

1989

THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

SENATE

AUSTRALIAN SECURITIES COMMISSION BILL 1988

SUPPLEMENTARY EXPLANATORY MEMORANDUM

Amendments and New Clauses to be Moved on
Behalf of the Government

(Circulated by authority of the Honourable
Lionel Bowen, MP, Deputy Prime Minister
and Attorney-General)

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AUSTRALIAN SECURITIES COMMISSION BILL 1988 –
AMENDMENTS AND INSERTION OF NEW CLAUSES

OUTLINE

The Attorney-General introduced the Australian Securities Commission Bill (“the Bill”) into the House of Representative on 25 May 1988. Its main purpose is to establish an Australian Securities Commission (‘ASC’) to regulate companies and the securities and futures industries in Australia. It is part of a package of Bills to replace the existing cooperative scheme under which the Commonwealth shares regulatory responsibilities with the States and the Northern Territory. The bill was introduced together with the Corporations Bill and the Close Corporations Bill.

2. The Bill was debated, amended and passed by the House of Representatives in late September 1988. It was introduced into the Senate on 14 October 1988, and referred to a Joint Select committee of both Houses of Parliament for examination on 17 October 1988. Over the course of its examination, the Committee received and considered 61 written submissions and a large number of letters providing individual views. It also held 12 public hearings between 30 January and 2 March 1989.

3. The Committee’s report was tabled on 13 April 1989. In the report, the Committee made a number of recommendations for changes to the Bill. Most amendments to the Bill to be moved on behalf of the government result from the government’s acceptance of recommendations made by the Committee. Some amendments, such as the amendment providing for the ASC Chairperson to be an ex officio member of the Advisory Committee, will be moved instead of the amendment proposed by the Committee.

4. The most significant of these amendments will establish a Parliamentary Joint Select Committee to inquire into and report on the operation of laws dealing with companies and securities.

Financial Impact Statement

5. The amendments will not have a significant financial impact. The amendment which requires the appointment of a full-time Chairperson to the Corporations and Securities Panel will entail some additional expenditure by the ASC. (The remuneration of the Panel Chairperson is yet to be determined by the Remuneration Tribunal.) However such additional expenditure will not be significant when viewed against the ASC’s overall budget.

NOTES ON CLAUSES – AMENDMENTS TO AUSTRALIAN SECURITIES COMMISSION BILL

THE ADVISORY COMMITTEE'S FUNCTIONS

Amendment (1): Cl.3: Objects

6. Paragraph 3(1)(c) provides that one object of the ASC Act is to establish a Companies and Securities Advisory Committee to provide informed and expert advice to the Minister about the content, operation and administration of Commonwealth laws relating to companies, securities and the futures industry and about the securities and futures markets.

7. The Joint Select Committee on Corporations Legislation has recommended that an appropriate amendment of paragraph 3(1)(c) be effected so as to allow the Advisory Committee to provide advice to the Minister about matters relating to corporations as well as to securities and futures markets.

8. The amendment gives effect to this recommendation.

ESTABLISHMENT OF PARLIAMENTARY COMMITTEE

Amendments (2) to (8): Establishment of Parliamentary Joint Committee on corporations and Securities

9. In accordance with the recommendation of the Joint Select Committee on Corporations Legislation, the amendments establish a Parliamentary Joint Select Committee on Corporations and Securities or are consequent upon the Committee's establishment.

10. The Committee is to consist of 10 members, 5 of whom are to be Senators appointed by the Senate and 5 of whom are to be members of the House of Representatives appointed by that House. A Minister, the President of the Senate or the Speaker of the House of Representatives, will not be eligible for appointment as a Committee member. Neither will the Deputy President and Chairman of Committees of the Senate nor the Chairman of Committees of the House of Representatives (new cl.230FA).

11. Subject to the ASC Act all matters relating to the Committee's powers and proceedings will be determined by resolution of both Houses (new cl.230FB).

12. The committee's duties will be:

a. to inquire into and report on:

i. the activities of the ASC or the Panel;

ii. the operation of any national companies and securities laws or any laws significantly affecting the operation of those laws;

b. to examine and report on the annual report of the ASC, the Panel, the Companies Auditors and Liquidators Disciplinary Board and the Accounting Standards Review Board; and

- c. to inquire into and report on relevant matters referred to it by a House of Parliament.

(New subcl.230FC(1)).

13. The Parliamentary Committee will be subject to the following restrictions:

- a. The Committee will not be able to investigate a matter that the ASC has investigated or is investigating or that the Panel or the Disciplinary Board has considered, is considering or is about to consider (new para 230FC(2)(a)).
- b. The Committee will not be able to require a person to provide it with information concerning investigations or hearings of the ASC, Panel or Disciplinary Board that are taking place in private (new para 230FC(2)(b)).
- c. The Committee will not be able to reconsider a decision of the ASC, Panel or Disciplinary Board (new para 230FC(2)(c)).
- d. The Committee's findings will not be able to be used as prima facie evidence against a person in any proceedings (new cl.230FD).

TABLING OF MINISTER'S DIRECTIONS

Amendment (9): Cl.12: Directions by Minister

14. Clause 12 permits the Minister to give the ASC written directions about the policies it should pursue, or priorities it should follow, in performing or exercising any of its functions or powers. Any directions which the Minister makes are to be published in the Commonwealth Gazette.

15. The Joint Select Committee on Corporations Legislation has recommended that the Minister should also be required to table in both Houses of Parliament a copy of any directions given to the ASC within 15 sitting days of their publication in the Gazette. A similar requirement is contained in s.8 of the Director of Public Prosecutions Act 1983 and in s.18 of the National Crime Authority Act 1984.

16. The amendment gives effect to the Committee's recommendation. However, failure of the Minister to table the directions in Parliament will not affect their validity.

REPORTS ABOUT SERIOUS CONTRAVENTIONS

Amendment (10): Cl.16: Interim report on investigation

17. Clause 16 requires the ASC to provide interim reports to the Minister in an investigation it is conducting whenever it forms the view that a contravention of the law has been committed.

18. The NCSC expressed its concern to the Join Select Committee on Corporations Legislation that this provision would require the ASC to prepare an interim report relating to the investigation of every minor contravention of a national scheme law. To overcome this concern, it is proposed to amend para 16(1)(a) to apply only to a serious contravention. The effect of this will be that where the ASC, in the course of an investigation, formed the opinion that a serious contravention of the law of the Commonwealth or a Sate or Territory had been committed, it would be obliged to prepare an interim report relating to the investigation.

Amendment (11): Cl.18: Distribution of Report

19. Clause 18 deals with the distribution of interim and final reports of the ASC's investigations.

20. In accordance with a recommendation of the Joint Select Committee on Corporations Legislation it is proposed to empower the ASC to give a copy of the whole or part of an interim or final report relating to a serious contravention to the Australian Federal Police, the national Crime Authority, the Director of Public Prosecutions or any other agency that may be prescribed in the regulations.

COMMISSION'S POWER TO BEGIN CIVIL PROCEEDINGS

Amendment (12): Cl.50: Commission may cause civil proceeding to be begun

21. Clause 50 enables the ASC to bring a representative action in a person's name for the recovery of damages or property provided the person's consent is obtained.

22. In evidence before the Joint Select Committee on Corporations Legislation the NCSC argued that the requirement to obtain a person's consent before bringing a representative action would prevent the ASC being able to bring proceedings to recover misappropriated money or property when the persons controlling the company are amongst the persons from whom recovery would be sought or are associates of such persons or are otherwise under their influence. This argument is based on the in Foss v Harbottle (1843) 2 Hare 461 which provides that the company is the proper plaintiff for an action to enforce any right of the company to remedy any wrong to it, or to recover its property. However, the rule in Foss v Harbottle does not apply to an illegal act, a fraud on the minority, or where directors have exercised their powers mala fide or for an improper purpose, or where the wrongdoers are in a position to prevent the company recovering its loss.

23. The Joint Select Committee on Corporations Legislation considered that the legislation should recognise the law as it has been interpreted in the courts on this matter. Accordingly it proposed that where the person on whose behalf a representative action was to be brought was a company the ASC should be able to commence the action without the consent of the company's directors. This would still leave open the possibility that shareholders of the company may refuse consent. In other cases, a person's written consent would still be required.

24. The amendment gives effect to the Committee's recommendation.

SELF-INCRIMINATION

Amendments (13) to (15): Cl.68: Self-incrimination

25. Clause 68 extends the cooperative scheme provisions concerning self-incrimination. Under the cooperative scheme a person is not excused from answering questions of an NCSC inspector on the ground that the answer might tend to incriminate him or her. However if, before answering, the person claims that the answer might tend to incriminate him or her, the answer is not admissible in evidence against the person in criminal proceedings other than proceedings for perjury.

26. Clause 68 extends the cooperative scheme provisions in the following respects:

a. It will cover the production of documents. Such an extension of the privilege is entrenched in many other pieces of legislation including the Trade Practices Act 1974, subs.155(7) and Independent Commission Against Corruption Act 1988 (NSW), s.26.

b. It will cover information obtained as a direct or indirect consequence of the information originally made available – the so-called use derivative use indemnity (cf. Proceeds of Crime Act 1987, subss.66(12) and (13) and National Crime authority Act 1984, s30).

27. The Joint Select committee on Corporations Legislation, while recognising the importance of the rule against self-incrimination, considered that in appropriate cases the rule should be abrogated by statute to protect the public interest. It recommended that cl.68 should be amended so as to allow the use in criminal proceedings of information obtained as a direct or indirect consequence of the production of books to the ASC.

28. The proposed amendment gives effect to this recommendation.

POWERS OF COMMISSION'S CHAIRPERSON

Amendment (16): Cl.94: Arrangement of Commission's business

Amendment (17): Cl.97: Chairperson may establish Division of Commission

Amendment (18): Cl.99: Chairperson may reconstitute Division

Amendment (19): Cl.120: Staff

29. Clauses 94, 97, 99 and 120 are modelled on ss.16, 19 and 27 of the Trade Practices Act 1974. The Joint Select Committee has recommended that the extensive powers conferred on the Chairperson by these clauses to arrange the ASC's business and to deal with staffing matters should be vested in the ASC itself to ensure that the ASC can operate as a collegiate body.

30. The proposed amendments give effect to this recommendation.

ANNUAL REPORT OF COMMISSION

Amendment (20): Cl.138: Application of Division 3 of Part XI of Audit Act

31. One effect of cl.138 is that the ASC must prepare and provide an annual report to the responsible Minister, who is then required to table it in Parliament within 15 days.

32. The Joint Select Committee on Corporations Legislation recommended that cl.138 should be redrafted so as to provide criteria which need to be complied with by the ASC in the preparation of its annual report. The Committee envisaged that the ASC should be required to follow the NCSC's example of reporting on matters undertaken during the year such as:

- investigations;
- litigation; and
- other noteworthy administrative matters.

33. The proposed amendment gives effect to the Committee's recommendation by requiring the ASC's annual report to describe:

- a. the specific goals the ASC has pursued, and the priorities it has followed, in performing its functions during the financial year;
- b. what progress the ASC has made during the year to achieving those goals; and

c. any matters that, during that year, have adversely affected the ASC's effectiveness.

COMMISSION'S CHAIRPERSON TO BE EX OFFICIO MEMBER OF ADVISORY COMMITTEE

Amendments (21) to (23): Cl.147: Membership

Amendment (24): Cl.150: Resignation

Amendment (25): Cl.152: Remuneration and allowances etc.

34. Clause 11 sets out the ASC's functions and powers. Under para 11(2)(b) one of the ASC's functions is to advise the Minister about any changes to a national scheme law that, in the ASC's opinion, are needed to overcome, or would assist in overcoming, any problems that the ASC has encountered in the course of performing or exercising any of its functions or powers. This provision strikes a balance between recognising the desirability of the ASC giving policy advice to the Minister on matters relevant to its charter, and giving effect to the primary administrative functions of the ASC.

35. Part 9 of the Bill provides for the establishment of a specialist Advisory Committee, separate from the ASC, to perform law reform functions and a general advisory role on the operation of the national scheme. Its advisory functions, set out in cl.148, are wider than the ASC's.

36. The Joint Select Committee on Corporations Legislation has recommended that paragraph 11(2)(b) of the Bill should be redrafted to provide the ASC with the same advisory functions as the Companies and Securities Advisory Committee has under clause 148 of the Bill.

37. The Government does not accept the Committee's recommendation insofar as it could require the ASC to devote considerable resources to the development of policy at the expense of its investigation and enforcement functions. However, in order to ensure that the ASC has a role in the development of broader policy and to address the legitimate concerns of the Committee, the Government amendments ensure that the Chairperson of the ASC will be an ex officio member of the Advisory Committee.

38. The ASC Chairperson will not receive any remuneration for taking part in the deliberations of the Advisory Committee. However, the duties of the ASC Chairperson as an ex officio member of the Committee would no doubt be considered by the Remuneration Tribunal when fixing the Chairperson's salary.

MEMBERSHIP OF PANEL

Amendment (26) to (28): Cl.172: Membership of the Corporations and Securities Panel

Amendment (29): Cl.173: President of the Panel

Amendment (30): Cl.175: Term of office as member of Panel

Amendment (31) and (32): Cl.178: Termination of appointment

39. Clause 172 provides that the Panel is to consist of such part-time members as hold office in accordance with Part 10 of the Bill.

40. The Joint Select Committee on Corporations Legislation considered that Panel members would have to be available at short notice on a full-time basis for extended periods. Accordingly it recommended that the Bill provide for the Panel to be constituted by at least 5 members, both part-time and full-time. The Committee also recommended that there be a full-time President with powers to make interlocutory and other interim orders as provided for by cl.734 of the Corporations Bill (to protect the rights of persons affected by unacceptable conduct during a takeover). In addition, the Committee recommended that the Minister have the option of appointing a pool of members to the Panel with the qualifications provided for in subclause 172(3).

41. The proposed amendments, together with proposed amendments to the Corporations Bill, give effect to the Committee's recommendations or are consequent upon the Committee's recommendations.

42. The Government accepts that the President of the Panel should be appointed full-time to facilitate the swift determination of declarations and to exercise interlocutory powers. To ensure the availability of an adequate number of members to sit on hearings at short notice the Government agrees with the Committee about the desirability of the Minister appointing a pool of members under cl.172 with appropriate qualifications and expertise.

Amendment (33): New cl.179A: Leave of absence

New cl.179B: Other terms and conditions

43. As is the case with full-time members of the ASC (see cl.113) under new cl.179A the Minister will be able to grant a full-time members o the Panel leave of absence from duty on such terms and conditions as to remuneration or otherwise as the Minister specifies.

44. Clause 179 provides for the remuneration and allowances payable to Panel members. In addition, under new cl.179B a Panel member will hold office on such terms and conditions (if any) as the Minister determines in writing.

HEARINGS BY PANEL

Amendment (34): Cl.185: Power to hold private hearings

Amendment (35) and (36): Cl.186: Who may be present at hearing

45. Subclause 185(3) provides that, subject to subsection (4), hearings of the Corporations and Securities Panel are to take place in private. Under subcl.(4), the Panel may direct that a hearing take place in public where all persons who are entitled to be given an opportunity to appear at a particular hearing agree that the hearing take place in public.

46. The Joint Select Committee on Corporations Legislation considered that it would be desirable for Panel hearings to take place in public and that the Panel should be conferred with a discretion to hold public or private hearings where a national scheme law requires it to hold a hearing.

47. The amendments give effect to the Committee's recommendation and are consequent upon it.