

House of Representatives  
Supplementary Order Paper

Wednesday, 5 June 2013

Companies and Limited Partnerships Amendment  
Bill

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*Proposed amendments*

Hon Craig Foss, in Committee, to move the following amendments:

*Clause 4*

In *clause 4*, heading to *new section 138A*, replace “**breaches of certain duties**” (line 9 on page 6) with “**breach of director’s duty to act in good faith and in best interests of company**”.

In *clause 4*, replace *new section 138A(1)* (lines 10 to 14 on page 6) with:

- “(1) A director of a company commits an offence if the director exercises powers or performs duties as a director of the company, or omits to exercise powers or perform duties as a director of the company,—
  - “(a) in bad faith towards the company; and
  - “(b) believing the conduct is not in the best interests of the company; and
  - “(c) knowing, or being reckless as to whether, the conduct will cause—
    - “(i) serious loss to the company; or
    - “(ii) benefit or advantage to a person who is not the company (including, for example, to the director).

In *clause 4*, delete *new section 138A(2)*, (lines 15 to 19 on page 6).

In *clause 4*, after *new section 138A* (after line 21 on page 6), insert:

“**138B Defence to director charged with offence under section 138A**

- “(1) It is a defence to a director charged with an offence under **section 138A** if the director proves, in relation to the company concerned, that—

- “(a) the company is a subsidiary; and
  - “(b) the constitution of the company expressly permits a director’s conduct to be in the best interests of that company’s holding company even though it may not be in the best interests of the company; and
  - “(c) the company’s shareholders have given prior agreement to the director’s relevant conduct; and
  - “(d) the director believed that his or her relevant conduct was in the best interests of the company’s holding company.
- “(2) It is a defence to a director charged with an offence under **section 138A** if the director proves, in relation to the company concerned, that—
- “(a) the company is carrying out a joint venture between its shareholders; and
  - “(b) the constitution of the company expressly permits a director’s conduct to be in the best interests of a shareholder or shareholders of the company even though it may not be in the best interests of the company; and
  - “(c) the director believed that his or her relevant conduct was in the best interests of the shareholder or shareholders, even though it was not in the best interests of the company.”

*New clauses 4AAA and 4AAB*

Before *clause 4A* (before line 22 on page 6), insert:

**4AAA Penalty for failure to comply with Act**

Section 373(4)(f) is amended by inserting “or in a manner that causes material or serious loss to 1 or more creditors” after “fraudulently”.

**4AAB Carrying on business fraudulently**

- (1) The heading to section 380 is amended by adding “**or in manner that causes material or serious loss to creditors**”.
- (2) Section 380 is amended by adding the following subsection:
  - “(4) Every director of a company commits an offence and is liable on conviction to the penalties set out in section 373(4) if—
    - “(a) the director agrees to, or causes or allows, the business of the company to be carried on in a manner that causes serious loss to 1 or more of the company’s creditors; and
    - “(b) the director knows that a serious loss will be suffered by the company’s creditors as a result of the business being carried on in that manner (whether or not the director knows the full extent of the loss or the identity of the creditors concerned); and

- “(c) the creditors that suffered the loss did not give their prior consent to carrying on the business in that manner.”

*Clause 7F*

In *clause 7F(1)*, replace *new section 220(1)(c)* (lines 32 to 34 on page 9) with:

- “(c) in relation to every director of the amalgamated company, his or her full name and the information required by **section 12(2)(b)(ii) to (iii)**.”

*New clause 7FA*

After *clause 7F* (after line 5 on page 10), insert:

**7FA Registration of amalgamation proposal**

Section 223 is amended by inserting the following paragraph after paragraph (b):

- “(ba) the date and place of birth of every director of the amalgamating company; and”.

*Clause 22A*

In *clause 22A(2)*, replace “paragraph” (line 28 on page 26), with “paragraphs”.

In *clause 22A(2)*, before *paragraph (ga)* (before line 30 on page 26), insert:

- “(gaaa) if a director is resident in an enforcement country, the prescribed information in respect of the company or companies in that country of which the director is a director:

*New clause 24A and cross-heading*

After *clause 24* (after line 26 on page 28), insert:

*Transitional provision relating to amendments to Part 13  
of principal Act*

**24A Transitional provision relating to amendments to Part 13  
of principal Act**

- (1) An amalgamation proposal involving 1 or more code companies that has been approved by the boards of all amalgamating companies in accordance with section 221(1) of the principal Act before the commencement of **section 24** of this Act is to be continued as if **section 24** of this Act had not been enacted, except if the amalgamation takes effect on or after 6 months after the commencement of **section 24** of this Act.
- (2) **Section 24** of this Act applies to both—
  - (a) an amalgamation described in **subsection (1)** that takes effect on or after 6 months after the commencement of **section 24**; and
  - (b) any other amalgamation proposal that has not been approved by the boards of all companies in accordance

with section 221(1) before the commencement of **section 24**.

- (3) In this section, **takes effect**, in respect of an amalgamation, means the date when the amalgamation takes effect in accordance with sections 224 and 225 of the principal Act.

*Clause 25*

In *clause 25, new section 236A(5)*, after “section” (line 33 on page 29), insert “and **section 236B**”.

In *clause 25, new section 236A(5)*, before the definition of **interest class** (before line 34 on page 29), insert:

“**affects the voting rights**, in respect of an arrangement or amalgamation, means an arrangement or amalgamation that involves a change in the relative percentage of voting rights held or controlled by 1 or more shareholders

*Clause 26*

In *clause 26(2), new section 8(1)(eb)*, after “code company” (line 32 on page 30), insert “(within the meaning of that term in **section 236A** of the Companies Act 1993)”.

In *clause 26(3), new section 23A*, after “code company” (line 5 on page 31), insert “(within the meaning of that term in **section 236A** of the Companies Act 1993)”.

*New clause 26B*

After *clause 26A* (after line 24 on page 31), insert:

**26B Consequential amendment to Takeovers (Fees) Regulations 2001**

- (1) This section amends the Takeovers (Fees) Regulations 2001.
- (2) Regulation 4(2) is amended by inserting the following paragraph after paragraph (a):
- “(aa) considering an application for an order under section 236(1) of the Companies Act 1993 that affects the voting rights of a code company (within the meaning of that term in **section 236A** of the Companies Act 1993), and indicating whether or not the Panel has an objection to such an order:”.

*New clauses 28A and 28B*

Before *clause 29* (before line 5 on page 32), insert:

**28A Interpretation**

Section 2(1) is amended by inserting the following definition in its appropriate alphabetical order:

“**control interest** has the meaning set out in **sections 365B to 365E**”.

**28B Meaning of director**

- (1) Section 126(1)(b) is amended by inserting “**318(1)(bab)**,” after “301,”.
- (2) Section 126(1)(c) is amended by inserting “**318(1)(bab)**,” after “301,”.

*Clause 29*

In *clause 29(1)*, after *new section 318(1)(ba)* (after line 16 on page 32), insert:

“(bab) the Registrar has reasonable grounds to believe that the company, or 1 or more of its directors or shareholders, has failed to respond to a requirement made in relation to that or another company under **section 365F or 365G**; or

In *clause 29(2)*, *new section 318(1A)*, after “subsection (1)(aaa),” (line 30 on page 32), insert “**(bab)**,”.

In *clause 29(4)*, *new section 318(4A)*, after “**(ba)**,” (line 2 on page 33), insert “**(bab)**,”.

*Clause 30*

In *clause 30(1)*, after “**(ba)**,” (line 22 on page 33), insert “**(bab)**,”.

In *clause 30(2)*, after “**(ba)**,” (line 24 on page 33), insert “**(bab)**,”.

In *clause 30(4A)*, after *new section 319(2)(c)* (after line 31 on page 34), insert:

“(ca) if **section 318(1)(bab)** applies, that the company will be removed from the New Zealand register unless—  
“(i) the Registrar does not, in accordance with section 322, proceed to remove the company from the register; or  
“(ii) by the date specified in the notice, which must be at least 20 working days after the date of the notice, the company satisfies the Registrar (by notice in writing) that—  
“(A) information has been disclosed as required by the Registrar under **section 365F or 365G** (in accordance with any specification under **section 365H**); or  
“(B) there is a proper reason for the company to continue in existence:

In *clause 30(5)*, after “**(ba)**,” (line 34 on page 35), insert “**(bab)**,”.

*Clause 31*

Replace *clause 31(2)* (lines 9 to 19 on page 36) with:

- (2) Section 321 is amended by inserting the following subsection after subsection (3):  
“(4) Where a notice is given of an intention to remove a company from the New Zealand register, in addition to an objection to the removal on 1 or more of the grounds identified in subsec-

tion (1), in relation to any of the grounds for removal specified in the first column of the following table, any person may deliver to the Registrar, not later than the date specified in the notice, an objection to the removal on any of the corresponding grounds specified in the second column of the following table:”

**Grounds for removal**

The company does not comply with section 10

The company has failed to respond to a requirement made under **section 365(1)(caaa)** or (c)

The Registrar has reasonable grounds to believe that the company, or 1 or more of its directors or shareholders, has failed to respond to a requirement made in relation to that or another company under **section 365F or 365G**

The Registrar has reasonable grounds to believe that the company, or 1 or more of its directors or shareholders, has intentionally provided the Registrar with inaccurate information

The Registrar has reasonable grounds to believe that the company, or 1 or more of its directors or shareholders, has failed to comply with duties relating to the company under this Act or the Financial Reporting Act 1993 in a serious or persistent way

**Grounds for objection**

The company complies with section 10

The company has responded to the requirement made under **section 365(1)(caaa)** or (c)

Information has been disclosed as required by the Registrar under **section 365F or 365G** (in accordance with any specification under **section 365H**)

The company has provided accurate information or inaccurate information was provided unintentionally

There has been no serious or persistent failure to comply with duties relating to the company under this Act or the Financial Reporting Act 1993

In *clause 31(3)*, replace “subsection (2)” (line 21 on page 36), with “subsection (4)”.

In *clause 31(3)*, *new section 321(2A)*, replace “(2A)” (line 22 on page 36), with “(5)”.

In *clause 31(3)*, *new section 321(2A)*, after “subsection (1)” (line 22 on page 36), insert “or **(4)**”.

*Clause 32*

Replace *clause 32(1AAA)* (lines 27 to 29 on page 36) with:

(1AAA) Section 322(1) is amended by inserting “or **(4)**” after “or (c)”.

In *clause 32(1)*, *new section 322(1)(ba)*, after “**(ba)**” (line 32 on page 36), insert “**(bab)**”.

*Clause 33*

In *clause 33(3)*, after “**(ba)**” (line 18 on page 37), insert “**(bab)**”.

*Clause 36*

In *clause 36*, new section 362(2)(ba), replace “; or” (line 7 on page 38) with “, **365F, or 365G**; or”.

*New clause 37A*

After *clause 37* (after line 34 on page 38), insert:

**37A New sections 365A to 365H and headings inserted**

The following sections and headings are inserted after section 365:

*“Registrar’s powers to identify controllers of company*

**“365A Purpose of sections 365B to 365H**

“(1) The purpose of **sections 365B to 365H** is to ensure that the Registrar may, for law enforcement purposes, obtain adequate, accurate, and timely information on the beneficial ownership and control of companies in order to conform with New Zealand’s obligations under the FATF Recommendations.

“(2) In this section,—

“**FATF** means the Financial Action Task Force on Money Laundering established in Paris in 1989

“**FATF Recommendations** means the revised Recommendations adopted by FATF at its plenary meeting on 15–17 February 2012.

**“365B Control interests in shares (basic rule)**

“(1) In **sections 365D to 365F**, a person has a **control interest** in a share if the person—

“(a) is a shareholder; or

“(b) is a beneficial owner of the share; or

“(c) has the power to exercise, or to control the exercise of, a right to vote attached to the share; or

“(d) has the power to acquire or dispose of, or to control the acquisition or disposal of, the share.

“(2) **Subsection (1)** applies regardless of whether the power or control is express or implied, direct or indirect, legally enforceable or not, related to a particular share or not, exercisable presently or in the future, or exercisable alone or jointly with another person or persons (but a power to cast merely 1 of many votes is not, in itself, a joint power of this kind).

“(3) **Subsection (1)** applies regardless of whether or not the power or control is or can be made subject to restraint or restriction or is exercisable only on the fulfilment of a condition.

“(4) If 2 or more persons can jointly exercise a power, each of those persons is taken to have that power.

“Compare: 1988 No 234 s 5

**“365C Extension of basic rule to powers or controls exercisable through trust, agreement, etc**

- “(1) A person has a power or control referred to in **section 365B** if the power or control is, or may at any time be, exercised under, by virtue of, by means of, or as a result of a revocation or breach of, a trust or an agreement (or any combination of them).
- “(2) **Subsection (1)** applies regardless of whether or not the trust or agreement is legally enforceable or whether or not the person is a party to it.

“Compare: 1988 No 234 s 5A

**“365D Extension of basic rule to interests held by other persons under control or acting jointly**

- “(1) A person (A) has a control interest in a share that another person (B) has if—
- “(a) B or B’s directors are accustomed or under an obligation (whether legally enforceable or not) to act in accordance with A’s directions, instructions, or wishes in relation to a power or control referred to in **section 365B**; or
  - “(b) A has the power to exercise, or control the exercise of, 20% or more of the votes that may be cast at a meeting of shareholders of B; or
  - “(c) A has the power to acquire or dispose of, or to control the acquisition or disposal of, shares that have 20% or more of votes that may be cast at a meeting of shareholders of B; or
  - “(d) A and B are related bodies corporate; or
  - “(e) A and B have an agreement, arrangement, or understanding to act in concert in relation to a power or control referred to in **section 365B**.
- “(2) For the purposes of **subsection (1)**,—
- “**share** includes—
- “(a) a share in a company;
  - “(b) a share in an industrial and provident society;
  - “(c) a share in a building society;
  - “(d) a partnership interest in a partnership
- “**shareholder** means a holder of a share.
- “(3) For the purposes of **subsection (1)(a)**, **director** means—
- “(a) in relation to a company, any person occupying the position of a director of the company by whatever name called;
  - “(b) in relation to a partnership (other than a limited partnership), any partner;
  - “(c) in relation to a limited partnership, any general partner;

- “(d) in relation to a body corporate or unincorporate, other than a company, partnership, or limited partnership, any person occupying a position in the body that is comparable with that of a director of a company.
- “(4) For the purposes of **subsection (1)(d)**, a body corporate (A) is **related** to another body corporate (B) if—
- “(a) B is A’s holding company or subsidiary; or
- “(b) more than half of A’s issued shares (other than shares that carry no right to participate beyond a specified amount in a distribution of either profits or capital) are held by B and bodies corporate that are related to B (whether directly or indirectly, but other than in a fiduciary capacity), or vice versa; or
- “(c) more than half of the issued shares (other than shares that carry no right to participate beyond a specified amount in a distribution of either profits or capital) of each of A and B are held by members of the other (whether directly or indirectly, but other than in a fiduciary capacity); or
- “(d) the businesses of A and B have been so carried on that the separate business of each body corporate, or a substantial part of that business, is not readily identifiable; or
- “(e) there is another body corporate to which A and B are both related.

“Compare: 1988 No 234 s 5B(1)

“**365E Situations not giving rise to control interests**

A person (A) does not have a control interest in a share under **section 365B** merely because—

- “(a) the ordinary business of A consists of, or includes, the lending of money or the provision of financial services, or both, and A has the control interest only as security given for the purposes of a transaction entered into in the ordinary course of the business of A; or
- “(b) A is authorised to undertake trading activities on a licensed market and A acts for another person to acquire or dispose of the share on behalf of that person in the ordinary course of A’s business of carrying out those trading activities; or
- “(c) A has been authorised by resolution of the directors of a company to act as its representative at a particular meeting of shareholders, or of a class of shareholders, of the company, and a copy of the resolution is deposited with the company before the meeting; or

- “(d) A is appointed as a proxy to vote at a particular meeting of shareholders, or of a class of shareholders, of a company and the instrument of A’s appointment is deposited with the company before the meeting; or
- “(e) A is a shareholder of a company and the company’s constitution gives the shareholder pre-emptive rights on the transfer of the shares, if all shareholders have pre-emptive rights on the same terms.

“Compare: 1988 No 234 s 6

**“365F Registrar may require persons to disclose control interests and powers to get control interests**

- “(1) The Registrar (or a person authorised by the Registrar) may, by notice given after having regard to the purpose in **section 365A**, require a specified person to disclose full details of all (or any class of)—
  - “(a) control interests that the specified person has in shares of a company and of the circumstances that give rise to those interests; or
  - “(b) powers that the specified person has or may at any time have to acquire a control interest in shares of a company and of the circumstances that give rise to that interest; or
  - “(c) control interests that any other person (who the specified person must identify by name and with current contact details) has in shares of a company and of the circumstances that give rise to the other person’s interests.
- “(2) However, a matter referred to in **subsection (1)(c)** need only be disclosed to the extent to which it is known to the specified person required to make the disclosure.
- “(3) **Subsection (1)** applies regardless of whether the shares referred to in **subsection (1)** have voting rights or not or are issued or yet to be issued.
- “(4) **Sections 365B to 365E** apply in determining whether or not a person has a power referred to in **subsection (1)(b)** (and for this purpose every reference in those sections to a control interest must be read as including a reference to the power to acquire a control interest).
- “(5) The person must disclose the information required under **subsection (1)** in accordance with any specifications under **section 365H**.
- “(6) For the purposes of this section, **specified person**, in relation to the company to which the requirement under **subsection (1)** relates, means—
  - “(a) a shareholder in the company;
  - “(b) a director of the company;

- “(c) a person named in a previous disclosure under **subsection (5)** as having a control interest in shares of the company.
- “(7) If a person fails to comply with **subsection (5)**, he or she commits an offence and is liable on conviction to the penalty set out in section 373(2).
- “Compare: 1988 No 234 ss 34, 35; Corporations Act 2001 ss 672A, 672B (Aust)

“**365G Registrar may require disclosure about controllers or delegates of directors**

- “(1) The Registrar (or a person authorised by the Registrar) may, by notice given after having regard to the purpose in **section 365A**, require a specified person to disclose control information in relation to a company.
- “(2) However, the following types of control information need only be disclosed to the extent to which they are known to the specified person:
- “(a) directions or instructions given to any other person:
- “(b) directions or instructions—
- “(i) given to the board that were not provided to the specified person; or
- “(ii) given to the board when the specified person was not a director.
- “(3) A specified person must disclose the information required under **subsection (1)** in accordance with any specifications under **section 365H**.
- “(4) If a specified person fails to comply with **subsection (3)**, he or she commits an offence and is liable on conviction to the penalty set out in section 374(2).
- “(5) For the purposes of this section,—
- “**control information**, in relation to the company to which the requirement under **subsection (1)** relates, means—
- “(a) any directions or instructions relating to the management and administration of the company given to a specified person (**A**) (or to the board or to any other person who is responsible for the management and administration of the company) by another person (**B**); or
- “(b) any delegation of powers relating to the management and administration of the company by a specified person to another person
- “**specified person**, in relation to the company to which the requirement under **subsection (1)** relates, means—
- “(a) a director of the company:
- “(b) a person named in a previous disclosure under **subsection (3)** concerning that company.

**“365H Registrar may specify deadlines, form, and verification for information required under section 365F or 365G**

When exercising a power described in **section 365F or 365G**, the Registrar (or a person authorised by the Registrar) may specify—

- “(a) a particular form in which the information must be provided; and
- “(b) a date by which the information must be provided; and
- “(c) whether the information must be verified by the production of original documents or certified copies of original documents or by a statutory declaration.

*“Other matters relating to Registrar’s powers”.*

*New clause 38AAA*

Before clause 38 (before line 1 on page 39), insert:

**38AAA Disclosure of information and reports**

- (1) Section 366(1) is amended by—
  - (a) omitting “purpose” and substituting “purposes”; and
  - (b) inserting “**365F, 365G, or 365H**” after “section 365”.
- (2) Section 366(1)(g) is amended by inserting “except in the case of an authorisation under **section 365F, 365G, or 365H**,” before “any person”.
- (3) Section 366 is amended by inserting the following subsections after subsection (1):
  - “(1A) The Registrar or any person authorised by the Registrar may give information disclosed to the Registrar under **section 365F or 365G** to a government agency for law enforcement purposes if the Registrar is satisfied that the agency has a proper interest in receiving the information.
  - “(1B) For the purposes of **subsection (1A)**,—
    - “**government agency** means—
    - “(a) the Crown Law Office:
    - “(b) the Department of Internal Affairs:
    - “(c) the Financial Markets Authority:
    - “(d) the Government Communications Security Bureau:
    - “(e) the Inland Revenue Department:
    - “(f) the Ministry of Business, Innovation, and Employment:
    - “(g) the Ministry of Justice:
    - “(h) the New Zealand Customs Service:
    - “(i) the New Zealand Security Intelligence Service:
    - “(j) the New Zealand Police:
    - “(k) the Reserve Bank of New Zealand:
    - “(l) the Serious Fraud Office:
    - “(m) any international counterpart of the entities in **paragraphs (a) to (l)**

- “**law enforcement purposes** means—
- “(a) the administration of this Act and the Anti-Money Laundering and Countering Financing of Terrorism Act 2009:
  - “(b) the detection, investigation, and prosecution of—
    - “(i) any offence under this Act; or
    - “(ii) any offence under the Anti-Money Laundering and Countering Financing of Terrorism Act 2009; or
    - “(iii) a money laundering offence (within the meaning of section 5 of the Anti-Money Laundering and Countering Financing of Terrorism Act 2009); or
    - “(iv) any offence under section 143B of the Tax Administration Act 1994; or
    - “(v) any serious offence (within the meaning of section 243(1) of the Crimes Act 1961):
  - “(c) the enforcement of the Proceeds of Crime Act 1991 or the Criminal Proceeds (Recovery) Act 2009:
  - “(d) the enforcement of the Misuse of Drugs Act 1975:
  - “(e) the enforcement of the Terrorism Suppression Act 2002:
  - “(f) the administration of the Mutual Assistance in Criminal Matters Act 1992:
  - “(g) the investigation of matters relating to security under the New Zealand Security Intelligence Service Act 1969:
  - “(h) any action referred to in **paragraphs (a) to (g)** taken in respect of legislation of an overseas jurisdiction that is broadly equivalent to the enactments listed in those paragraphs.”
- (4) Section 366(2) and (3) are amended by inserting “, **365F, 365G, or 365H**” after “section 365”.
- (5) Section 366(3)(c) is amended by omitting “(1) or subsection (2)” and substituting “(1), **(1A), (1B)**, or (2)”.

*Clause 38*

In *clause 38*, new section 366A(1)(a), after “or (c)” (line 9 on page 39), insert “, **365F, 365G, or 365H**”.

*New clauses 38A and 38B*

After *clause 38* (after line 26 on page 39), insert:

**38A Inspector’s report admissible in liquidation proceedings**

Section 369 is amended by inserting “, or in relation to a disclosure under **section 365F, 365G, or 365H**,” after “section 365”.

**38B Exercise of powers under section 365 not affected by appeal**

- (1) The heading to section 371 is amended by inserting “, **365F, 365G, or 365H**” after “**section 365**”.
- (2) Section 371(1) is amended by inserting “, **365F, 365G, or 365H**” after “section 365”.

*Clause 39*

In *clause 39*, new *section 385AA(1)*, after “**318(1)(ba)**,” (line 6 on page 40), insert “**(bab)**,”.

*Clause 46*

In *clause 46(1)*, replace *new section 8(4)* (lines 9 to 20 on page 43) with:

- “(4) Subject to **subsection (5)**, a limited partnership must have 1 or more of the following:
- “(a) a general partner who is a natural person who—
    - “(i) lives in New Zealand; or
    - “(ii) lives in an enforcement country and is a director of a company that is registered (except as the equivalent of an overseas company) in that enforcement country; or
  - “(b) a general partner that is a limited partnership and that has 1 or more general partners who are natural persons who—
    - “(i) live in New Zealand; or
    - “(ii) live in an enforcement country and are directors of a company that is registered (except as the equivalent of an overseas company) in that enforcement country; or
  - “(c) a general partner that is a partnership governed by the Partnership Act 1908 and that has 1 or more partners who are natural persons who—
    - “(i) live in New Zealand; or
    - “(ii) live in an enforcement country and are directors of a company that is registered (except as the equivalent of an overseas company) in that enforcement country; or
  - “(d) a general partner that is a company; or
  - “(e) a general partner that is an overseas company registered under the Companies Act 1993 and that has 1 or more directors who are natural persons who—
    - “(i) live in New Zealand; or
    - “(ii) live in an enforcement country and are directors of a company that is registered (except as the equivalent of an overseas company) in that enforcement country.

“(5) Every natural person who is a general partner, or who is a director, partner, or general partner of a general partner, must be qualified under **section 19A**.”

*Clause 47*

Delete *clause 47(1)(a)* (lines 25 and 26 on page 43).

*Clause 48*

In *clause 48*, delete *new section 19A(3)* (lines 12 to 15 on page 45).

In *clause 48*, replace *new section 19B* (lines 16 to 24 on page 45) with:

**“19B Disqualified general partner still has duties or obligations under Act**

A person who is disqualified from being a general partner but who acts as a general partner is a general partner for the purposes of a provision of this Act that imposes a duty or an obligation on a general partner of a limited partnership.”

*Clause 49A*

In *clause 49A*, replace *new section 52(1)(d)* (lines 4 to 14 on page 46), with:

- “(d) in relation to every natural person who is a proposed general partner or who is a director, partner, or general partner of a proposed general partner, state—
- “(i) his or her full name and date and place of birth; and
  - “(ii) his or her residential address; and
  - “(iii) if the residential address is in an enforcement country, whether the natural person is a director of a company that is registered (except as the equivalent of an overseas company) in that enforcement country and, if so, the prescribed information; and”.

*Clause 54*

In *clause 54(2)*, *new section 63(2)(a)*, after “or (a)” (line 23 on page 57), insert “, **78F, 78G, or 78H**”.

*New clause 56A*

After *clause 56* (after line 2 on page 59), insert:

**56A New sections 78A to 78H and headings inserted**

The following sections and headings are inserted after section 78:

*“Registrar’s powers to identify controllers of limited partnership*

**“78A Purpose of sections 78B to 78H**

“(1) The purpose of **sections 78B to 78H** is to ensure that the Registrar may, for law enforcement purposes, obtain

adequate, accurate, and timely information on the beneficial ownership and control of limited partnerships in order to conform with New Zealand's obligations under the FATF Recommendations.

“(2) In this section,—

“**FATF** means the Financial Action Task Force on Money Laundering established in Paris in 1989

“**FATF Recommendations** means the revised Recommendations adopted by FATF at its plenary meeting on 15–17 February 2012.

“**78B Control interests in partnership interests (basic rule)**

“(1) In **sections 78D to 78F**, a person has a **control interest** in a partnership interest if the person—

“(a) is a partner; or

“(b) has a right (other than under the partnership agreement) to any of the following:

“(i) to share in the assets of the partnership:

“(ii) to receive a share of the distributions from the partnership:

“(iii) to receive a share of other benefits provided by the partnership to partners; or

“(c) has the power to exercise, or to control the exercise of, any decision-making powers arising from the partnership interest (where that partnership interest relates to a general partner); or

“(d) has the power to acquire or dispose of, or to control the acquisition or disposal of, all or part of a partnership interest (where that partnership interest relates to a general partner).

“(2) **Subsection (1)** applies regardless of whether the power or control is express or implied, direct or indirect, legally enforceable or not, related to a particular partnership interest or not, exercisable presently or in the future, or exercisable alone or jointly with another person or persons (but a power to cast merely 1 of many votes is not, in itself, a joint power of this kind).

“(3) **Subsection (1)** applies regardless of whether or not the power or control is or can be made subject to restraint or restriction or is exercisable only on the fulfilment of a condition.

“(4) If 2 or more persons can jointly exercise a power, each of those persons is taken to have that power.

“Compare: 1988 No 234 s 5

“**78C Extension of basic rule to powers or controls exercisable through trust, agreement, etc**

“(1) A person has a power or control referred to in **section 78B** if the power or control is, or may at any time be, exercised under, by virtue of, by means of, or as a result of a revocation or breach of, a trust or an agreement (or any combination of them).

“(2) **Subsection (1)** applies regardless of whether or not the trust or agreement is legally enforceable or whether or not the person is a party to it.

“Compare: 1988 No 234 s 5A

“**78D Extension of basic rule to interests held by other persons under control or acting jointly**

“(1) A person (**A**) has a control interest in a partnership interest that another person (**B**) has if—

“(a) B or B’s directors are accustomed or under an obligation (whether legally enforceable or not) to act in accordance with A’s directions, instructions, or wishes in relation to a power or control referred to in **section 78B**; or

“(b) A has the power to exercise, or control the exercise of, 20% or more of the votes that may be cast at a meeting of shareholders of B; or

“(c) A has the power to acquire or dispose of, or to control the acquisition or disposal of, shares that have 20% or more of votes that may be cast at a meeting of shareholders of B; or

“(d) A and B are related bodies corporate; or

“(e) A and B have an agreement, arrangement, or understanding to act in concert in relation to a power or control referred to in **section 78B**.

“(2) For the purposes of **subsection (1)**,—

“**share** includes—

“(a) a partnership interest in a partnership:

“(b) a share in a company:

“(c) a share in an industrial and provident society:

“(d) a share in a building society

“**shareholder** means a holder of a share.

“(3) For the purposes of **subsection (1)(a)**, **director** means,—

“(a) in relation to a company, any person occupying the position of a director of the company by whatever name called:

“(b) in relation to a partnership (other than a limited partnership), any partner:

“(c) in relation to a limited partnership, any general partner:

- “(d) in relation to a body corporate or unincorporate other than a company, partnership, or limited partnership, any person occupying a position in the body that is comparable with that of a director of a company.
- “(4) For the purposes of **subsection (1)(d)**, a body corporate (A) is **related** to another body corporate (B) if—
- “(a) B is A’s holding company or subsidiary; or
- “(b) more than half of A’s issued shares (other than shares that carry no right to participate beyond a specified amount in a distribution of either profits or capital) are held by B and bodies corporate that are related to B (whether directly or indirectly, but other than in a fiduciary capacity), or vice versa; or
- “(c) more than half of the issued shares (other than shares that carry no right to participate beyond a specified amount in a distribution of either profits or capital) of each of A and B are held by members of the other (whether directly or indirectly, but other than in a fiduciary capacity); or
- “(d) the businesses of A and B have been so carried on that the separate business of each body corporate, or a substantial part of that business, is not readily identifiable; or
- “(e) there is another body corporate to which A and B are both related.

“Compare: 1988 No 234 s 5B(1)

**“78E Situations not giving rise to control interests**

A person (A) does not have a control interest in a partnership interest under **section 78B** merely because—

- “(a) the ordinary business of A consists of, or includes, the lending of money or the provision of financial services, or both, and A has the control interest only as security given for the purposes of a transaction entered into in the ordinary course of the business of A; or
- “(b) A is authorised to undertake trading activities on a licensed market and A acts for another person to acquire or dispose of the partnership interest on behalf of that person in the ordinary course of A’s business of carrying out those trading activities; or
- “(c) A has been authorised by resolution of the limited partnership’s partners (or class of partners) to act as their representative at a particular meeting of partners (or a class of partners), and a copy of the resolution is deposited with the limited partnership before the meeting; or

- “(d) A is appointed as a proxy to vote at a particular meeting of the limited partnership’s partners (or a class of partners) and the instrument of A’s appointment is deposited with the limited partnership before the meeting; or
- “(e) A is a partner of a limited partnership and the limited partnership’s partnership agreement gives the partner pre-emptive rights on the transfer of the partnership interest, if all partners have pre-emptive rights on the same terms.

“Compare: 1988 No 234 s 6

“**78F Registrar may require persons to disclose control interests and powers to get control interests**

- “(1) The Registrar (or a person authorised by the Registrar) may, by notice given after having regard to the purpose in **section 78A**, require a specified person to disclose full details of all (or any class of)—
  - “(a) control interests that the specified person has in partnership interests of a limited partnership and of the circumstances that give rise to those control interests; or
  - “(b) powers that the specified person has or may at any time have to acquire a control interest in partnership interests of a limited partnership and of the circumstances that give rise to that control interest; or
  - “(c) control interests that any other person (who the specified person must identify by name and with current contact details) has in partnership interests of a limited partnership and of the circumstances that give rise to the other person’s control interests.
- “(2) However, a matter referred to in **subsection (1)(c)** need only be disclosed to the extent to which it is known to the specified person required to make the disclosure.
- “(3) **Subsection (1)** applies regardless of whether the partnership interests referred to in **subsection (1)** have voting rights or not or are issued or yet to be issued.
- “(4) **Sections 78B to 78E** apply in determining whether or not a person has a power referred to in **subsection (1)(b)** (and for this purpose every reference in those sections to a control interest must be read as including a reference to the power to acquire a control interest).
- “(5) The person must disclose the information required under **subsection (1)** in accordance with any specifications under **section 78H**.

- “(6) For the purposes of this section, **specified person**, in relation to the limited partnership to which the requirement under **subsection (1)** relates, means—
- “(a) a partner in the limited partnership;
  - “(b) a person named in a previous disclosure under **subsection (5)** as having a control interest in shares of the limited partnership.
- “(7) If a person fails to comply with **subsection (5)**, he or she commits an offence and is liable on conviction to a fine not exceeding \$10,000.
- “Compare: 1988 No 234 ss 34, 35; Corporations Act 2001 ss 672A, 672B (Aust)

“**78G Registrar may require disclosure about controllers or delegates of general partners**

- “(1) The Registrar (or a person authorised by the Registrar) may, by notice given after having regard to the purpose in **section 78A**, require a specified person to disclose control information in relation to a limited partnership.
- “(2) However, control information that is directions or instructions given to any other person need only be disclosed to the extent to which they are known to the specified person.
- “(3) A specified person must disclose the information required under **subsection (1)** in accordance with any specifications under **section 78H**.
- “(4) If a specified person fails to comply with **subsection (3)**, he or she commits an offence and is liable on conviction to a fine not exceeding \$10,000.
- “(5) For the purposes of this section,—
- “**control information**, in relation to the limited partnership to which the requirement under **subsection (1)** relates, means—
- “(a) any directions or instructions relating to the management and administration of the limited partnership given to a specified person (**A**) (or any other person who is responsible for the management and administration of the limited partnership) by another person (**B**); or
  - “(b) any delegation of powers relating to the management and administration of the limited partnership by a specified person to another person
- “**director** means,—
- “(a) in relation to a company, any person occupying the position of a director of the company by whatever name called;
  - “(b) in relation to a partnership (other than a limited partnership), any partner:

- “(c) in relation to a limited partnership, any general partner:
- “(d) in relation to a body corporate or unincorporate other than a company, partnership, or limited partnership, any person occupying a position in the body that is comparable with that of a director of a company
- “**specified person**, in relation to the limited partnership to which the requirement under **subsection (1)** relates, means—
- “(a) a general partner of the limited partnership:
- “(b) a person named in a previous disclosure under **subsection (3)** concerning that limited partnership.

“**78H Registrar may specify deadlines, form, and verification for information required under section 78F or 78G**

When exercising a power described in **section 78F or 78G**, the Registrar (or a person authorised by the Registrar) may specify—

- “(a) a particular form in which the information must be provided; and
- “(b) a date by which the information must be provided; and
- “(c) whether the information must be verified by the production of original documents or certified copies of original documents or by a statutory declaration.

“*Other matters relating to Registrar’s powers*”.

*New clauses 56B, 56C, and 56D*

Before *clause 57* (before line 3 on page 59), insert:

**56B Disclosure of information and reports**

- (1) Section 79(1) is amended by—
  - (a) omitting “purpose” and substituting “purposes”; and
  - (b) inserting “, **78F, 78G, or 78H**” after “**section 78**”.
- (2) Section 79 is amended by inserting the following subsections after subsection (1):
  - “(1A) The Registrar or any person authorised by the Registrar may give information disclosed to the Registrar under **section 78F or 78G** to a government agency for law enforcement purposes if the Registrar is satisfied that the agency has a proper interest in receiving the information.
  - “(1B) For the purposes of **subsection (1A)**,—
    - “**government agency** means—
    - “(a) the Crown Law Office;
    - “(b) the Department of Internal Affairs;
    - “(c) the Financial Markets Authority;
    - “(d) the Government Communications Security Bureau;
    - “(e) the Inland Revenue Department;

- “(f) the Ministry of Business, Innovation, and Employment:
  - “(g) the Ministry of Justice:
  - “(h) the New Zealand Customs Service:
  - “(i) the New Zealand Security Intelligence Service:
  - “(j) the New Zealand Police:
  - “(k) the Reserve Bank of New Zealand:
  - “(l) the Serious Fraud Office:
  - “(m) any international counterpart of the entities in **paragraphs (a) to (l)**
- “**law enforcement purposes** means—
- “(a) the administration of this Act and the Anti-Money Laundering and Countering Financing of Terrorism Act 2009:
  - “(b) the detection, investigation, and prosecution of—
    - “(i) any offence under this Act; or
    - “(ii) any offence under the Anti-Money Laundering and Countering Financing of Terrorism Act 2009; or
    - “(iii) a money laundering offence (within the meaning of section 5 of the Anti-Money Laundering and Countering Financing of Terrorism Act 2009); or
    - “(iv) any offence under section 143B of the Tax Administration Act 1994; or
    - “(v) any serious offence (within the meaning of section 243(1) of the Crimes Act 1961):
  - “(c) the enforcement of the Proceeds of Crime Act 1991 or the Criminal Proceeds (Recovery) Act 2009:
  - “(d) the enforcement of the Misuse of Drugs Act 1975:
  - “(e) the enforcement of the Terrorism Suppression Act 2002:
  - “(f) the administration of the Mutual Assistance in Criminal Matters Act 1992:
  - “(g) the investigation of matters relating to security under the New Zealand Security Intelligence Service Act 1969:
  - “(h) any action referred to in **paragraphs (a) to (g)** taken in respect of legislation of an overseas jurisdiction that is broadly equivalent to the enactments listed in those paragraphs.”
- (3) Section 79(2) and (3) are amended by inserting “, or in relation to a disclosure under **78F, 78G, or 78H,**” after “**section 78**”.
- (4) Section 79(3)(a) is amended by omitting “(1) or subsection (2)” and substituting “(1), **(1A), (1B)** or (2)”.

**56C Inspector’s report admissible in liquidation proceedings**

Section 80 is amended by inserting “, or in relation to a disclosure under **section 78F, 78G, or 78H,**” after “**section 78**”.

**56D Exercise of powers under section 78 not affected by appeal**

(1) The heading to section 81 is amended by inserting “, **78F, 78G, or 78H**” after “**section 78**”.

(2) Section 81(1) is amended by inserting “, **78F, 78G, or 78H**” after “**section 78**”.

*Clause 57*

In *clause 57*, after *new section 98A(1)(b)* (after line 16 on page 59), insert:

“(ba) the Registrar has reasonable grounds to believe that the limited partnership, or 1 or more of its general partners, has failed to respond to a requirement made in relation to that or another limited partnership under **section 78F, 78G, or 78H**; or”.

*Schedule 2*

In *Schedule 2*, item relating to section 373(2), after the item relating to *new paragraph (ha)* (after line 11 on page 74), insert:

Insert after paragraph (s):

“(sa) **section 365F(7)** (which relates to the Registrar’s powers to require disclosure in relation to control interests).”

In *Schedule 2*, item relating to section 374(2), after the item relating to paragraph (20) (after line 6 on page 75), insert:

Insert after paragraph (31):

“(32) **section 365G(4)** (which relates to the Registrar’s powers to require directors to disclose their controllers).”

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## Explanatory note

This Supplementary Order Paper amends the Companies and Limited Partnerships Amendment Bill (the **Bill**), a Bill that amends the Companies Act 1993 and the Limited Partnerships Act 2008. This Supplementary Order Paper gives effect to 5 distinct policies.

### *Criminalisation of breaches of certain directors’ duties*

The first policy is to amend the changes made by the Bill in relation to criminalising certain directors’ duties.

As introduced, the Bill amended the Companies Act 1993 (the **Companies Act**) to criminalise serious breaches of 2 duties of directors. *Clause 4* of the Bill

inserted *new section 138A* into the Companies Act. *New section 138A* provided for offences in relation to serious breaches of—

- the duty provided for in section 131 of the Companies Act (the duty of directors to act in good faith and in the best interests of the company); and
- the duty provided for in section 135 of the Companies Act (the duty of directors 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).

This Supplementary Order Paper removes the second offence. Instead, this Supplementary Order Paper amends the existing offence provision in section 380 of the Companies Act. *New section 380(4)* (inserted by *new clause 4AAB*) creates a new offence where a director agrees to, or causes or allows, the business of the company to be carried on in a manner that causes serious loss to 1 or more of the company's creditors and knows that serious loss will be suffered. A serious loss is a loss of a kind that is more significant than a material loss (as referred to in section 380(3) of the Companies Act). The offence is not committed if the creditors concerned consented to the business being carried on in that manner. (The policy being to allow companies that are close to insolvency to enter into arrangements with their creditors to save the company without the directors facing a risk of prosecution.)

The requirements of the new offence are based on those of the duty in section 135 of the Companies Act not to agree to, or cause or allow, reckless trading. However, the offence requires actual serious loss to be suffered (rather than a substantial risk of such a loss) and knowledge on the part of the director that such a loss will be suffered.

A director convicted of the offence is liable under section 373(4) of the Companies Act to imprisonment for a term not exceeding 5 years or to a fine not exceeding \$200,000. *New clause 4AAA* consequentially amends section 373(4)(f).

This Supplementary Order Paper also changes the offence created by the Bill relating to the section 131 duty. Now, the offence is to become one of exercising powers or performing duties as a director of a company (or omitting to exercise powers or perform duties as a director of a company) in bad faith towards the company and in a manner that the director believes is not in the best interests of the company. There must also be knowledge or recklessness as to whether the conduct will cause the company serious loss or will benefit or advantage a person who is not the company (including, for example, the director).

This Supplementary Order Paper provides the revised offence relating to the section 131 duty with defences (set out in *new section 138B*). These defences are based on the qualifications in section 131(2) to (4) of the Companies Act. The director will need to prove he or she had the requisite authority for the relevant conduct, along with the belief that the conduct was in the best interests of that company's holding company (in relation to subsidiaries) or shareholder or shareholders (in relation to joint ventures between shareholders), rather than in the best interests of the company.

*Registrar's powers to identify controllers of company*

The second policy of this Supplementary Order Paper is to amend the Companies Act in order to create new powers for the Registrar to identify the controllers of a company for defined law enforcement purposes.

In order to achieve this, *new sections 365A to 365H* (inserted by *new clause 37A*) give the Registrar the powers to ascertain—

- who has (and who has the power to acquire) a control interest in shares of the company and full details of that interest (*new section 365F*)—control interest is defined in *new sections 365B to 365E*, in a similar way to the definition of relevant interest in sections 5 to 6 of the Securities Markets Act 1988; and
- control information relating to a company—this is defined in *new section 365G* as directions or instructions relating to the management and administration of the company or delegation of powers relating to the management and administration of the company.

*Registrar's powers to identify controllers of limited partnership*

The third policy of this Supplementary Order Paper is to amend the Limited Partnerships Act 2008 (the **Limited Partnerships Act**) in order to create new powers for the Registrar to identify the controllers of a limited partnership for defined law enforcement purposes. (This is the equivalent of the second policy, but done in relation to the Limited Partnerships Act 2008 rather than the Companies Act 1993.)

In order to achieve this, *new sections 78A to 78H* of the Limited Partnerships Act are inserted by *new clause 56A*. These new provisions are very similar to those inserted by *clause 37A* into the Companies Act; the only changes relate to the differences between a limited partnership and a company (and between shares and partnership interests).

*Arrangements, amalgamations, and compromises of code companies*

The fourth policy of this Supplementary Order Paper relates to *subpart 3 of Part 1* of the Bill, which is concerned with amendments relating to companies that fall under the takeovers code (**code companies**).

An amendment in this Supplementary Order Paper to *new section 236A* of the Companies Act (inserted by *clause 25* of the Bill) clarifies that the Bill's new Part 15 provisions about the reconstruction of code companies do not apply where there is no change in the relative holding or control of voting rights.

The Supplementary Order Paper creates a transitional arrangement for a code company that has already begun a process to amalgamate under Part 13 of the Companies Act before the Bill comes into force. If the boards of the amalgamating companies have agreed to an amalgamation, the law as it was before the Bill comes into force will apply to that amalgamation—as long as the amalgamation takes effect within 6 months.

The Supplementary Order Paper also amends the Takeovers (Fees) Regulations 2001 to include the ability for the Takeovers Panel to charge applicants for considering whether or not to provide a no-objection statement to applications under section 236(1) of the Companies Act.

*Requirements for general partner of limited partnership*

The fifth policy of this Supplementary Order Paper is to clarify—

- the requirement in the Bill for limited partnerships to have at least 1 general partner with a substantive connection to New Zealand; and
- that the qualification requirements for general partners do not prevent overseas companies from being general partners.

This clarification is achieved by changes to *clauses 46 to 49A* of the Bill, which amend the Limited Partnerships Act.

The revisions in this Supplementary Order Paper reflect the policy that all natural persons who are general partners, or who are directors, partners, or general partners of a general partner, must be qualified under *new section 19A* of the Limited Partnerships Act. (*New section 19A* essentially requires that the person not be a minor and not have various criminal convictions.) This policy is articulated in *new section 8(5)* of the Limited Partnerships Act, which is inserted by a change in the Supplementary Order Paper to *clause 46* of the Bill.

*Miscellaneous amendments*

This Supplementary Order Paper also amends an amendment made to the Companies Act at select committee that required a director's date and place of birth to be sent to all shareholders of amalgamating companies—instead, the Supplementary Order Paper requires these details to go only to the Registrar (*see* the change to *new section 220(1)(c)* in *clause 7F(1)*, the amendment to section 223 made by *new clause 7FA*, and the change to *clause 22A*).

This Supplementary Order Paper also makes consequential amendments associated with the changes described above. For example, it inserts into the Companies Act and the Limited Partnerships Act various cross-references to the Supplementary Order Paper's new provisions.

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