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THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

THE HOUSE OF REPRESENTATIVES

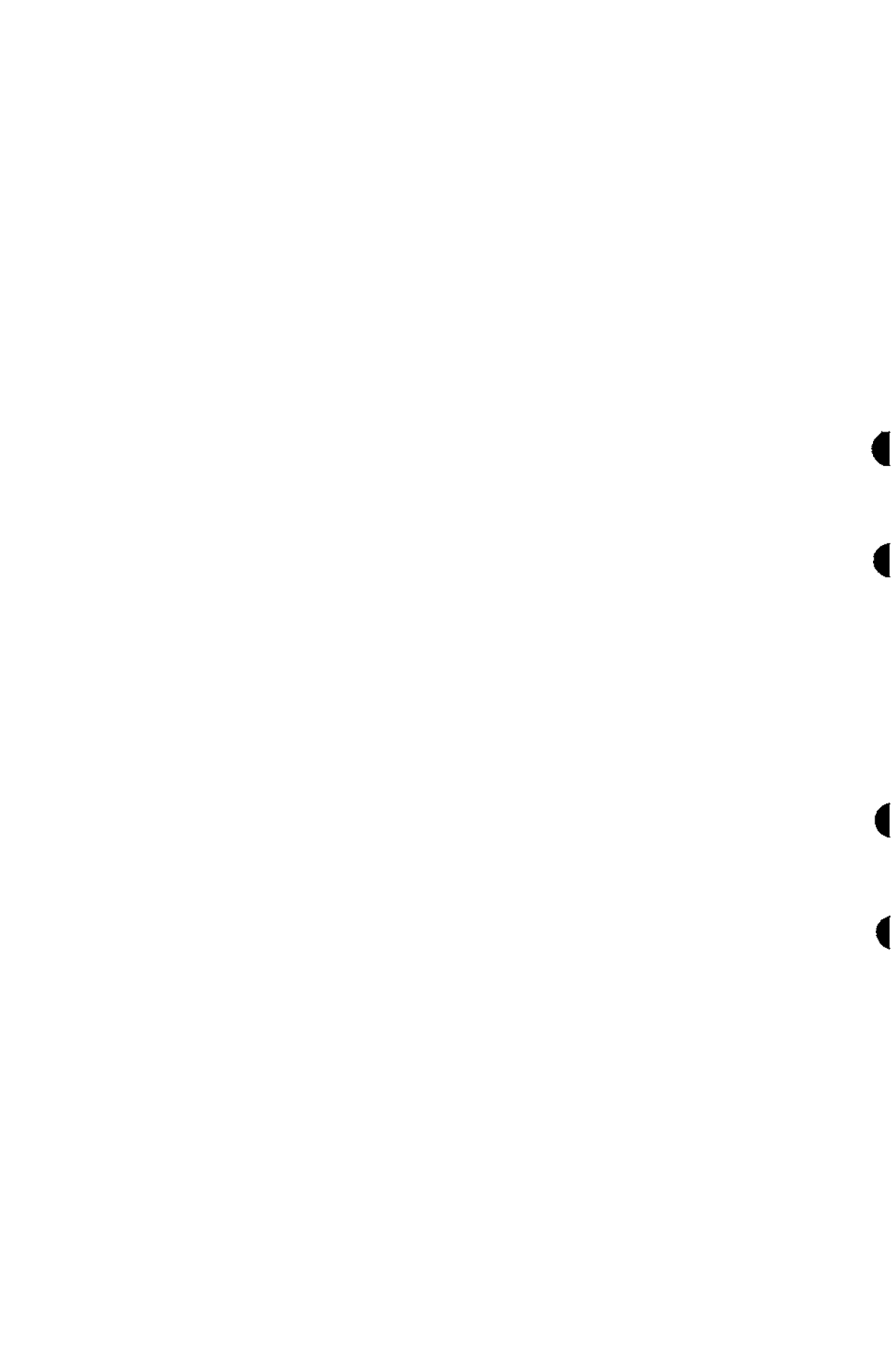
CROWN DEBTS (PRIORITY) BILL 1981

EXPLANATORY MEMORANDUM

(Circulated by the Minister for Business and Consumer Affairs,
the Honourable John Moore, M.P.)

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OUTLINE

Crown Debts (Priority) Bill 1981

The Crown Debts (Priority) Bill 1981 will:-

- (a) abrogate the prerogative priority of the Crown in right of the Commonwealth; and
- (b) ensure that, in a corporate insolvency, the Commonwealth is under an obligation to repay preferential payments in circumstances where other creditors would be obliged to do so.

2. The Crown Debts (Priority) Bill will come into operation on the day on which the Companies Bill 1981 comes into operation.

BACKGROUND

Report of Senate Standing Committee : 'Priority of Crown Debts'

3. On 2 June 1978 the Senate Standing Committee on Constitutional and Legal Affairs tabled in the Senate its report entitled "Priority of Crown Debts". This report was in response to a reference to that Standing Committee from the Senate on 21 April 1977 to review the right of priority of the Crown over other creditors in matters of bankruptcy, corporate liquidations or other cases of impecunious persons or corporations.

4. In its report the Senate Standing Committee recommended the complete abrogation of all Crown priorities in insolvency administrations.

Subsequent actions

5. The Government's decision in relation to this report was announced by the then Minister for Business and Consumer Affairs (the Honourable Wal Fife, M.P.) in a statement to the House of Representatives on 13 September 1979. In that statement Mr Fife said that:-

'The Government has examined the report and is fully in agreement with the main thrust of the Committee's argument. The Government supports uniformity of insolvency administration which was of particular concern to the Senate Committee. It also acknowledges the desirability of placing the Crown on an even footing with the private sector so far as possible.

Accordingly, the Government has decided to abolish all remaining Crown priorities in the Commonwealth sphere and to seek the abolition of all remaining Crown priorities in the State sphere except in relation to tax instalment deductions and withholding tax on dividends and interest remitted overseas. Special considerations apply in relation to these two categories of debt and separate them from other Crown debts....

It is proposed to take action as soon as possible to implement those aspects of this decision that relate to bankruptcy and company law. Consequential changes to the Income Tax Assessment Act 1936 and other associated tax legislation will be introduced by the Treasurer in due course. This action will also give effect to a long standing commitment by the Commonwealth to the States that the Commonwealth would abandon its common law priorities in company insolvencies....

To give full effect to the Committee's recommendations, the Government is negotiating with the States amendments to the legislation proposed to give effect to the Commonwealth's obligations under the co-operative companies and securities scheme. These amendments will ensure that the legislation does not accord any special priority in corporate insolvencies to Crown debts other than those in relation to tax instalment deductions and dividend withholding tax. Under the terms of the Formal Agreement between the Commonwealth and the States in relation to companies and securities, it will not be possible to introduce these amendments unless they are approved by the Ministerial Council of Commonwealth and State Ministers on Companies and Securities. In addition, the Government intends to legislate to abrogate the prerogative priority of the Crown in right of the Commonwealth and to ensure that, in a company liquidation, the Commonwealth is under an obligation to repay preferential payments in circumstances where other creditors would be obliged to do so....'

6. Since that statement, the following legislative actions have been taken:-

- (a) The Bankruptcy Amendment Act 1980 has been passed. This Act abolished the priority that had previously been accorded to a certain amount of any outstanding income taxes in a bankruptcy administration (see Amendment Act s. 51).

- (b) The Taxation Debts (Abolition of Crown Priority) Act 1980 has been passed. Section 5 of this Act abolished the priority that had previously been accorded to income tax in a company liquidation (other than in relation to debts for tax instalment deductions and withholding tax). The Act also modified the requirement in several taxation Acts which required a liquidator or receiver for debenture holders to hold sufficient of the assets of the company to pay in full the amount of tax notified by the Commissioner of Taxation as being owed.

CROWN DEBTS (PRIORITY) BILL 1981

7. The remainder of this explanatory memorandum deals sequentially with each clause of the Crown Debts (Priority) Bill 1981 (hereafter referred to as the "Priority Bill").

Cl. 1 : Short title

8. When enacted the Bill will be cited as the Crown Debts (Priority) Act 1981 (Priority Bill cl. 1).

Cl. 2 : Commencement

9. The Act will come into operation on the day on which the Companies Bill 1981 comes into operation (Priority Bill cl. 2).

10. The Companies Bill 1981 is part of the initial Commonwealth legislation under the co-operative companies and securities scheme, the basic features of which were set out in a Formal Agreement executed by the Commonwealth and the six States on 22 December 1978. An outline of the four basic elements of the co-operative scheme and of the various codes that form part of the scheme is contained in paras 7 to 36 of the explanatory memorandum on the Companies Bill 1981.

11. While the Priority Bill will come into operation at the same time as the Companies Bill, it does not form part of the co-operative scheme legislation and therefore does not require the approval of the Ministerial Council for Companies and Securities.

Cl. 3 : Crown subject to State and Territory laws with respect to priority

12. Laws relating to the order in which debts or liabilities of a body are to be paid or discharged - Once the Priority Bill comes into operation, the Commonwealth will become subject to any provision of a law of a State or Territory relating to the order in which debts or liabilities of a body (whether corporate or unincorporate) are to be paid or discharged (Priority Bill para 3(a)). Among the laws that the Commonwealth will become subject to are the following three general categories:

- (a) the Companies (Application of Laws) Acts or Ordinances of jurisdictions other than the A.C.T. which are covered by the co-operative companies and securities scheme;
- (b) the Companies Act or Ordinance of a jurisdiction which is not covered by the Formal Agreement;
and

- (c) laws providing for the winding-up of credit unions, building societies, co-operative societies and unincorporated associations (to the extent that the Commonwealth would not already be bound under (a) or (b) above in respect of such bodies which are wound up under the same legislation as that relating to companies).

13. The existing laws providing for the winding up of these various bodies that are not companies either:-

- (a) apply the company law provisions, usually with some modifications; or
- (b) make separate provisions for the dissolution of the bodies covered by that law.

(Examples of existing laws are at Attachment 'A')

14. Avoidance of preferences - In addition to abrogating the Commonwealth's right to be paid certain taxes and trading debts in priority to other unsecured creditors, the Priority Bill will give a wider operation to those provisions of the company law of the States and Territories which enable a liquidator to recover as a preference certain payments made to a creditor prior to winding-up. The Priority Bill will ensure that these avoidance of preference provisions also apply to

payments made to the Commonwealth (Priority Bill para 3(b)). In the absence of the Priority Bill, such payments could not be recovered from the Commonwealth because a State Act cannot bind the Crown in right of the Commonwealth.

15. Compromises and schemes of arrangement - The Crown in right of the Commonwealth will be bound by any compromise or scheme of arrangement effected under the laws of a State or Territory (Priority Bill para 3(c)).

16. General - The Priority Bill will not operate in respect of debts owed by individuals, as the Commonwealth's prerogative priorities in this regard were abrogated by the Bankruptcy Act 1966 which is expressed to bind the Crown in right of the Commonwealth (see Bankruptcy Act 1966 s. 8). The Bankruptcy Act 1966 provides that a sequestration order shall not be made against a corporation or against a partnership, association or company registered under a law which provides for the winding up of such a body (see s-sec. 7(1)).

17. Provisions in the Companies Bill 1981 (CB) binding the Crown by the Parts relating to schemes of arrangement (see CB cl. 314), receivership (see CB cl. 322), official management (see CB cl. 334) and winding up (see CB cl. 358), will have the same effect in respect of companies wound up in the A.C.T. as the Priority Bill will have in subjecting the Crown in right of the Commonwealth to the corresponding Parts of the company laws of the other States and Territories.

Cl. 4 : Certain rights of the Crown no affected

18. Notwithstanding the provisions of the law of a State or Territory relating to the order in which debts of a body are to be paid, the Commonwealth will retain the overriding priority accorded by ss. 221P and 221YU of the Income Tax Assessment Act 1936 in relation to tax instalment deductions and withholding tax on dividends and interest remitted overseas (Priority Bill cl. 4).

19. Abrogating the Commonwealth's prerogative priorities will not deny to the Crown in right of the Commonwealth the priority accorded to secured debts over unsecured debts under the general law.

20. Similarly, a revenue collection authority will continue to have the same protection in relation to payments made to it under ss. 22 and 123 of the Bankruptcy Act 1966 as is given by those provisions to a creditor who receives a payment for valuable consideration and in the ordinary course of business (see particularly Bankruptcy Act 1966 para 122(4)(b) and s-sec. 123(5)).

Examples of existing laws
providing for the winding up
of various bodies

21. Laws which apply the Companies Act or Ordinance of that jurisdiction (usually with some modifications) to the winding up and dissolution of bodies other than companies:-

- A.C.T. - Associations Incorporation Ordinance 1953
- Co-operative Societies Ordinance 1939

- N.S.W. - Co-operation Act 1924
- Credit Union Act 1969
- Loan Fund Companies Act 1976
- Permanent Building Societies Act 1967

- VIC. - Building Societies Act 1976
- Co-operation Act 1958
- Co-operative Housing Societies Act 1958
- Industrial and Provident Societies Act 1958

- QLD. - Building Societies Act 1886-1976
- Co-operative and Other Societies Act 1967-1978
- Co-operative Housing Societies Act 1958-1974

S.A. - Associations Incorporation Act 1956-1965
- Building Societies Act 1975
- Credit Unions Act 1976
- Industrial and Provident Societies Act 1923-1974

W.A. - Building Societies Act 1976
- Co-operative and Provident Societies Act 1903
- Credit Union Act 1980

TAS. - Associations Incorporation Act 1964
- Co-operative Housing Societies Act 1963
- Co-operative Industrial Societies Act 1928

N.T. - Co-operative Trading Societies Ordinance 1945

22. Laws which make separate provisions for the winding up and dissolution of the bodies covered by that law:-

N.S.W. - Friendly Society Act 1912

VIC. - Benefit Associations Act 1958
- Friendly Societies Act 1958

QLD. - Friendly Societies Act 1913-1965

TAS. - Building Societies Act 1876

W.A. - Companies (Co-operative) Act 1943-1959

