing or refusing to do any other act or thing.

New cl.130B - Applications for review

8. Subject to subsequent provisions of new Division 1A, applications to the AAT will be able to be made for review of decisions made under the Bill by the Minister or the ASC.

New cl.130C - Excluded decisions

9. There will be no right to AAT review in relation to:

- a) a decision in respect of which an appeal or review right is expressly provided by the Bill;
- b) a decision that is declared by the Bill to be conclusive or final or is embodied in a document declared by the Bill to be conclusive evidence of an act, matter or thing;
- c) decisions of the ASC under Division 8 of Part 5.6 of the Corporations Bill as applying by virtue of cl.114 (relating to defunct close corporations - since ancillary orders may need to be made and there is the possibility of related private actions); or
- d) a decision by the ASC to refuse to exercise a power under Division 8 of Part 5.6 as so applying.

Amendment (2) : Cl.137 - Appeals from decisions of Commission

10. Clause 137 confers on a person aggrieved by the ASC's refusal to register a close corporation or to register or receive a document, or by any other act, omission or decision of the ASC under the Bill, the right to appeal to the Federal Court or a Supreme Court.

11. As a consequence of the proposed insertion of new Division 1A of Part 18, which provides for AAT rather than Court review of ASC decisions, the amendment omits cl.137.

Amendments (3) and (4) : Cl.142 - Proceedings, how taken

12. Clause 142 requires the ASC, an ASC delegate or a person authorised by the Minister to have the sole duty to cause proceedings to be begun for offences against the Bill. The amendments to clause 142 seek to preserve the statutory functions and powers of the Director of Public Prosecutions and, in particular, the DPP's general functions which are to institute and carry on proceedings for commitment for trial, and to institute and carry on proceedings for summary conviction, in relation to Commonwealth offences.

13. The amendments will empower the ASC, an ASC delegate or a person authorised by the Minister to commence and carry on prosecutions but without prejudice to the DPP's statutory powers and functions. In particular, the DPP's powers to take over, to carry on or to terminate a proceeding for commitment for trial or summary conviction and to give directions or furnish guidelines with respect to the prosecution of offences will not be prejudiced.

14. In accordance with Commonwealth prosecution policy the ASC will have to send the DPP a brief of evidence if as a result of an investigation an offence appears to have been committed. Although the ASC will be able to make an initial decision to prosecute, the DPP has the responsibility to determine whether a prosecution should proceed.

15. Similar amendments are proposed to the corresponding provisions in the Australian Securities Commission Bill (clause 49) and the Corporations Bill (clause 1315).

16. The amendment proposed to clause 127 of the Australian Securities Commission Bill will enable the ASC to provide the DPP with all the information necessary to enable it to

exercise all relevant powers and functions in relation to the prosecution of offences created by the Bill.

Amendment (5) : Cl.144 - Jurisdiction of Courts

17. It is proposed to delete cl.144. The jurisdiction of Courts under all national scheme laws will be governed by a new Part 12A of the Australian Securities Commission Bill.