

# THE NEW COMPANY LEGISLATION IN SOUTH AUSTRALIA

## *A Brief Comparison with the Old Act*

The general pattern of the new Act is deceptively similar to the South Australian Companies Act 1934-1960, which it replaces. Its sections are in general grouped together under the same familiar subject-headings, and their form and sequence still retain a resemblance to the old Act. However, neither the form nor the outline of the new Act lack significant changes, the purpose of which is to accommodate the many new provisions appearing in the new Act, if not to achieve a more coherent arrangement of the legislation. The sections of the new Act are on an average longer and contain provisions which had previously appeared in several sections of the old Act. There is also a re-arrangement in the sequence and order of the sections. The more important re-arrangements are as follows:—

(a) The provisions dealing with the administration of the statute, the Companies Registrar's Office, the Companies Auditors Board<sup>1</sup> and the qualifications of auditors and liquidators, instead of being dispersed throughout the statute as was the case with the old Act,<sup>2</sup> are grouped together more conveniently in Part II of the new Act.<sup>3</sup> Unavoidably, however, there are still some provisions of a transitional nature or local origin, not being part of the uniform legislation, dealing with the above subject-matter which, although relevant to Part II appear elsewhere in the new Act.<sup>4</sup>

(b) The part of companies legislation dealing with what is commonly known as "Shares, Debentures and Charges" is considerably re-arranged. In the old Act the sections dealing with the title and transfer of shares and debentures<sup>5</sup> appeared first and were followed by sections relating to debentures,<sup>6</sup> the registration of charges,<sup>7</sup> and the issue of interests or, as they are known more popularly although inaccurately, unit trusts.<sup>8</sup> The order of the subjects in the new Act is different. Provisions relating to debentures are dealt with first,<sup>9</sup> thereafter the provisions controlling the issue of interests,<sup>10</sup> the provisions relating to the title and transfer of shares

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1. In the old Act known as the Companies Auditors' and Liquidators' Board.
  2. The administrative provisions and those dealing with the Companies Registrar's Office appeared in sections 315-324 and 378; the Companies Auditors' and Liquidators' Board was dealt with in section 370; and the qualifications of auditors and liquidators were governed by sections 154, 193, 293 and 371.
  3. Sections 7-13.
  4. See particularly sections 2 (3), 4 (5) and (6), 26 (5) and 384.
  5. Sections 83-93.
  6. Sections 94-98.
  7. Sections 99-114.
  8. Sections 114a-114o.
  9. Sections 70-75.
  10. Sections 76-89.

and debentures,<sup>11</sup> and lastly, the provisions dealing with the registration of charges.<sup>12</sup>

(c) Similar re-arrangement is made in the part of the statute known as "Management and Administration". The sections relating to directors and other officers of companies appear in the beginning of that part, immediately following the sections dealing with registered offices and names of companies<sup>13</sup> instead of towards the end of that part<sup>14</sup> as formerly. Also the requirement that a company must appoint a secretary is included more logically within that group of sections,<sup>15</sup> instead of appearing in the division relating to the registered offices and names of companies as was the position with the old Act.<sup>16</sup> The sections dealing with directors and officers of companies are followed by provisions relating to the meetings of companies,<sup>17</sup> registers of members<sup>18</sup> and annual returns.<sup>19</sup> The sequence of these provisions was different in the old Act where the registers of members were taken first,<sup>20</sup> to be followed by annual returns<sup>21</sup> and meetings of companies.<sup>22</sup>

(d) Provisions dealing with accounts of companies, their audit and the investigation of companies are grouped in that order in a separate part in the new Act.<sup>23</sup> They appeared in the old Act in the middle of the part dealing with the management and administration of companies.<sup>24</sup>

(e) The sections concerned with arrangements and reconstructions of companies are also allocated a separate part in the new Act,<sup>25</sup> instead of appearing at the end of the part dealing with the management and administration of companies.<sup>26</sup> This part of the new Act contains two important new provisions, section 184 dealing with take-overs of companies and, although its subject-matter may have only an incidental connection with the reconstruction of companies, section 186, which opens new avenues of protection to oppressed minority shareholders.<sup>27</sup>

(f) The provisions dealing with receivers and managers of company property appear in the new Act before the winding up provisions,<sup>28</sup> and not thereafter as in the old Act.<sup>29</sup>

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11. Sections 90-99.

12. Sections 100-110.

13. Sections 114-134.

14. 1934-1960 Act, sections 160-169.

15. Section 132.

16. 1934-1960 Act, section 116.

17. Sections 135-149.

18. Sections 150-157.

19. Sections 158-160.

20. Sections 119-128.

21. Sections 129-130.

22. Sections 131-140.

23. Part VI, comprising sections 161-180.

24. Sections 141-159.

25. Part VII consisting of sections 181-186.

26. Sections 171-173.

27. This section has been adopted in a slightly modified and amplified form from section 210 of the English Companies Act 1948. See further Gower, *Modern Company Law* (2nd ed., 1957), pp. 541-544; Paterson and Ednie, *Australian Company Law* (1962), pp. 444-447; and P. C. Heerey, "The Shareholder's Petition in Cases of Oppression" (1962) 36 A.L.J. 187.

28. Sections 187-197.

29. Sections 311-314.

(g) The special provisions relating to the regulation of no-liability companies are to be found in Part XI of the new Act<sup>30</sup> under the general heading of "Various Types of Companies" and not, as in the old Act, prior to the winding up provisions.<sup>31</sup>

(h) Part XIII of the old Act, which contained provisions either restricting or controlling certain fund-raising practices by companies, does not appear in the new Act. The old sections 366 and 367, which required fund-seeking foreign companies to issue prospectuses and placed other restrictions on them, are merged in the general prospectus provisions of the new Act.<sup>32</sup> Section 368 of the old Act, which placed restrictions on offers to sell company securities (in the wide sense of that word, including debentures and other securities), appears now in a considerably amplified form as section 374 of the new Act. Section 369, prohibiting sales of shares in companies with illegal objects, is now section 381 of the new Act.

(i) The new Act also contains a number of provisions concerned with a variety of subjects which appeared in the former South Australian Companies Act 1934-1960, but which do not appear in the uniform companies statutes of other Australian States. Most of these provisions appear in Parts XII and XIII of the new Act.

The new Act has undoubtedly striven towards a greater coherence, but this object has not been entirely attained. Although the anomalous arrangements of the earlier statute have been corrected, the insertion of many new provisions, and the retention of some of the old sections which do not form part of the uniform legislation, have prevented the formation of a logically coherent and comprehensive piece of legislation. It is still necessary under the new Act to leaf through its pages and make many cross-references to establish the effect of the statute on a particular company problem. For example, the relatively simple and basic question whether a company must include a balance-sheet and profit and loss account in its annual return requires the careful examination of sections 5, 6, 15, 158, 397 and 398 and the 8th schedule of the new Act.

It is obvious that a statute such as the Companies Act, dealing with a complex subject and required to provide solutions to many detailed and unconnected problems, does not easily lend itself to logical and coherent arrangement unless the legislators are prepared to take the unprecedented step of codifying the whole of company law and submitting it to a rigid and arbitrary classification, a move attended by many dangers and demanding a thorough and lengthy preliminary investigation. Nevertheless, there is much in the new Act which could have been arranged more systematically and comprehensively.

When the contents of the new Act are compared in detail with those of the old Act, the superficial similarity discernible in the form and pattern of the two statutes disappears entirely. The new Act introduces many significant changes and innovations.

First, the new Act unequivocally prohibits the creation of new private companies, in addition to the requirement that existing

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30. Sections 319-333.

31. Sections 175-185.

32. Sections 37-47.

private companies convert to proprietary or public companies by 1st July, 1965.<sup>33</sup> Other restrictions also are placed on existing private companies. The new Act also prohibits the issue of share warrants<sup>34</sup> and abolishes extraordinary resolutions,<sup>35</sup> winding up subject to the supervision of the court,<sup>36</sup> and the formation of limited companies with unlimited liability on the part of the managing director, directors and managers.<sup>37</sup> Subsidiary companies are prevented from holding shares, but not debentures or other securities, of their holding companies.<sup>38</sup> The new Act also repeals Part IX<sup>39</sup> and Part X<sup>40</sup> of the old Act. These parts of the old Act referred, respectively, to the application of the old Act to companies formed and registered under earlier companies statutes and to the registration of unincorporated local companies or companies incorporated under letters patent or companies which were otherwise of a transitional nature only and thought to have become redundant.

Secondly, the new Act introduces many new provisions which make changes in existing company law and practice. Thus section 20 of the new Act substantially abolishes the operation of the *ultra vires* doctrine. Section 28 simplifies the procedure for the alteration of the objects clause in company constitutions. However, this section does not permit retrospective alteration of the objects clause, and the decision in *Ashbury Carriage Co. v. Riche*,<sup>41</sup> in so far as it does not permit the ratification of prior unauthorized activities of companies, is still good law. It should be also noted that reduction of company capital is still subject to the same cumbersome procedure as under the old Act.<sup>42</sup> Proprietary companies, following the model of the English Companies Act 1948, are now classified into exempt and non-exempt.<sup>43</sup>

In addition the new Act establishes prescribed proprietary companies.<sup>44</sup> These are a local departure from the recommended uniform companies legislation, made to relieve purely local proprietary companies from the requirements placed by the Act on non-exempt proprietary companies.<sup>45</sup> The provisions relating to no-liability companies<sup>46</sup> and foreign companies<sup>47</sup> are considerably altered. The Governor may proclaim certain companies to be investment com-

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33. Section 399, and see sections 2 (3) and 26 (5) which exempt private companies converting into proprietary or public companies before the 1st July, 1965, from payment of fees.

34. Section 57.

35. Section 144.

36. 1934-1960 Act, sections 272-276.

37. 1934-1960 Act, section 72. However see 1962 Act, section 218 (2) and (3) on the extent of such liability in existing companies.

38. Section 17.

39. 1934-1960 Act, sections 325-327.

40. 1934-1960 Act, sections 328-344.

41. (1875) L.R. 7 H.L. 653.

42. 1962 Act, section 64.

43. Section 5 (1), (7) and (8).

44. Section 397.

45. Section 398.

46. 1962 Act, sections 319-333.

47. 1962 Act, sections 344-361.

panies,<sup>48</sup> another innovation, in which case special provisions become applicable to them.<sup>49</sup>

Prospectus provisions are expanded, and the so-called unsecured notes, if they are offered to the public, are now regarded as debentures.<sup>50</sup> The meaning of the words "offer to the public", which has hitherto caused considerable confusion, is defined with more precision in section 5 (6). Take-over offers are submitted to elaborate regulation under section 184 and the 10th schedule. A wider protection is given to oppressed shareholders by section 186, which is modelled on section 210 of the English Companies Act 1948.

As a method of dealing with insolvent companies in lieu of winding up, the new Act introduces official management of such companies.<sup>51</sup> This method of dealing with insolvent companies, which has the same object as assignments or arrangements by insolvent individuals under Parts XI and XII of the Commonwealth Bankruptcy Act 1924-1959, is taken from the South African Companies Act 1926.<sup>52</sup> The winding up provisions themselves are greatly improved by dispensing with the unnecessary duplication of provisions which occurred in the old Act; by clarifying the powers of courts and liquidators; particularly by making the Commonwealth Bankruptcy Act provisions applicable to companies which are being wound up instead of continuing to rely on the earlier and otherwise obsolete local insolvency legislation<sup>53</sup> which was deemed to apply under the old Act; and also by introducing the same rules for preferential transactions as apply to bankruptcies of individuals instead of retaining the inimical fraudulent preference rule.<sup>55</sup>

Thirdly, there are sections, the object of which is to simplify the law, but which do this in such an unsatisfactory manner that they are either meaningless or of doubtful practical value. Thus, in an attempt to clarify the right of preferential shareholders to dividends or the capital in companies of which they are members, section 66 requires their rights to be set out in the memorandum or articles. Many companies intending to issue preference shares in the future but not setting out in their articles "the rights of the holders of those shares with respect to repayment of capital, participation in surplus assets and profits, cumulative and non-cumulative dividends, voting and priority of payment of capital and dividend in relation to other shares or other classes of preference shares", will have to make the necessary amendments to their articles; but in the event of their failing to do so, the old confusing law on this subject will still prevail. It would have been more desirable for the law on this subject to be codified, although it is recognized that this would have required the insertion in the Act

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48. Section 334 (2).

49. Sections 334-343.

50. Section 38.

51. Sections 198-215.

52. See Paterson and Ednie, *Australian Company Law* (1962), pp. 459 *et seq.*

53. 1962 Act, section 291; cf. 1934-1960 Act, section 278.

54. See *Re Spicer Shoe Co. Pty. Ltd.* [1962] V.R. 43.

55. 1962 Act, section 293; cf. 1934-1960 Act, section 281.

of some arbitrary provisions. It is submitted that the result would still be preferable, regardless of its mandatory nature, to the present legal quagmire.

Another equally confusing new provision is section 98, taken from section 79 of the English Companies Act 1948, which gives recognition to the certification of transfers by companies. But, although statutorily recognizing the validity of such certifications, the section does not avoid the many problems and conflicts arising therefrom.

There are also two sections which, it is submitted, are completely redundant. Section 124 requires the directors to act honestly and to "use reasonable diligence" in the discharge of their duties, as well as prohibiting company officers from using information obtained in their official capacities for their own benefit. The section is an imprecise and loose restatement of the existing common law position. However, in sub-section (2) it makes the breach of such obligations an offence with penalties of up to five hundred pounds. If the section is stringently enforced, it may have dangerous repercussions, especially as what amounts to reasonable diligence is neither defined in the Act nor clearly established by the courts. The other redundant provision is section 376, which provides that "no dividend shall be payable to the shareholders of any company except out of profits . . .". Since it only repeats what is well established by the case law, and as the Act does not attempt to define the meaning of the word "profit", an impossible task in any event if one is to believe accountants and economists, the section leaves one in the same state of confusion as before.

Although the new Act contains only three hundred and ninety-nine sections and ten schedules, as compared with the four hundred and thirty-six sections and thirteen schedules of the old Act,<sup>56</sup> it is longer by some fifty pages. The explanation for this is that on the average the sections in the new Act are much longer and contain more sub-sections than the old Act.<sup>57</sup> In fairness to the draftsmen of the new Act, it must be said that it is an improvement on its predecessor, although it must also be emphasised that this is by no means the last word in the statutory reform of company law.

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56. Counting sections known by a number as well as a letter, e.g., sections 27a, 114a-114o, 158a, 358a-358m, 360a and 361a-361c.

57. For example, 1962 Act, section 74, which deals with the appointment of trustees for holders of debentures, extends over six pages.

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