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WEEKLY COMMENT: FRIDAY 26 APRIL 2013

1. Week-before-last I looked at the *Financial Markets Conduct Bill* (the “FMC Bill”) as reported from the Commerce Committee and *Supplementary Order Paper No. 93* to the Financial Reporting Bill (the “FR SOP”). Last week I looked at the *Financial Reporting Bill* (the “FR Bill”), on which the report from the Commerce Committee is due on 28 May 2013.
2. Since then, on 22 April 2013, the Minister of Commerce, the Hon Craig Foss, introduced *Supplementary Order Paper No. 220* (“SOP 220”) to the FMC Bill. This SOP is a revised version of the FMC Bill as reported from the Commerce Committee and contains “minor or technical changes, consequential and consistency changes, updates to consequential amendments, and other changes to improve drafting”. SOP 220 is now the latest version of the FMC Bill.
3. This week I look at the *Companies and Limited Partnerships Amendment Bill* (the “CLP Bill”), as reported from the Commerce Committee on 1 December 2012.

The Companies and Limited Partnerships Amendment Bill

4. The CLP Bill as reported from the Commerce Committee contained a major change from the Bill that was initially introduced. The requirement for companies and limited partnerships to have a resident agent, and all the consequential requirements, has been omitted. Instead, there is now a requirement for a company director or a general partner of a limited partnership who lives in New Zealand (or meets “reciprocal arrangement country” requirements). Additional information requirements include the date and place of a director’s birth (not to be made publicly available) and, in the case of companies, the ultimate holding company.

Commencement date

5. The requirement for a director or general partner who lives in New Zealand and the enhanced powers of the Registrar are to come into force 6 months after the date on which the Act receives the Royal assent, unless brought into force earlier by the Governor-General by Order in Council. The rest of the Act will come into force on the day after the date on which it receives the Royal assent.
6. In conjunction with the transitional provisions in sections 22B, 22C, 52A and 52B, this means that:
 - (a) A company registered later than 6 months after the Act receives the Royal assent must comply with all the new requirements.

- (b) A company registered earlier than 6 months after the Act's date of assent, which includes all existing companies, will have a further 6 months after the rules come into force within which to organise for a director who meets the new requirements to live in New Zealand etc. (see paragraph 9 below) – i.e. 12 months from the date of assent.
- (c) A company registered earlier than 6 months after the Act's date of assent must provide details of directors' date and place of birth and details of any ultimate holding company etc. (see paragraph 10 below) by the date the rules come into force – i.e. by 6 months from the date of assent.
- (d) A limited partnership registered later than 6 months after the Act receives the Royal assent must comply with all the new requirements.
- (e) A limited partnership registered earlier than 6 months after the Act's date of assent, which includes all existing limited partnerships, will have a further 6 months after the rules come into force within which to organise for a general partner who meets the new requirements for a natural person to live in New Zealand etc. (see paragraph 14 below) – i.e. 12 months from the date of assent.
- (f) A limited partnership registered earlier than 6 months after the Act's date of assent must provide details of their natural person general partners' date and place of birth etc. (see paragraph 15 below) by the date the rules come into force – i.e. by 6 months from the date of assent.

Criminalisation of breaches of certain directors' duties

- 7. Criminal sanctions are being introduced for very serious breaches of two existing duties that directors owe to their companies and creditors. The Commerce Committee considered that such behavior is “sufficiently blameworthy to warrant criminal punishment”.
- 8. Under new section 138A of the *Companies Act 1993*, a director commits an offence and is liable upon conviction to be imprisoned for up to 5 years or fined up to \$200,000 if:
 - (a) The director breaches the duty to act in good faith and in the best interests of the company, and the breach is seriously detrimental to the interests of the company; or
 - (b) The director breaches the duty not to agree to, or cause or allow, company business to be carried on in a manner likely to create a substantial risk of serious loss to the company's creditors, and the director knows that the breach will result in serious loss to the company's creditors.

One or more directors to live in New Zealand and other measures

- 9. Section 10 of the *Companies Act 1993*, which stipulates the essential requirements, will under replacement paragraph (d), require at least 1 director to live in New Zealand, or live in an “enforcement country” and be a director of a company registered in that country.
- 10. Amended registration requirements in section 12 will require:
 - (a) Directors to provide details of their date and place of birth;
 - (b) Directors who live in an “enforcement country” to confirm that they are directors of a company registered in that country; and
 - (c) The proposed company's “ultimate holding company information”.

11. “Ultimate holding company information” essentially means the name of the ultimate holding company and country of registration. Any changes in ultimate holding company information are required to be delivered to the Registrar for registration within 20 working days of the date of the change.
12. The same requirements will apply to amalgamating companies and an amalgamated company.
13. Under new section 367A, details of a director’s date and place of birth must be kept confidential and the *Official Information Act 1982* will not apply to that information.

One or more general partners to live in New Zealand and other measures

14. Section 8 of the *Limited Partnerships Act 2008* (the “LPA”) is to be amended so as to require a limited partnership to have a general partner:
 - (a) Who is a natural person who lives in New Zealand, or lives in an “enforcement country” and is a director of a company registered in that country; or
 - (b) That is a partnership governed by the *Partnership Act 1908*, which has at least 1 partner who is a natural person who meets the above requirements; or
 - (c) That is a company registered under the *Companies Act 1993*.
15. Amended registration requirements in section 52 will require every general partner who is a natural person to:
 - (a) Provide details of their place of birth (in addition to the existing requirement to provide their date of birth);
 - (b) Confirm that they are directors of a company registered in an enforcement country, if they live in that country.
16. Details of the date and place of birth will be kept confidential: only the Registrar may search the Register by reference to those criteria.
17. The Commerce Committee has left unchanged the qualification requirements for a general partner, contained in new sections 19A and 19B of the LPA. There are no qualification requirements to be a limited partner of a limited partnership.
18. The Commerce Committee has also left unchanged all of the new provisions in sections 103A to 103G relating to persons prohibited from managing limited partnerships, and general partners who may be disqualified by the Court.

No long-form amalgamations of code companies

19. A code company is defined in section 2A of the *Takeovers Act 1993*. The definition is for the purposes of the takeovers code. A code company is either a listed company, or a company that has 50 or more shareholders. A code company can remain a code company for certain time periods before and after these criteria were met, or ceased to be met, for the purposes of certain parts of the takeovers code.
20. A code company will not be allowed to amalgamate under sections 220 and 221 of the *Companies Act 1993*. These provisions allow ordinary or “long-form” amalgamations.

21. The stated purpose behind this change is to ensure that shareholders of companies that fall under the takeovers code will not be disadvantaged if a change to the company is effected under the *Companies Act 1993* rather than the takeovers code.
22. As part of the changes, there will be more rigorous voting thresholds and additional judicial oversight for court-approved schemes of arrangement, amalgamation, or compromise under Part 15 of the *Companies Act 1993*. For court-approved schemes, the changes will provide a mechanism for the scheme promoter to seek a preliminary “no objection” statement from the Takeovers Panel, which could assist the court to decide whether to approve the scheme.



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