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SECURITIES INDUSTRY AMENDMENT BILL 1980

EXPLANATORY MEMORANDUM

**(Circulated by The Hon. R. V. Garland M.P.,
Minister for Business and Consumer Affairs**

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INTRODUCTION

1. This explanatory memorandum contains a brief outline of the co-operative companies and securities scheme and the Securities Industry Act 1980 (hereafter referred to as the Securities Industry Act or 'the Principal Act') and then deals sequentially with each clause of the Securities Industry Amendment Bill 1980 (hereafter referred to as the 'Amendment Bill').

Formal Agreement

2. On 22 December 1978 the Commonwealth and the six States executed a Formal Agreement that provided the framework for a co-operative Commonwealth/State scheme for a uniform system of law and administration in relation to company law and the regulation of the securities industry in the six States and the Australian Capital Territory. The Formal Agreement also provides a procedure to enable the Northern Territory to become a party to the Agreement (Agreement Cl.49) and to enable the Agreement to be extended to the various external Territories (Agreement cl. 50).

National Companies and Securities Commission Legislation

3. Following execution of the Formal Agreement the Commonwealth Parliament passed the following Acts:

- (a) National Companies and Securities Commission Act 1980;
- (b) Companies (Acquisition of Shares) Act 1980;
- (c) Companies (Acquisition of Shares-Fees) Act 1980;
- (d) Securities Industry Act 1980;
- (e) Securities Industry (Fees) Act 1980; and
- (f) Companies and Securities (Interpretation and Miscellaneous Provisions) Act 1980.

4. A brief outline of the National Companies and Securities Commission Act (hereafter called the 'NCSC Act') and the co-operative scheme is as follows:-

- (a) The NCSC Act established the National Companies and Securities Commission (the 'NCSC') which will have responsibility for the companies and securities laws covered by the Formal Agreement subject to directions from the Ministerial Council for Companies and Securities which is established by the Agreement. The NCSC will have such functions and powers as are conferred on it by the various pieces of Commonwealth, State and Territory legislation that are required to give effect to the co-operative companies and securities scheme. The administration of the co-operative scheme legislation within each State and Territory will, so far as practicable, be carried out by the relevant corporate affairs office in that State or Territory under delegations from the NCSC.
- (b) The content of the substantive law under the scheme will be set out in legislation that will apply to the Australian Capital Territory. Each other jurisdiction that is covered by the Formal Agreement will then pass legislation which will apply the relevant Commonwealth law as the law of that jurisdiction to the exclusion of its present legislation as from the date of commencement of the Commonwealth law. Subsequently, any amendments to the Commonwealth law that are approved by the Ministerial Council, subject to the making of any 'translator' amendments, will have automatic effect in those jurisdictions without the necessity of further and separate legislation in each other jurisdiction.

(c) The aim is that, as far as possible, any person or company in a particular Australian jurisdiction should be able to deal on all general companies and securities matters as if that person or company were only subject to one system of law and administration throughout Australia.

5. Each State will be introducing into its Parliament National Companies and Securities Commission (State Provisions) Bill to support the operations of the NCSC in that State. Once these six Bills are brought into operation, the NCSC will be able to start administering its first substantive legislation : it is expected that this will be the share acquisition code and the securities industry code. This will be followed by a companies code.

Australian code on the securities industry

6. In accordance with the Formal Agreement the new securities industry code is based on the Securities Industry Acts of the four States which are parties to the Interstate Corporate Affairs Agreement (these Acts are hereafter referred to as 'ICAC SIAs').

7. The new securities industry code was however, modified to take account of:

(a) substantive amendments that were agreed to by the Ministerial Council for Companies and Securities;

(b) the need to ensure that the S.I. Act and the Fees Act will be capable of application in each jurisdiction with a minimum of specific supporting provisions in that jurisdiction's application legislation;

(c) any differences in the present ICAC SIAs; and

(d) desirable changes in the light of experience with the operation of the existing ICAC Acts.

8. Some of the more important modifications are as follows:-

(i) provisions have been included to allow evidence gathered in an examination to be admissible in both civil and criminal proceedings against the person examined (see principal Act ss.23-27);

(ii) a power vested in the NCSC to prohibit trading of securities on a stock market has been included (see principal Act s.40);

(iii) to a dealer's licence have been extended (see Principal Act s.51);

(iv) a register of interests, required to be maintained under Part VII of the Act, will be able to be kept at any place in Australia covered by the scheme (see Principal Act s.89);

(v) provisions dealing with stock market manipulation have been re-drafted and provisions relating to the dissemination of information about illegal transactions have been included (see Principal Act ss 123 and 127); and

(vi) provisions dealing with court orders prohibiting persons subject to investigations from taking property out of the relevant State or Territory, the power of the NCSC to intervene in proceedings and provisions dealing with injunctions, have been included (see Principal Act ss147-149).

9. The Securities Industry Act sets out the substantive provisions of the code and applies those provisions in the A.C.T. (see Principal Act s.3). The substantive provisions of the legislation are in an appropriate form for application in any State or Territory by an Act of that State or Territory

adopting these provisions as law of that State or Territory. The legislation will be administered by the NCSC which, so far as practicable, will delegate its administrative responsibilities to the relevant corporate affairs office in each jurisdiction.

10. Following further work on the scheme legislation it has become apparent that there is a need for amendment to the Securities Industry Act.

SECURITIES INDUSTRY AMENDMENT BILL 1980

Cl. 1: Short title etc.

11. When enacted the Bill will be cited as the Securities Industry Amendment Act 1980 and the Securities Industry Act 1980 is the Principal Act.

Cl. 2: Commencement

12. The Bill will come into operation on the day on which the Securities Industry Act 1980 comes into operation.

Cl. 3 : Interpretation

13. Section 4 of the Principal Act contains a series of definitions for the purposes of the Act. There will be a number of amendments to section 4 (Bill cl 3):

(a) There is a new definition of "bankers books" and "banking corporation" is now defined.

(b) There have also been changes to the definitions of "executive officer", "officer" and "voting share".

(c) The reference in sub-section (7) to "that Act" has been corrected to "that Ordinance".

Cl. 4: Relevant interests in securities

14. Section 5 of the Principal Act describes when a person will have a relevant interest in securities. The figure "20%" will be removed from sub-sections (4) and (7) of section 5 and replaced by the words "the prescribed percentage", (Bill cl 4). This amendment will bring the provisions relating to interests into line with the corresponding provisions (s. 9) of the Companies (Acquisition of Shares) Act 1980.

Cl. 5: Power of Commission to require production of books

15. A new sub-section (1A) will be inserted after subsection 8(1) of the Principal Act (Bill para 5(a)). This sub-section limits both the powers of the NCSC under subsection 8(1) and the powers of an authorised person under sub-section 8(2): the NCSC or an authorised person will only be able to require a corporation to produce books for purposes connected with functions or powers conferred by scheme legislation or where there is a contravention or suspected contravention of scheme legislation or an offence involving fraud or dishonesty committed against a relevant Act.

16. A notice in writing will be required to be given to the corporation or any person from which books are sought (Bill paras 5(b) to (f)).

17. A person will now only be obliged to give such explanation that he is able to give concerning the books and their compilation (Bill para 5(g) - proposed s. para 8(6)(a)(ii)). The NCSC or an authorised person will only be able to keep the books for such period as is necessary to enable them to be inspected and copied (Bill para 5(g) - proposed s. para 8(6)(a)(iii)).

Cl. 6: Power of magistrate to issue warrant to seize books

18. Any lien over books that are seized will now be protected (Bill para 6(a) - proposed s. sec 9(3)).

19. A person will only be required to give explanations of books and their compilation if he is able to do so; and a person who takes possession of books under section 9 will only be able to retain these books for such period as is necessary to inspect and make copies of them (Bill para 6(b) - proposed paras 9(4)(b) and (c)).

20. A typographical error in sub-section 9(6) of the Principal Act will be corrected (Bill para 6(c)).

Cl. 7: Offences

21. It will now be a defence to a prosecution under sub-section 10(2) for furnishing false or misleading statements in purported compliance with ss. 8 or 9 of the Securities Industry Act that the defendant believed on reasonable grounds that the information or statement was true and was not misleading. (Bill cl. 7 - proposed s-sec. 10(2A)).

Cl. 8: Copies or extracts of books to be admitted in evidence

22. There will be a new provision which will provide that a copy or extract of a book which is proved to be a true copy will be admissible in evidence as if it were the original book. Evidence that a copy is a true copy may be given by a person who has compared the copy with the original. (Bill cl. 8 - proposed s. 10A).

Cl. 9: Privilege

23. A legal practitioner will only be required to furnish to the NCSC the name and address of a person to whom or by whom a communication was made if he knows that person's name and address (Bill para 9(a)). The restrictions on the powers of inspection in relation to a banking corporation (s-secs. 11(2) and (3) of the Principal Act) have been omitted (Bill para 9(b)).

Cl. 10: Disclosure to Commission

24. The NCSC will be given additional powers to obtain information concerning any dealing in securities (Bill cl. 10). These additional powers may be exercised where the NCSC considers:

- (a) that it may be necessary to prohibit trading in particular securities;
- (b) that a person may have contravened sections 123, 124, 125, 126, 127, 128 or 132, (stock market manipulation, market rigging, or fraudulent stock market activities);
- (c) that a person may have contravened the substantial shareholder provisions of the Companies Ordinance (Division 3A Part IV); or
- (d) that an acquisition of shares may have occurred as a result of unacceptable circumstances or conduct under sub-sections 60(7) and 60(7A) of the Companies (Acquisition of Shares) Act 1980.

25. These new provisions will enable the NCSC to obtain, from a director, secretary or executive officer of a relevant body corporate, information that might have affected any dealing that has taken place, or might effect any dealing that may take place, in securities of, or made available by, that body corporate (See also Bill cl. 5 - ex memo paras 15 to 17).

26. The NCSC may also require a person whom it believes on reasonable grounds is capable of giving information concerning:

- (a) any dealing in securities;

(b) any advice given by or any issued or published report or analysis by a dealer, investment adviser, dealer's representative or investment representative concerning relevant securities;

(c) the financial position of a person or his nominee who is or has been a dealer, or investment adviser who has dealt in or given advice concerning relevant securities; or

(d) an audit of or auditors report concerning any accounts or records of a dealer or investment adviser that relate to dealings in relevant securities;

to provide that information.

27. For the purposes of para 12(3A)(g) relevant securities is defined in proposed sub-section 12(3B).

28. A person will be required to disclose self incriminating information, but if he objects to disclosing the information on the grounds that it is self incriminating, the information is not admissible evidence in criminal proceedings against him other than proceedings under section 12 (proposed s-sec. 12(3C)). Before a person can be required to disclose information under para 12(3A)(f) or (g), the NCSC must give that person a notice in the prescribed form setting out the terms of sub-section 12(3c) (proposed s-sec. 12(3D)).

29. It will be an offence to fail to comply with a requirement or to disclose a false or misleading information under sub-sections 12(1), (2)(3) or (3A) (proposed s-sec. 12(5)).

30. It will be a defence to a prosecution under sub-section 12(5) if the defendant proves that he believed on reasonable grounds that the information or statement was true and not misleading (proposed s-sec. 12(6)).

Cl. 11: Powers of inspectors

31. There will be a minor change to sub-section 19(1) (which deals with the powers of inspectors) and a new subsection (19(1A)) which will provide that a notice given, pursuant to para 19(1)(c), to appear before an inspector for examination should set out the matters contained in subsections 19(8) and (9) (which relate to legal representation and self incriminating answers) (Bill paras. 11(a) and (b)).

32. The Supreme Court will now be able to exercise its power under section 19 of the Principal Act notwithstanding that the person has been convicted of an offence relating to the relevant matter (Bill para. 11(c) - proposed s-sec. 19(i7)).

Cl. 12: Record of examination

33. There will be new provisions relating to the record of an examination. (Bill cl. 12 - proposed new s.21).

34. Where a record of examination is reduced to writing, the inspector may require the person being examined to read and sign the record (proposed s-sec. 21(1)). If the person examined requests a copy of the written record, the inspector must give him a copy but in doing so, he may impose whatever conditions he considers are appropriate (proposed s-sec. 21(2)). Such a written record is prima facie evidence of the questions asked and the answers given at an examination (proposed s-sec. 21(3)).

35. Any conditions imposed under sub-section 21(2) must be complied with (proposed sub-sec. 21(4)). This requirement applies not only to the person examined but also to other persons who come into possession of an examination.

36. The NCSC will be able to give a copy of the record of examination to such other people as it thinks fit and subject to any conditions it imposes (proposed s-sec. 21(8). It will be an offence for anyone to breach such conditions (proposed s-sec. 21(9)).

Cl. 13: Admissibility in other proceedings of questions and answers at an examination

37. Sub-paras 24(a) (iv) and (v) of the Principal Act will be omitted (Bill cl. 13).

Cl. 14: Determination of objection to admissibility of question and answer

38. Where a record of examination is before a court or tribunal, that body will be able to give leave to a party to take objection to the admission of a record of examination as evidence where the party has failed to object as provided for in sub-section 27(2) (Bill cl. 14).

Cl. 15: Privileged communications

39. A legal practitioner will only be required to produce in writing the relevant name and address of the person to whom or by whom a privileged communication was made if he knows it (Bill Cl. 15).

Cl. 16: Conditions to which licence is subject

40. Where a security is required to be lodged as a condition for the granting of a licence, this security will be lodged with the local corporate affairs office rather than with the NCSC (Bill cl. 16).

Cl. 17: Penalties

41. The word "indictable" will be deleted from the penalty provision (s. 129) of the Principal Act (Bill cl. 17). Section 35 of the Companies and Securities (Interpretation and Miscellaneous Provisions) Act 1980 as amended by Cl. 4 of the Companies and Securities (Interpretation and Miscellaneous Provisions) Amendment Bill 1980 will provide the criteria for determining whether an offence shall be heard and dealt with on indictment or summarily.

Cl. 18: Power of Court to prohibit payment or transfer of moneys, securities or other property

42. The Supreme Court will be able to make its prohibitions under paras 147(1)(d) and (e) either absolute or subject to conditions (Bill paras. 18(a)-(c)). The Court will also be able to make three new types of orders:

- an order appointing a receiver etc. of the person's property;
- an order requiring a person to deliver up his passport and any other document as the Court thinks fit;
- an order prohibiting the person from leaving Australia without the consent of the Court.

(Bill para. 18(d) - proposed paras 147(1)(h) to (k)).

Cl. 19: Regulations

43. A wrong reference in section 150 dealing with the regulation making power is corrected (Bill para. 19(c)). There will also be a new para 150(2)(ca) which expands on the type of regulations which can be made (Bill paras. 19(a) and (b)).