

1980-81

THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

HOUSE OF REPRESENTATIVES

COMPANIES (ACQUISITION OF SHARES) AMENDMENT BILL (NO.2) 1981

COMPANIES (ACQUISITION OF SHARES - FEES) AMENDMENT BILL 1981

EXPLANATORY MEMORANDUM

(Circulated by authority of the Minister for
Business and Consumer Affairs, the Honourable John Moore M.P.)



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COMPANIES (ACQUISITION OF SHARES - FEES)

AMENDMENT BILL 1981

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OUTLINE

Companies (Acquisition of Shares) Amendment Bill (No. 2) 1981

Companies (Acquisition of Shares - Fees) Amendment Bill 1981

1. The Companies (Acquisition of Shares) Amendment Bill (No. 2) 1981 (hereafter referred to as 'the Amendment Bill') makes various amendments to the Companies (Acquisition of Shares) Act 1980 (hereafter referred to as the 'Share Acquisition Act'), one of the initial Commonwealth Acts under the co-operative companies and securities scheme (further background on the Act and the scheme is at paras 5 to 12 of this explanatory memorandum).

2. The amendments in Part II of the Amendment Bill deal with various miscellaneous amendments (see eg Amendment Bill cl. 3 which extends the commercial relationships excluded from the tests of association for the purposes of the Share Acquisition Act). Part III deals with amendments relating to crossings.

3. The amendments in Part IV of the Amendment Bill are consequential on the enactment of the Companies Bill 1981. The Companies Bill which will repeal the A.C.T. Companies Ordinance 1962, sets out the substantive provisions of the new companies code and applies those provisions in the A.C.T. Part IV of

the Amendment Bill, among other things, alters the references to the provisions of the A.C.T. Companies Ordinance in the Share Acquisition Act to references to the corresponding provisions of the new Companies Bill (see e.g. Amendment Bill cl. 14).

4. The Companies (Acquisition of Shares - Fees) Amendment Bill 1981 amends the Companies (Acquisition of Shares - Fees) Act 1980 to enable a fee to be prescribed for the submission of documents to the NCSC for examination by the NCSC.

PROPOSED NEW AUSTRALIAN SHARE ACQUISITION CODE

5. The remainder of this explanatory memorandum contains a brief outline of the co-operative companies and securities scheme and the Share Acquisition Act and then deals sequentially with each clause of the Amendment Bill 1980.

Formal Agreement

6. On 22 December 1978 the Commonwealth and the six States executed a Formal Agreement that provides 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.

7. Additional background material on the Formal Agreement and on the four basic elements of the co-operative companies and securities scheme are contained in paras 7 to 36 of the separate explanatory memorandum on the Companies Bill 1981.

8. The initial Commonwealth legislation under the scheme can be divided into five groups:

- the NCSC Act
- the interpretation code;
- the new Australian code to regulate the acquisition of shares, etc. in companies;
- the new Australian securities industry code; and
- the new Australian companies code.

Proposed new Australian share acquisition code

9. The Share Acquisition Act sets out the substantive provisions of the proposed new Australian share acquisition code and applies these provisions in the A.C.T. The substantive provisions of the code are in an appropriate form for any State or Territory that is covered by the co-operative scheme to apply in that jurisdiction by appropriate legislation.

10. The new code will be administered by the NCSC which, so far as is practicable, will delegate its administrative responsibilities to the relevant corporate affairs office in each jurisdiction.

11. Basically, the proposed new share acquisition code will prohibit (unless exempted) acquisitions above 20% and below 90% of a company's shares unless one of the following methods is adopted:

- (a) a gradual acquisition of shares in any way the acquirer chooses at the rate of 3% every six months;
- (b) by a formal take-over bid, based on the procedure that existed under the superseded take-over legislation; or
- (c) a take-over announcement on the floor of the home exchange of the offeree company, undertaking unconditionally to take, for a period of one month and at a specified price, all shares offered.

12. Following further work on the scheme legislation and, in particular, on the Companies Bill (hereafter referred to as the 'CB') it has become apparent that there is a need for amendment of the Share Acquisition Act. The remainder of the explanatory memorandum deals, sequentially, with each clause of the Amendment Bill, and the Companies (Acquisition of Shares - Fees) Amendment Bill.

COMPANIES (ACQUISITION OF SHARES) AMENDMENT BILL

(NO.2) 1981

PART I : PRELIMINARY

Cl. 1 : short title, &c.

13. When enacted the Bill will be cited as the Companies (Acquisition of Shares) Amendment Act (No.2) 1981 (Amendment Bill s-cl. 1(1)).

Cl. 2 : commencement

14. Part I of the Bill will come into effect on the day it receives Royal Assent. Parts II and III of the Bill will come into effect when proclaimed, and Part IV will come into effect when the CB comes into operation (Amendment Bill cl. 2).

PART II: MISCELLANEOUS AMENDMENTS

Cl. 3 : definitions

15. A new definition of "listed public company" will be inserted to ensure that companies which remain on the official list of a stock exchange continue to be covered by the definition, even though their securities may be suspended from quotation (Amendment Bill cl. 3).

Cl. 4 : provisions relating to acquisition and disposal of,
and entitlement to, shares, and associated persons

16. There will be amendments to s. 7 of the Share Acquisition Act (Amendment Bill cl. 4). S. 7 of the Share Acquisition Act sets out the circumstances in which a person is taken to acquire and dispose of shares, and contains provisions relating to a persons entitlement to shares and determination of association for the purposes of the Act.

17. Legitimate commercial relationships are excluded from those provisions setting out the tests of association for the purposes of the Share Acquisition Act (see Share Acquisition Act, s-sec. 7(6)). The type of commercial relationships excluded will be extended to:-

- (a) a person who advises or acts on behalf of the other person in performing functions attaching to his professional capacity or to his business relationship (Amendment bill cl. 4 - proposed para 7(6)(a)); and
- (b) a person who has been appointed as a proxy or representative to vote at a meeting where his relevant interest would be disregarded because of that appointment (Amendment Bill cl. 4 - proposed para 7(6)(d)).

Cl. 5 : relevant interests in shares

18. The circumstances in which a person is regarded as having a relevant interest in a share for the purposes of the Share Acquisition Act are set out in s. 9 of that Act. Certain relevant interests are disregarded for the purposes of the Share Acquisition Act, including that of a person who has been appointed as a proxy or representative to vote at a meeting and who has not received consideration for the appointment (see Share Acquisition Act para 9(8)(e)). This relevant interest will now be excluded where the only reason a person has a relevant interest is his appointment as a proxy or representative for a particular meeting (Amendment Bill cl. 5).

Cl. 6 : take-over announcements

19. This will correct a printing error in s. 17 (Amendment Bill cl. 6).

Cl. 7 : take-over offers not subject to certain terms or conditions

20. Certain conditions in take-over offers are prohibited by s. 20 of the Share Acquisition Act. One of these conditions is a requirement that the offeree approve of compensation for loss of office by a director, secretary or executive officer of the target company or related corporations (see Share Acquisition Act s-sec. 20(1)). A drafting alteration has been

made to this provision so that it will relate to the management of the target company, rather than the management of affairs of that company (Amendment Bill cl. 7).

Cl. 8 : notification of acquisitions and disposals of shares

21. The s. 39 notification requirements for persons other than offerors during a take-over are triggered by holdings of 5%, and movements of 1% or more above that level. The amendment will allow lower threshold levels to be prescribed by regulation (Amendment Bill cl. 8).

Cl. 9 : schedule

22. The schedule to the Share Acquisition Act sets out the detailed requirements in relation to the statements to be forwarded by bidders and target companies under the Act. The four different statements provided for by the Act are as follows:-

- Part A : statement to be forwarded by formal offeror
- Part B : statement to be furnished by target company to which take-over scheme relates
- Part C : statement to be furnished by on-market offeror
- Part D : statement to be furnished by target company to which take-over announcement relates.

23. The requirements in relation to all these statements will be amended (Amendment Bill cl. 9). The additional requirements will be:-

- (a) Part A and Part C Statements must contain details of dealings in securities of the target company by the offeror and his associates, and dealings in securities of the offeror by associates of the offeror, during the four months preceding the takeover bid; and
- (b) Part B and Part D Statements must contain details of dealings in securities of the offeror by the target company or its associates, and dealings in securities of the target Company by associates of the target, during the four months preceeding the takeover bid.

24. Sub-para. 1(e)(iv) of Part A will be amended to ensure that the requirement to specify changes in the capital structure of subsidiaries applies only to changes in the last 5 years.

PART III - Amendments relating to crossings

Cl. 10 : other interpretative and evidentiary provisions

25. The effect of the present para 8(9)(a) is that a broker acting for an offeror cannot acquire shares for his client, beyond the threshold levels, by crossings. Such acquisitions would be in contravention of the Act, and orders could be sought under s. 45. In addition, the savings provisions in sub-s. 40(3) do not apply to crossings.

26. The amendment will remove para 8(9)(a). Crossings will then become an acceptable method of acquisition by a broker acting for an offeror. Sub-s. 40(3) will also then extend to crossings (Amendment Bill cl. 10).

27. Part III of the Bill will not be proclaimed to come into operation until the Ministerial Council agrees unanimously to do so. Before deciding to proclaim Part III, the Ministerial Council will consider:-

- (a) reports on whether stock exchange business rules need changes to deal adequately with conflicts of interest during crossings; and
- (b) draft changes to the securities industry code relating to the enforcement of the relevant stock exchange business rules and appropriate disciplinary procedures for dealers.

Cl. 11 : take-over announcements

28. Section 17 applies the same prohibitions on crossings as in para 8(9)(a) to crossings by a broker acting for an on-market offeror (para. 17(1)(c) inserted by s. 7 of the Companies (Acquisition of Shares) Amendment Act 1981). Cl. 11 will make the same changes to s. 17 as discussed in paras 25 to 27 above.

PART IV : MISCELLANEOUS AMENDMENTS CONSEQUENTIAL OF ENACTMENT
OF COMPANIES ACT 1981

Cl. 12 : incorporation

29. Subject to the provisions of the Share Acquisition Act itself and the terms of the Companies and Securities (Interpretation and Miscellaneous Provisions) Act, for the purpose of the application of the code in the A.C.T., the code will be incorporated into, and read as part of, the CB (Amendment Bill cl. 7). At the moment (in the A.C.T.) it is incorporated into and read as part of the A.C.T. Companies Ordinance.

30. Therefore, expressions used in the Share Acquisition Act but not defined in it (e.g. "officer in default", "related corporation", "subsidiary", and "voting share") will have the meanings given to the same expressions by the CB.

31. Other provisions of the CB that will be applicable are:

- cls. 10 to 16 dealing with powers of inspection;
- cl. 31 dealing, among other things, with the registration of documents by the NCSC.

32. The proposed Companies Regulations prescribing matters in relation to lodged documents such as paper size, types of copies and details required of persons lodging documents will also apply to the proposed share acquisition code.

33. For the purpose of this incorporation, references in the CB or Companies Regulations to documents submitted to or lodged with the NCSC will be read as references to documents submitted or lodged under the Share Acquisition Act. It is envisaged that the NCSC will delegate many of its functions and powers to the relevant State and Territory corporate affairs offices (see Formal Agreement cl. 35). All documents required to be lodged with the NCSC in relation to companies incorporated in the A.C.T. will be lodged at the office of the A.C.T. Corporate Affairs Commission (see Companies and Securities (Interpretation and Miscellaneous Provisions) Act s. 14).

Cl. 13 : definitions

34. The amendments proposed to be made to the definitions provision of the Share Acquisition Act are of three types:

- (a) those which alter references to provisions of the Companies Ordinance 1962 to references to the corresponding provisions of the CB (Amendment Bill paras 13(a) and (e));

- (b) those which omit definitions having equivalents in the CB viz. "dealing in securities", "director", "executive officer", "expert", "marketable securities", "nominee corporation", "officer", "prescribed interest" and "securities" (Amendment Bill paras 13(b), (d) and (f)). The share acquisition code will be incorporated into, and read as part of, the CB - see Amendment Bill cl. 12 and para. 29 of this explanatory memorandum); and
- (c) a drafting change to the definition of "Part A statement" to take account of the introduction of s-sec 16(2A) into the Share Acquisition Act (see paras 37-39 of this explanatory memorandum).

Cl. 14 : acquisitions to which s. 11 does not apply

35. S. 12 of the Share Acquisition Act lists various acquisitions which are not subject to s. 11 of that Act. S. 11 underpins the operation of the threshold requirements by prohibiting any acquisition (otherwise than in accordance with the code) of shares which would:

- s-sec. 11(1): result in a person becoming entitled to more than 20% (or such lesser percentage as prescribed) of the voting shares;
or

- s-sec. 11(2): increase the entitlement of a person already entitled to between 20% (or such lesser percentage as prescribed) and 90% of the voting shares.

In all cases, the threshold test is based on the number of voting shares, not the number of votes which might be cast. The main intention of s. 11 is to limit the speed with which persons can acquire control of companies other than by formal take-overs or similar procedures which afford all shareholders equal opportunities.

36. The effect of the amendments will be as follows:

- (a) References to the A.C.T. Companies Ordinance will be replaced by references to the corresponding provisions of the CB and to the corresponding provisions of the repealed Ordinance (Amendment Bill para 14(b)).
- (b) The reference in para 12(ea) to s.181 or 183 will be replaced by a reference to the corresponding provisions in the CB (Amendment Bill para 14(c)) (Para 12(ea)) was introduced into the Share Acquisition Act by the Companies (Acquisition of Shares) Amendment Act 1981).
- (c) The reference in s. 12 to an acquisition of shares pursuant to s.270 of the Companies Ordinance will be replaced by a reference to an acquisition pursuant

to CB cl. 409 or the corresponding provision of the repealed Companies Ordinance (i.e., s. 270) (Amendment Bill para 14(d)).

Cl. 15 : take-over offers

37. In addition to the information referred to in Part A of the Schedule to the Share Acquisition Act, a Part A statement will be required to set out certain prescribed matters and contain certain prescribed reports where the statement:

(a) is included in a class of Part A statements in relation to which regulations have been made for the purposes of this provisions; or

(b) relates to an offer to acquire shares where the consideration includes marketable securities included in a class of marketable securities, or includes marketable securities of a class of corporations, prescribed by regulation.

(Amendment Bill cl. 15 - proposed para 16(2A)(a)).

38. In any other case, the Part A statement must also set out such matters and reports as the NCSC requires (Amendment Bill cl. 15 - proposed para 16(2A)(b)). This provision replaces sub-paragraphs 1(e)(i) and (ii) of Part A which are omitted by this Bill consequent on repeal of the Fifth Schedule of the

Companies Ordinance (see paragraph 50 of this explanatory memorandum).

39. The above prescribed reports and reports required by the NCSC must either indicate any adjustments to the figures of any profit or loss or assets and liabilities dealt with by the reports that appear necessary or must make those adjustments and indicate that adjustments have been made. (Proposed para 16(2A)(a) and (b) - based on para 98(1)(e) of the Companies Bill; cf cl. 31 of the Fifth Schedule to the A.C.T. Companies Ordinance - see also para 50 of this explanatory memorandum).

Cl. 16 : registration of Part A statements and offers

40. The amendment to be made to s. 18 is consequential on the proposed new sub-s. 16(2A) (see paras 37-39 above).

Cl. 17 : effect of acquiring shares otherwise than under take-over scheme

41. Sub-s. 31(5) of the Share Acquisition Act provides that cancellation of an allotment of shares returned to a Company pursuant to s-sec. 31(3) and is not to be taken to be a reduction of capital. Cl. 17 of the Amendment Bill will delete the reference to this return of shares not being a reduction of capital. This matter will be dealt with in CB s-cl. 123(15) which will provide that a reduction of capital or cancellation of shares resulting from the operation of the Share Acquisition

Act is not invalidated by any provision of the CB and is not caught by CB s.123. (see also paras 46-47 of this explanatory memorandum).

Cl. 18 : statements on asset valuations

42. S. 38 of the Share Acquisition Act which prohibits statements relating to asset valuations in certain circumstances will be amended to replace references to provisions of the A.C.T. Companies Ordinance by references to the corresponding provisions of the CB or the corresponding previous law of the Territory i.e. the repealed Companies Ordinance (Amendment Bill cl. 18). In addition the reference to the repealed Ordinance is necessary to cover the situation where accounts which are referred to in s. 38 were made out in accordance with the provisions of that Ordinance before its repeal.

Cl. 19 : miscellaneous provisions relating to orders

43. Under sections 45 to 47, and 60 of the Share Acquisition Act the A.C.T. Supreme Court may make various orders for disposal of shares which, if not complied with, may lead to the shares being vested in the NCSC (see Share Acquisition Act, s-sec. 49(5)). These powers will vest in each State Supreme Court by virtue of provisions in each State's Application of Laws legislation.

44. S-sec. 49(6) of the Share Acquisition Act provides that the disposal procedure set out in s.311 of the Companies Ordinance applies where shares or interests are vested in the NCSC. The reference to sec. 311 of the Ordinance will be altered to a reference to the corresponding provision (cl. 462) in the CB (Amendment (Bill cl. 19 - proposed s-sec. 49(6))).

45. It will also be provided that CB cls. 463 and 464 will apply where the shares or interests in question vest in the NCSC (Amendment Bill cl. 19 - proposed s-sec 49(6A)). These CB provisions make the vested property liable to charges etc. imposed by reason of any law as to rates, taxes etc. and impose an obligation on the NCSC to keep accounts relating to that property.

Cl. 20 : repeal

46. S. 49A of the Share Acquisition Act (inserted by s. 15 of the Companies (Acquisition of Shares) Amendment Act 1981) provides that s. 64 of the ACT Companies Ordinance does not apply in relation to a reduction of capital or to a cancellation of allotted shares resulting from the operation of the Share Acquisition Act. This provision will be repealed (Amendment Bill cl. 20).

47. This matter will now be dealt with by CB s-cl. 123(15) (see paragraph 41 of this explanatory memorandum).

Cl. 21 : offences

48. The reference in s-sec. 53(5) of the Share Acquisition Act to the non-application to the share acquisition code of the general penalty provision (s. 379), and of the continuing offences provisions (s. 380), in the A.C. Companies Ordinance will be replaced by a reference to the corresponding provisions in the CB (i.e. cls. 570 and 571) (Amendment Bill cl. 21).

Cl. 22 : schedule

49. The requirements in relation to the Part A, Part B and Part D statements will be amended (Amendment Bill cl. 22).

50. The requirements presently contained in s-paras 1(e)(i) and (ii) of Part A of the Schedule will be omitted as a consequence of the repeal of the Fifth Schedule to the A.C. Companies Ordinance (Amendment Bill para. 22(a)).

51. Appropriate modifications will be made to these requirements and they will be reintroduced, in part, by cl. 15 of the Amendment Bill (see paras 37-39 of this explanatory memorandum) and, in part, by regulations made under the Share Acquisition Act.

52. The references to the provisions of the A.C. Companies Ordinances relating to the dispatch, etc, of balance sheets (s. 164) in para 2(j) of Part B of the Schedule and in para 2(h) of Part D of the Schedule will be changed to the

corresponding provision (cl. 274) of the CB (Amendment Bill paras 22(b) and (c)).

COMPANIES (ACQUISITION OF SHARES - FEES) AMENDMENT BILL 1981

53. The fees that will be charged in connection with the Share Acquisition Act will be set out in regulations to be made under the Companies (Acquisition of Shares - Fees) Act 1980.

Cl. 1 : short title

54. When enacted the Bill will be cited as the Companies (Acquisition of Shares - Fees) Amendment Act 1981.

Cl. 2 : commencement

55. The Bill will come into operation on a date to be proclaimed.

Cl. 3 : fees payable

56. The fees payable are those that will be prescribed under s. 4 of the Companies (Acquisition of Shares - Fees) Act 1980.

57. In addition to those fees, a fee will be prescribed for submitting documents to the NCSC for examination by the NCSC.



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