LEGISLATIVE RESEARCH SERVICE
DEPARTMENT OF THE PARLIAMENTARY LIBRARY

COMPANIES AND SECURITIES LEGISLATION (MISCELLANEOUS AMENDMENTS) BILL 1985

Date introduced: 11 October 1985
House: House of Representatives
Presented by: Hon. Lionel Bowen, M.P., Attorney-General

DIGEST OF BILL

Purpose

To implement amendments to the Commonwealth Acts under the national companies and securities scheme.

Background

Prior to the introduction of the national companies and securities scheme, each State and the Commonwealth was responsible for the regulation of its own activities. As a result, there were 7 separate sets of laws regulating companies and securities, namely, six State jurisdictions and Commonwealth law for the Territories. In addition to the differences between the laws, this situation paved the way for people and companies to engage in conduct which would normally have been illegal, had there been only one law. Such conduct involved companies taking action in various jurisdictions in order to circumvent particular State laws. The actions on stock exchanges during the 1960's mining boom led to the establishment of the Rae Committee[1] which reported in 1974. One of the Committee's findings has been summarised as: 'The major frauds of the period nearly all involved actions and transactions in two or more States'.[2] The Committee recommended that a central administration be established to prevent such conduct.

Following negotiations between the Commonwealth and State Governments, a formal agreement was signed for a 'Commonwealth-State Scheme for Co-operative Companies and Securities Regulation' in December 1978. Under the scheme, a 'Ministerial Council for Companies and Securities' was created comprising the 6 States and Commonwealth Ministers responsible for companies and securities. Unanimous
approval of the Council is required before any law can be adopted. Furthermore, it was agreed that once the Council had approved company or security legislation, it would be first passed by the Commonwealth and then adopted by the States.[3] It was also agreed that amendments to the original legislation would only be made with unanimous Ministerial Council approval and, once passed into Commonwealth law, such amendments would automatically be adopted by the States.[4]

The first Act to be passed under this scheme was the National Companies and Securities Commission Act 1979 which established the National Companies and Securities Commission (NCSC) to administer take-overs, the security industry and the companies' codes. These codes were introduced by the following Acts:

- Companies (Acquisition of Shares) Act 1980 (regulates take-overs);
- Securities Industry Act 1980 (regulates the securities industry); and
- Companies Act 1981.

Outline

The companies and securities legislation is to be amended to adopt the changes approved by the Ministerial Council by the following Parts:

- Part II of the Bill (clauses 3 to 28) will amend the Companies (Acquisition of Shares) Act 1980;
- Part III of the Bill (clauses 29 to 133) will amend the Companies Act 1981;
- Part IV of the Bill (clauses 134 to 151) will amend the Companies and Securities (Interpretation and Miscellaneous Provisions) Act 1980;
- Part VI of the Bill (clauses 154 to 163) will amend the National Companies and Securities Commission Act 1979; and
- Part VII of the Bill (clauses 164 to 200) will amend the Securities Industry Act 1980.
The major amendments are introduced by Parts II and III.

Main Provisions

For a detailed analysis of the clauses of the Bill refer to the Explanatory Memorandum.

1. Amendment to the Companies (Acquisition of Shares) Act 1980 (CASA)

Section 11 of CASA is to be amended to make it clear that ignorance of the law is not a defence to a prosecution under that section (clause 6).

Section 9 of CASA will be amended to reduce the circumstances in which a person is deemed to have control of a company because of their interest in another company (clause 8).

Where a take-over offer is made and that offer is conditional on a minimum acceptance level, the offerer is to be precluded from acquiring shares on the market in the company that is subject to the offer. However, an offerer will be allowed to purchase shares under conditions approved by the NCSC (clause 9).

The prohibition on acquiring more than 3 per cent of voting shares in a 6 month period without making a take-over offer is to be amended so that shares acquired through a pari passu allotment (i.e. where an allotment is made to all shareholders in proportion to their holdings) will not be taken into account (amendment to section 15 by clause 10).

Clause 13 of the Bill will amend section 18 of CASA to allow the NCSC to refuse to register a Part A statement where a take-over offer is conditional on an opinion or belief of the offerer or on the occurrence of an event within the offerer's control. The registration of a Part A statement is a precondition for a take-over offer.

A new section 21 will be substituted into CASA so that take-over offers may only be withdrawn with the NCSC's consent. As well, NCSC will be given power to impose conditions for the withdrawal of take-over offers (clause 14).
Section 52 of CASA prohibits the making of take-over offers when the offerer has no reasonable grounds to believe he can meet the obligations involved in the offer. Clause 24 will amend that section to clarify the law dealing with an offer which could be a bluff.

2. Amendment to the Companies Act 1981 (CA)

The NCSC's power to require companies to produce their books for examination will be widened to enable the NCSC to ensure compliance with the companies and securities legislation (amendment to section 12 by clause 34).

Clause 35 will amend Section 16A of the CA to widen the NCSC's power of investigation. At present, such power may only be exercised where the NCSC knows that a specific offence has been committed by a specific person. This will be widened to allow investigations where the NCSC is reasonably satisfied that an offence may have been committed though it is unaware which specific person committed the offence.

The Companies Auditors and Liquidators Disciplinary Board will be required to cancel or suspend the registration of auditors or liquidators where they are in breach of certain provisions of the CA or have become incapable of managing their affairs. At present, the Board has a discretion as to whether to cancel or suspend registration (amendment to section 31 by clause 39).

In future reports of receivers, official managers and liquidators will not be available for public inspection under the CA (clause 44).

Clauses 46 to 49 will reinforce amendments made to the CA in 1983 to abolish the doctrine of ultra vires as it applies to companies dealing with outsiders. The amendments will make it clear that agreements entered into by the company and third parties will not be affected by any restrictions in the companies memorandum or articles of associations. The provisions will be deemed to have come into force from 1 January 1984, the date the amendment, now clarified by this Bill initially came into force.

Section 78 of the CA is to be amended to state that the memorandum and articles of a company are to form a contract between the company and its members and between the members themselves. This will prevent additional restrictions being unilaterally placed on issued shares (clause 52).
The Court's powers under section 146 to deal with defaulting shareholders will be widened by clause 58 to expressly include powers to cancel a contract, arrangement or offer relating to the defaulter's shares; to declare such contracts voidable and to order that such shareholders account to the company for any profit from the disposal of the shares.

Clause 60 will amend section 186 of the CA to give the Courts power to direct that a relevant authority (i.e. persons who have authority to register the transfer of shares or whose consent is required for the registration of the transfer) register the transfer of shares. At present, such orders can only be made when the directors of a company refuse to register the transfer.

The proposed section 205A (clause 62) will provide liquidators with a statutory right to inspect books in the possession of a receiver and will require an officer of a company who holds a secured charge to prove the bona fides of the charge if the officer attempts to enforce the charge within 6 months of its creation. This will prevent officers from becoming secured creditors when the charge is created close to liquidation and will support provisions of the Bankruptcy Act 1966.

At present, certain retirement village schemes fall within the provisions of the CA. Clause 63 will remove all retirement villages from the CA from 1 July 1987 (proposed section 215D).

The liability of directors of a company that acts as trustee is dealt with by clause 66. In brief, where a company acting as trustee incurs a debt in respect of which it is not entitled to be indemnified from the trust (usually because the company has acted in breach of the trust), the directors of the company at the time the debt was incurred (except 'innocent directors') will be jointly and severally liable for the debt. This will place such directors in the same position, as regards liability to creditors, as other trustees and will involve the 'lifting of the corporate veil'.

Clause 68 will amend section 232 to require directors of all companies to give written notice to the company of their date and place of birth. (This requirement currently only applies to directors of public companies and their subsidiaries). It will also require secretaries and principal executive officers to supply the information
necessary to complete the register of directors, secretaries and principle executive officers. The amendments will implement a recommendation of the Costigan Royal Commission.

The amount that may be paid to executive directors, who have held office for at least 3 years, on retirement without the shareholders' approval is to be increased to the same level that may be paid to principal executive officers (section 233, amended by clause 69). The clause will also extend the payment of such retirement benefits to full-time employees.

In order to assist the tracing of the beneficial owners of shares, a new section 255A is to be inserted in the CA by clause 72 to require shareholders in unlisted companies who hold the shares in a non-beneficiary capacity, (e.g. as trustee or nominee) to disclose this information to the company concerned. As well, clause 75 will extend section 261 of the CA, which allows the NCSC, the company or shareholders to determine the true ownership of shares in a listed company, to unlisted companies.

Clause 77 will introduce provisions to allow a member of a company (i.e. a shareholder) to apply to the Courts for the inspection of the company books by an auditor or legal practitioner. There will be strict guidelines on the disclosure of any information (proposed sections 265B and 265C).

Clause 78 amends section 266 to allow regulations to be made requiring certain companies to include a statement of cash movements in their accounts.

Clause 94 will amend section 315 of the CA to ensure that the NCSC has time to examine proposed arrangements between a company and its creditors before a Court orders a meeting of creditors or members of the company.

Section 331 of the CA is to be amended by clause 99 to ensure that, where a receiver is appointed other than voluntarily or by Court order (i.e. mainly by creditors), employee retrenchment payments are to be paid before a floating charge is paid out. As well, retrenchment payments are to be listed eighth in the list of priorities for payment when a company is wound up. This will place such payments after the costs of winding up, wages, compensation and leave payments but before taxes and other debts, in the order of priority (clause 105 which amends section 441 of
the CA). As well, clause 105 will remove the maximum payment of $2,000 in respect of wages. The $2,000 limit will remain for directors.

Foreign companies will be required to lodge a statement with the NCSC relating to their Australian operations (clause 116). At present, it is sufficient for such companies to lodge a statement dealing with their global activities.

A new section 562A is to be inserted in the CA by clause 123 to allow the NCSC to prohibit certain persons from taking part in the management of a company without Court approval. The persons to be so excluded are those who were directors, during the 12 months prior to the commencement of winding up, of two or more companies that had been wound up and were unable to pay unsecured creditors at least 50 cents in the dollar. The need for such persons to gain a Court order will last for 5 years.

3. Amendments to the Companies and Securities (Interpretation and Miscellaneous Provisions) Act 1980 (the Principal Act)

The Bill will make two major changes to the Principal Act.

First, section 5B is to be amended to allow the use of extrinsic evidence in interpreting the companies and securities scheme legislation (clause 136). This will mirror section 15AB of the Acts Interpretation Act 1901 which was inserted in 1984.

Secondly, clause 140 will insert a new section 13A in the Principal Act to require that information produced in accordance with any of companies and securities legislation be in a form capable of being understood by the person requiring the information. This provision has become particularly necessary since the spread of computer stored information.

4. Amendments to the National Companies and Securities Commission Act 1979 (NCSC Act)

The size of the NCSC is to be increased from 5 to 8 members. There is to be a minimum of 3 full-time members (amendment to section 11, by clause 156).
Clause 158 will amend section 20 to allow meetings of the NCSC to be held by telephone, closed-circuit television or other modes of communication. At present such meetings must be held with members physically present.

At present, the NCSC can only engage consultants with the Public Service Board's approval. Clause 160, by amending section 25, will remove the need for such approval.

5. Amendments to the Securities Industry Act 1980 (SIA)

The definition section, section 4, of the SIA is to be amended by clause 165 to widen the definition of securities to include commodity and index options traded on the Sydney Stock Exchange (SSE). This follows the SSE's membership of the International Options Market and its proposal to introduce options trading.

Section 13 of the SIA is to be amended similarly to section 16A of the CA, i.e. to allow the NCSC to investigate where it suspects that an offence has been committed though it does not know exactly who committed the offence (clause 170).

Proposed section 65A is inserted by clause 191 to require investment advisers to have a reasonable basis for providing investment advice. If a recommendation is made without a reasonable basis, the advisers may be liable to pay damages to a person who has acted on such a recommendation.

The limitations on 'short selling', i.e. the sale of securities the seller does not possess at the time of sale is to be eased to allow prescribed securities to be short sold (amendment to section 68 by clause 192).

For further information, if required, contact the Law and Government Group.
References

1. Report on the Australian Securities Markets and their Regulation by the Senate Select Committee on Securities and Exchanges.

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