



ANALYSIS

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1999, No. 19

An Act to amend the Companies Act 1993

[26 April 1999]

BE IT ENACTED by the Parliament of New Zealand as follows:

1. Short Title—This Act may be cited as the Companies Amendment Act 1999, and is part of the Companies Act 1993 (“the principal Act”).

2. Liability of shareholders—(1) Section 98 (6) of the principal Act is amended by repealing paragraph (a), and substituting the following paragraph:

“(a) A period of 1 year before the date of commencement of the liquidation of the company together with the period commencing on that date and ending at the time at which the liquidator is appointed; and”.

(2) Section 98 (6) of the principal Act is amended—

(a) By inserting in paragraph (b), after the word “which”, the expression “, and at the time at which,”;

(b) By inserting in paragraph (c), after the word “date” in the second place where it appears, the words “and at the time”.

3. Commencement of liquidation—Section 241 of the principal Act is amended by repealing subsection (5), and substituting the following subsection:

“(5) The liquidation of a company commences on the date on which, and at the time at which, the liquidator is appointed.”

4. Commencement of liquidation to be recorded—The principal Act is amended by inserting, after section 241, the following section:

“241A. (1) If—

“(a) A liquidator is appointed under section 241 (2) (a), the shareholders must record in the special resolution appointing the liquidator the date on which, and the time at which, the special resolution was passed; or

“(b) A liquidator is appointed under section 241 (2) (b), the board of the company must record in the instrument appointing the liquidator the date on which, and the time at which, the liquidator was appointed; or

“(c) A liquidator is appointed under section 241 (2) (c), the Court must record in the order appointing the liquidator the date on which, and the time at which, the order was made.

“(2) If any question arises as to whether on the date on which a liquidator was appointed an act was done or a transaction

was entered into or effected before or after the time at which the liquidator was appointed, that act or transaction is, in the absence of proof to the contrary, deemed to have been done or entered into or effected, as the case may be, after that time.”

5. Interim liquidator—Section 246 of the principal Act is amended by adding the following subsections:

“(4) The appointment of an interim liquidator takes effect on the date on which, and at the time at which, the order appointing that interim liquidator is made.

“(5) The Court must record in the order appointing the interim liquidator the date on which, and the time at which, the order was made.

“(6) If any question arises as to whether on the date on which an interim liquidator was appointed an act was done or a transaction was entered into or effected before or after the time at which the interim liquidator was appointed, that act or transaction is, in the absence of proof to the contrary, deemed to have been done or entered into or effected, as the case may be, after that time.”

6. Other duties of liquidator—Section 255(2) of the principal Act is amended—

(a) By inserting in paragraph (a)(ii), after the word “date”, the words “and time”:

(b) By inserting in paragraph (d), before the word “commencement”, the words “date of”.

7. Power to disclaim onerous property—Section 269 of the principal Act is amended by repealing subsection (2), and substituting the following subsection:

“(2) For the purposes of this section, ‘onerous property’—

“(a) Means—

“(i) An unprofitable contract; or

“(ii) Property of the company that is unsaleable, or not readily saleable, or which may give rise to a liability to pay money or perform an onerous act; but

“(b) Does not include—

“(i) A netting agreement to which sections 310A to 310O apply; or

“(ii) Any contract of the company that constitutes a transaction under a netting agreement.”

8. Transactions having preferential effect—(1) Section 292 (5) of the principal Act is amended by repealing paragraph (a), and substituting the following paragraph:

“(a) The period of 2 years before the date of commencement of the liquidation together with the period commencing on that date and ending at the time at which the liquidator is appointed; and”.

(2) Section 292 (5) of the principal Act is amended—

(a) By inserting in paragraph (b), after the word “which”, the words “, and at the time at which,”:

(b) By inserting in paragraph (c), after the word “date” in the second place where it appears, the words “and at the time”.

(3) Section 292 (6) of the principal Act is amended by repealing paragraph (a), and substituting the following paragraph:

“(a) The period of 6 months before the date of commencement of the liquidation together with the period commencing on that date and ending at the time at which the liquidator is appointed; and”.

(4) Section 292 (6) of the principal Act is amended—

(a) By inserting in paragraph (b), after the word “which”, the words “, and at the time at which,”:

(b) By inserting in paragraph (c), after the word “date” in the second place where it appears, the words “and at the time”.

9. Voidable charges—(1) Section 293 (6) of the principal Act is amended by repealing paragraph (a), and substituting the following paragraph:

“(a) The period of a year before the date of commencement of the liquidation together with the period commencing on that date and ending at the time at which the liquidator is appointed; and”.

(2) Section 293 (6) of the principal Act is amended—

(a) By inserting in paragraph (b), after the word “which”, the words “, and at the time at which,”:

(b) By inserting in paragraph (c), after the word “date” in the second place where it appears, the words “and at the time”.

(3) Section 293 (7) of the principal Act is amended by repealing paragraph (a), and substituting the following paragraph:

“(a) The period of 6 months before the date of commencement of the liquidation together with the period commencing on that date and ending at the time at which the liquidator is appointed; and”.

(4) Section 293 (7) of the principal Act is amended—

(a) By inserting in paragraph (b), after the word “which”, the words “, and at the time at which,”;

(b) By inserting in paragraph (c), after the word “date” in the second place where it appears, the words “and at the time”.

10. Transactions at undervalue—(1) Section 297 (3) (b) of the principal Act is amended by repealing subparagraph (i), and substituting the following subparagraph:

“(i) The period of a year before the date of commencement of the liquidation together with the period commencing on that date and ending at the time at which the liquidator is appointed; and”.

(2) Section 297 (3) (b) of the principal Act is amended—

(a) By inserting in subparagraph (ii), after the word “which”, the words “, and at the time at which,”;

(b) By inserting in subparagraph (iii), after the word “date” in the second place where it appears, the words “and at the time”.

11. Transactions for inadequate or excessive consideration with directors and certain other persons—

(1) Section 298 (4) of the principal Act is amended by repealing paragraph (a), and substituting the following paragraph:

“(a) The period of 3 years before the date of commencement of the liquidation together with the period commencing on that date and ending at the time at which the liquidator is appointed; and”.

(2) Section 298 (4) of the principal Act is amended—

(a) By inserting in paragraph (b), after the word “which”, the words “, and at the time at which,”;

(b) By inserting in paragraph (c), after the word “date” in the second place where it appears, the words “and at the time”.

12. Ascertainment of amount of claim—Section 306 (1) of the principal Act is amended by inserting, after the word “date”, the words “and time”.

13. Claims relating to debts payable after commencement of liquidation—Section 309(1) of the principal Act is amended by inserting, before the word “commencement”, the words “date of”.

14. Mutual credit and set-off—(1) Section 310(6) of the principal Act is amended by repealing paragraph (a), and substituting the following paragraph:

“(a) The period of 6 months before the date of commencement of the liquidation together with the period commencing on that date and ending at the time at which the liquidator is appointed; and”.

(2) Section 310(6) of the principal Act is amended—

(a) By inserting in paragraph (b), after the word “which”, the words “, and at the time at which,”;

(b) By inserting in paragraph (c), after the word “date” in the second place where it appears, the words “and at the time”.

(3) Section 310(7) of the principal Act is amended by repealing paragraph (a), and substituting the following paragraph:

“(a) The period of 2 years before the date of commencement of the liquidation together with the period commencing on that date and ending at the time at which the liquidator is appointed; and”.

(4) Section 310(7) of the principal Act is amended—

(a) By inserting in paragraph (b), after the word “which”, the words “, and at the time at which,”;

(b) By inserting in paragraph (c), after the word “date” in the second place where it appears, the words “and at the time”.

15. New sections inserted—The principal Act is amended by inserting, after section 310, the following sections:

“310A. Definitions relating to set-off under netting agreement—In this Act, unless the context otherwise requires,—

“‘Bank’ means the Reserve Bank of New Zealand;

“‘Bilateral netting agreement’ means an agreement that provides, in respect of transactions between 2 persons to which the agreement applies,—

“(a) That on the occurrence of an event specified in the agreement, all or any of those transactions must

(or may, at the option of a party) be terminated and—

“(i) An account taken of all money due between the parties in respect of the terminated transactions; and

“(ii) All obligations in respect of that money satisfied by payment of the net amount due from or on behalf of the party having a net debit to or on behalf of the party having a net credit; or

“(b) That each transaction is to be debited or credited to an account with the effect that the rights and obligations of each party that existed in respect of the relevant account prior to the transaction are extinguished and replaced by rights and obligations in respect of the net debit due on the relevant account after taking into account that transaction; or

“(c) That amounts payable by each party to the other party are to be paid or satisfied by payment of the net amount of those obligations by the party having a net debit to the party having a net credit;— but does not include any bilateral netting agreement that is part of a multilateral netting agreement:

“‘Clearing house’ means a person that provides clearing or settlement services in respect of financial transactions between parties to a multilateral netting agreement:

“‘Multilateral netting agreement’ means an agreement that provides for the settlement, between more than 2 persons, of payment obligations arising under transactions that are subject to the agreement, and that provides, in respect of transactions to which it relates, that debits and credits arising between the parties are to be brought into account so that amounts payable by or to each party are satisfied by—

“(a) Payment by or on behalf of each party having a net debit to or on behalf of a clearing house (whether as agent or as principal) or a party having a net credit; and

“(b) Receipt by or on behalf of each party having a net credit from or on behalf of a clearing house (whether as agent or as principal) or a party having a net debit:

“ ‘Netted balance’ means any amount calculated under a netting agreement as the net debit payable by or on behalf of a party to the agreement to or on behalf of another party to the agreement in respect of all or any transactions to which the netting agreement applies:

“ ‘Netting agreement’ means a bilateral netting agreement or a recognised multilateral netting agreement:

“ ‘Recognised clearing house’ means a clearing house declared under section 310K to be a recognised clearing house:

“ ‘Recognised multilateral netting agreement’ means a multilateral netting agreement that is contained in, or is subject to, the rules of a recognised clearing house.

“310B. Application of set-off under netting agreement—(1) Despite anything in section 313, sections 310A to 310O apply—

“(a) To a netting agreement—

“(i) Made in or evidenced by writing; and

“(ii) In which the application of sections 310A to 310O has not been expressly excluded; and

“(iii) Whether made before or after the commencement of this section; and

“(b) To all obligations under a netting agreement (whether those obligations are payable in New Zealand currency or in some other currency).

“(2) Sections 310A to 310O apply despite—

“(a) Any disposal of rights under a transaction that is subject to a netting agreement in contravention of a prohibition in the netting agreement; or

“(b) The creation of a charge or other interest in respect of the rights referred to in paragraph (a) in contravention of a prohibition in the netting agreement.

“(3) Nothing in sections 310A to 310O applies to an amount paid or payable by a shareholder—

“(a) As the consideration, or part of the consideration, for the issue of a share; or

“(b) In satisfaction of a call in respect of an outstanding liability of the shareholder made by the board of directors or by the liquidator.

“310C. Calculation of netted balance—If a company that is a party to a netting agreement is in liquidation,—

“(a) Any netted balance payable by or to the company must be calculated in accordance with the netting agreement; and

“(b) That netted balance constitutes the amount that may be claimed in the liquidation or is payable to the company, as the case may be, in respect of the transactions that are included in the calculation.

“310D. Mutuality required for transactions under bilateral netting agreements—Sections 310A to 310O apply to transactions that are subject to a bilateral netting agreement only if those transactions constitute mutual credits, mutual debts, or other mutual dealings.

“310E. When mutuality required for transactions under recognised multilateral netting agreements—(1) Sections 310A to 310O apply to transactions that are subject to a recognised multilateral netting agreement, whether or not those transactions constitute mutual credits, mutual debts, or other mutual dealings.

“(2) Despite subsection (1), sections 310A to 310O do not apply to transactions that are subject to a recognised multilateral netting agreement if—

“(a) Those transactions do not constitute mutual credits, mutual debts, or other mutual dealings; and

“(b) A party to any of those transactions is acting as a trustee for another person; and

“(c) The party acting as trustee is not authorised by the terms of the trust of which the party is a trustee to enter into the transaction.

“310F. Application of set-off under section 310 to transactions subject to netting agreements—(1) Section 310 does not apply to transactions that are subject to a netting agreement to which sections 310A to 310O apply.

“(2) However, a netted balance is to be treated as an amount to which section 310 (1) applies if the company that is in liquidation and the other party to the netting agreement also have mutual credits, mutual debts, or other mutual dealings between them that are not subject to the netting agreement.

“310G. Transactions under netting agreement and effect on certain sections—(1) Nothing in sections 310A to 310O prevents the operation of section 56 or section 292 or section 297 or section 298 in respect of a transaction that is subject to a netting agreement.

“(2) However, nothing in section 292 (3) applies to a transaction that is subject to a netting agreement.

“(3) For the purposes of sections 292 and 297, the term ‘transaction’, in relation to a company, does not include a netting agreement entered into by the company, except to the extent that the effect of entering into the netting agreement is to reduce any amount that was owing by or to the company at the time the company entered into the agreement.

“310H. **Rights under netting agreement not affected by commencement of liquidation**—Nothing in section 248 (1) affects, in respect of a company in liquidation, the exercise of any of the following rights under a netting agreement:

- “(a) The termination, in accordance with the netting agreement, of all or any transactions that are subject to the netting agreement by reason of the occurrence of an event specified in the netting agreement, being an event (including the appointment of a liquidator) occurring not later than the commencement of the liquidation; or
- “(b) The taking of an account, in accordance with the netting agreement, of all money due between the parties to the netting agreement in respect of transactions affected by the termination.

“310I. **Set-off under netting agreement not affected by notice under section 294**—The filing of a notice under section 294 in respect of any transaction that is subject to a netting agreement does not affect the operation of section 310C in respect of the transaction, and that section continues to apply to the transaction until the transaction is set aside under subsection (3) or subsection (4) of section 294.

“310J. **Court may set aside bilateral netting agreement between company and related person**—(1) The Court may order, on the application of a liquidator, that a bilateral netting agreement entered into by a company be set aside as against the liquidator of the company if—

- “(a) The netting agreement is between the company and a person who was a related person at the time that the netting agreement was entered into; and
- “(b) The netting agreement was entered into within the restricted period; and
- “(c) The related person does not prove that, at the time the netting agreement was entered into, the related person did not have reason to suspect that the

company was unable to pay its debts as they became due.

“(2) The Court may make any other orders it thinks proper for the purpose of giving effect to an order under subsection (1).

“(3) In this section, unless the context otherwise requires,—

“‘Related person’, in relation to the company in liquidation, means—

“(a) A director of the company, or a nominee or relative of or a trustee for, or a trustee for a relative of, a director of the company; or

“(b) A person, or a relative of a person, who has control of the company; or

“(c) Another company that is controlled by a director of the company, or a nominee or relative of or a trustee for, or a trustee for a relative of, a director of the company; or

“(d) A related company.

“‘Restricted period’ has the same meaning as in section 310 (7).

“310K. Certain persons may be declared to be recognised clearing houses—(1) The Bank may, by notice in the *Gazette*, declare any person that provides or proposes to provide clearing or settlement services to be a recognised clearing house for the purposes of sections 310A to 310O.

“(2) The Bank may, by notice in the *Gazette*, vary or revoke any declaration made under subsection (1).

“310L. Matters that Bank must or may have regard to when making, varying, or revoking declaration under section 310K—(1) In determining whether a declaration should be made, varied, or revoked under section 310K, the Bank must have regard to the extent to which the application of sections 310A to 310O to any multilateral netting agreement that is subject to the rules of that clearing house would assist in promoting the soundness or efficiency of the financial system.

“(2) In determining whether a declaration should be made, varied, or revoked under section 310K, the Bank may have regard to any of the following matters:

“(a) The type of transactions that may be effected through the clearing house; and

“(b) Any laws or regulatory requirements relating to the operation of that clearing house and compliance with those laws or regulatory requirements; and

“(c) Any other matters that the Bank may, in any particular case, consider appropriate.

“310M. Bank may impose conditions in declaration under section 310K—(1) The Bank may, in any declaration made or varied under section 310K, impose conditions relating to any of the matters referred to in section 310L.

“(2) If a recognised clearing house fails to comply with any conditions referred to in subsection (1), the Bank may revoke the declaration made under section 310K that relates to the clearing house.

“310N. Bank to notify recognised clearing house about Bank’s intention to revoke or vary declaration under section 310K—The Bank must not revoke or vary a declaration made under section 310K unless—

“(a) The recognised clearing house to which the notice applies has been given not less than 7 days’ notice in writing of the Bank’s intention to do so; and

“(b) The clearing house has a reasonable opportunity to make submissions to the Bank; and

“(c) The Bank considers those submissions.

“310O. Transactions under recognised multilateral netting agreement not affected by variation or revocation of declaration under section 310K—The variation or revocation of a declaration under section 310K does not affect the application of sections 310A to 310O to any transaction—

“(a) That is or was subject to a recognised multilateral netting agreement; and

“(b) That was entered into before the variation or revocation of the declaration.”

16. Interest on claims—Section 311 of the principal Act is amended by inserting in subsections (1) and (3), before the word “commencement” in each place where it appears, the words “date of”.

17. Seventh Schedule amended—Clause 2 (i) of the Seventh Schedule of the principal Act is amended by inserting, after the word “date”, the words “and time”.

18. Volunteers Employment Protection Act 1973 amended—Section 15 (1) (b) of the Volunteers Employment

Protection Act 1973 is amended by inserting, after the word “date”, the words “and time”.

19. Customs and Excise Act 1996 amended—
Section 99(2)(b) of the Customs and Excise Act 1996 is amended by omitting the words “the date of” in the second place where they appear.

This Act is administered in the Ministry of Commerce.
