PARLIAMENT OF AUSTRALIA
DEPARTMENT OF THE PARLIAMENTARY LIBRARY

COMPANIES (ACQUISITION OF SHARES) BILL 1980

Date Introduced: 2 April 1980
House: House of Representatives

Short Digest of Bill

Purpose

To amend the A.C.T. Companies Ordinance 1962 so as to regulate under the new Australian take-over code the acquisition of shares in companies incorporated in the A.C.T.

Background

On 22 December 1978 the Commonwealth and the six States executed a Formal Agreement to implement a uniform system of law and administration for the Australian securities industry and company law. This Bill and 4 other bills introduced by Mr. Garland are the first pieces of substantive legislation that are proposed to be enacted.

Mr. Garland stated that the substantive legislation with respect to the Companies Code is expected to be released for public comment about mid-April and introduced into the Commonwealth Parliament during the Budget Session.

In December 1978 a draft Company Take-overs (Australian Capital Territory) Bill was released for public comment. In November 1979 the Company Take-overs Bill 1979 was introduced which incorporated a number of the amendments which resulted from public comments on the draft Bill.

The present Bill incorporates a number of amendments following further public comments on the previous two bills.

On 20 November 1979 the then Minister for Business and Consumer Affairs Mr. Fife, stated that the general aim of the proposed take-over code is to overcome the criticism of the present legislation that whilst it regulates the dispatching of certain take-over offers or invitations it has failed to regulate take-overs achieved through combinations of private acquisitions or purchases on the stock market. Such take-overs have often meant that control of a company has been obtained without shareholders being adequately informed or equitably treated.
Although this Bill will apply only to companies incorporated in the A.C.T. it is intended that the other parties to the Formal Agreement will pass mirror legislation which will mean that the law in this area will be uniform throughout Australia. The Queensland and Western Australian Governments have passed legislation which accords with the Company Take-overs Bill 1979 except for the threshold test (see notes on clause 11). They are expected to repeal this legislation and pass legislation which accords fully with this Bill.

The administrative responsibility for the take-over code will be assumed by the National Companies and Securities Commission (NCSC).

Main Provisions

Clause 2 states that the Act will become operative on a date to be fixed by Proclamation.

Clause 4 repeals Part VIB and the Tenth Schedule of the A.C.T. Companies Ordinance 1962 which are the existing provisions regulating take-overs.

Clause 6 defines certain key terms included in the Bill.

Clauses 7,8,9 are interpretative and evidentiary provisions.

Clause 12 details acquisitions to which the proposed new take-over code will not apply.

Clause 11 sets out the take-over code's prohibition of any acquisition, otherwise than as provided by the code, by a person who holds between 20% (or such lesser percentage as prescribed) and 90% of the voting shares of a company or whose holding would increase to more than 20% (or such lesser percentage as prescribed) through the acquisition.

The adoption in the previous Bill of 20% as the appropriate threshold beyond which the acquisition controls imposed by the proposed take-over code will apply was criticised as being too high. The Queensland and Western Australian Governments for example passed legislation adopting a 12.5% threshold level. This Bill retains the 20% threshold but incorporates provisions to allow for a reduction in the threshold by regulation. This is expected to lead to uniformity in legislation being restored.

Sub-clause 13 (1) provides that the provisions of clause 11 prohibiting certain take-overs will not apply to
take-overs of companies which do not have more than 15 members or if more than 15 members it will not apply if all consent in writing. Sub-clause 13 (3) also provides that the provisions of clause 11 will not apply to certain acquisitions made on a stock exchange by (1) an offeror under a relevant take-over scheme for the period of 28 days after service of a Part A statement or if offers are dispatched, for as long as take-over offers remain open; or (2) an on-market offeror after his announcement and for as long as his offer remains open.

Clause 15 provides that the prohibitions of clause 11 will not apply where the total of the relevant acquisitions, plus net acquisitions in the preceding 6 months, do not exceed 3% of the voting shares in the company, provided a person has been entitled to at least 19% (or such lesser percentage as prescribed) for a continuous period of 6 months.

These restrictions on gradual take-overs are tighter than the provisions of the draft Bill released in December 1978 which provided for acquisitions of less than 5% during 4 monthly periods.

Clause 16 similarly provides that the prohibitions of clause 11 will not apply where a formal take-over offer is made which falls within the terms of the clause. The requirements of such offers are similar to the existing take-over legislation including the requirement that the Part A Statement and other relevant documents must be served on the target company between 14 and 28 days before the offers are dispatched.

The informational requirements of Part A statements are detailed in Part A of the Schedule to the Bill.

Clause 17 also provides that the prohibitions of clause 11 will not apply where an announcement is made on the target company's home exchange, undertaking for a period of one month to take at a specified minimum price all shares offered. Sub-clause 17 (3) provides that such on-market offers may not be made by offerors who hold 30% or more of the target company except with the consent of the NCSC. The specified price to be offered is the highest price paid by the offeror or his associates in the 4 months before the announcement (sub-cl. 17 (6)). Sub-clause 17 (10) provides that, on the day of the announcement, the offeror must provide the target company, the home exchange and the NCSC with a Part C statement and within 14 days of the announcement send in a manner approved by the NCSC a copy of the Part C statement to each shareholder.
The informational requirements of Part C statements are detailed in Part C of the Schedule to the Bill.

Clauses 18 to 31 contain provisions which relate only to take-over offers (not take-over announcements, the on-market alternative) including:

- the registration with the NCSC of the Part A statement and offers (cl.18),
- the issuance of a Part B statement by the target company to the offeror and a copy to the target company's shareholders (cl.22),
- the variation (cl.27) and withdrawal (cl. 21) of offers, and
- the issuance of conditional offers (cl. 20, 28-30).

The informational requirements of Part B statements are detailed in Part B of the Schedule to the Bill.

Clauses 32 to 35 contain provisions which relate only to on-market take-over announcements. These include:

- the issuance of a Part D statement by the target company to the home exchange(cl.32),
- the circumstances when an on-market offer may be withdrawn (cl.33), and
- the suspension of acceptance of offers by the NCSC (cl.34).

The informational requirements of Part D statements are detailed in Part D of the Schedule to the Bill.

Clauses 36 to 43 contain provisions relating to both take-over offers and take-over announcements. These include prohibitions on the issuance of forecasts of profits and asset valuations without NCSC written consent (cl.37, 38), the requirement to notify the home exchange of acquisitions and disposals of shares (cl.39) and the compulsory acquisition of the shares of minority holders who do not accept bids (cl.42).

Part VI (cl.44-64) of the Bill contains provisions relating to offences, the powers of the Court where prohibited acquisition takes place and various miscellaneous provisions.

The discretionary powers of the NCSC incorporated in the draft legislation are substantially increased under this Bill. The NCSC has the power to grant exemptions from compliance with any provision of the proposed code (cl.57). This was contained in the previous Bill. It can also declare that the Act applies as if modified (cl.58).
However, in exercising these powers the NCSC is required to take certain matters into account and these are set out in cl. 59. In addition cl. 60 enables the NCSC to declare that for the purposes of the code, a specified acquisition is an unacceptable acquisition, and that specified conduct (once a Part A statement has been served, or a take-over announcement has been made) is unacceptable conduct. Such a declaration will enable the Supreme Court to make a wide range of orders to protect the rights of persons affected by the acquisition or conduct.

These provisions will enable the NCSC to enforce the aims of the code.

The NCSC in addition to this broad power has considerable administrative power including the ability to impose conditions with respect to statements on asset valuations (sub-clause 38 (2)) and forecasts of profits (sub-clause 37 (3)). The NCSC cannot however vary the disclosure requirements contained in the Schedule for Part A, B, C and D statements. These requirements can be varied under the provisions of clause 62 by the Governor-General in accordance with advice consistent with Ministerial Council resolutions.