

Companies and Limited Partnerships Amendment Bill

New director residency requirements, offences for directors, and powers to examine controlling interests¹

13 June 2013

As many as 4200 businesses will need to add local directors to their boards to comply with the Companies and Limited Partnerships Amendment Bill now going through the House. We expect the Bill will be passed by the end of the Parliamentary year and fully in force by as early as 31 March next year.

The Bill was introduced in October 2011, was reported back from Select Committee on 11 December 2012 and is now waiting for a second reading. Substantial amendments were tabled on 5 June in Supplementary Order Paper no. 249.

The provisions criminalising certain directors' duties and on arrangements and amalgamations of code companies will come into force on the day after the Bill becomes law (receives Royal Assent). The remainder of the Bill, including director residency requirements, enhanced powers of Registrar, and amendments to Limited Partnership Act 2008 will come into force 6 months after that date or on earlier by Order in Council.

Residency requirements

Under the upcoming changes, every New Zealand incorporated company must have:

- a director who lives in New Zealand (no requirement to be a citizen), or
- a director who is also a director of a company incorporated in, and who also lives in, a country with which New Zealand has reciprocal enforcement arrangements for low-level fines. The list of such countries has yet to be finalised, however indications are that only Australia will qualify, at least initially.

This information will be collected at registration and updated when any subsequent director is appointed.

Companies that are already incorporated will have six months to comply with the new requirements. After that the Registrar of Companies may remove the company from the register for non-compliance.

These requirements do not apply to an overseas company registered in New Zealand.

There are similar requirements for limited partnerships. The SOP also proposes a limited partnership must have at least one general partner with a substantive connection to New Zealand. General partners must not be minors and must not have various criminal convictions.

Information requirements

¹ This brief updates a Chapman Tripp newsletter to cover a SOP tabled on 5 June
<http://www.chapmantripp.com/publications/Pages/Upcoming-director-residency-requirements.aspx>

Under the upcoming changes:

- In addition to the current requirement to provide a residential address, every director must, at the time of appointment, provide his or her date and place of birth. This will be held by the Registrar, but will not be publicly available. Existing directors will need to provide this information in a manner still to be determined by the Registrar.
- On registration and within 20 working days of any change, every company must disclose the name of any ultimate holding company, the country of registration, the registration number or code (if any) and the address for service. These details will be publicly available. Existing companies will need to provide this information in a manner still to be determined by the Registrar.
- There are penalty provisions for failure to comply with these information requirements.

The effective date of the new requirements will probably depend on the Registrar's assessment of progress with practical implementation. It is surprising that the Bill does not simply stipulate that the information be provided in the next Annual Return for existing directors.

The Companies Office Registry Integrity Team is already requesting further identity information and proof of place of residency when applications are made to register a company's off shore shareholders and directors. We expect this trend to intensify.

Another significant amendment enhances powers of the Registrar to remove a company from the register. One of these grounds is persistent failure of a company or of one or more of its directors to comply with the Companies Act 1993 or the Financial Reporting Act 1993.

Currently, failure of a director to comply with obligations under section 19 of the Financial Reporting Act 1993 (FRA) to file a company's audited financial statements with the Companies Office is an offence. Prosecutions under section 39 and infringement notices under section 41B(1) of the FRA have been rare. Generally the Registrar sends emails, texts and letters to non-compliant companies and their directors. The Companies Office is becoming more proactive in this area.

Directors of companies which must file financial statements under section 19 FRA, but fail to do so, already face fines of up to \$100,000 on summary conviction. As an alternative the Registrar can issue notices demanding infringement fees of \$7000 from each director. And the financial statements must still be filed. There are also penalty regimes for other failures to comply with other provisions of the FRA.

The Registrar will be able to strike a company of the register for breaches of the FRA under the proposed amendments.

A good bring-up system for timely annual returns and necessary filings, such as financial statements, will be vital.

Offences

Under the Bill certain directors' duties will be criminalised. The SOP refines those changes. Imprisonment for up to 5 years or a fine not exceeding \$200,000 will apply to:

- Directors who act in bad faith towards the company believing the conduct is not in the best interest of the company and knowing or being reckless as to whether the conduct will cause serious loss to the company or benefit or advantage a person who is not the company. A defence would be if the company is a subsidiary and the conduct is in the best interest of the

holding company even though it may not be in the best interest of the company. For this defence the director has to have been given prior approval by the shareholders and the conduct must be permitted in the company's constitution.

- Directors who knowingly agree to, or cause or allow, the business of the company to be carried on in a manner than causes serious loss to a creditor (whether or not they know the full extent of the loss or identity of the creditors). This will not apply if the creditors that suffer the loss consent to the business being carried on in that manner.

Control interests

The SOP proposes new powers for the Registrar to identify the controllers of a company for law enforcement purposes, including:

- who has a controlling interest in shares of the company and the full details of that interest; and
- other information pertaining to who has control of the company (e.g. gives instructions or directions relating to the management and administration of the company).

Similar amendments apply to limited partnerships to give the Registrar new powers to identify the controllers of limited partnerships.