

1992

THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

HOUSE OF REPRESENTATIVES

MUTUAL ASSISTANCE IN BUSINESS REGULATION BILL 1992

EXPLANATORY MEMORANDUM

(Circulated by the authority of the Attorney-General  
the Hon. Michael Duffy MP)





# TABLE OF CONTENTS

## Paragraph

OUTLINE AND FINANCIAL IMPACT	1
------------------------------	---

### NOTES ON CLAUSES:

INTRODUCTION AND BACKGROUND	4
-----------------------------	---

## PART 1 - PRELIMINARY

### Clause

1. Short title	12
2. Commencement	13
3. Interpretation	14
4. Act to extend to external Territories	19
5. Object of Act	20

## PART 2 - REQUESTS BY FOREIGN REGULATORS

6. Making of requests	22
7. Commonwealth regulator's consideration of requests	27
8. Attorney-General's consideration of matter	33
9. Conditions etc. relevant to an authorisation	35
10. Taking of evidence etc.	38
11. Appearance to be in private	43
12. Representation	44
13. Information provider to comply with requirement	45
14. Self-incrimination	47
15. Legal professional privilege	49
16. Taking of evidence - protection of persons	50
17. Evidence to be put in writing etc.	52
18. Evidence etc. to be sent to foreign regulator	53

## PART 3 - MISCELLANEOUS

19. Act not to limit other provision of assistance	59
20. Orders under Foreign Proceedings (Excess of Jurisdiction) Act not to be contravened	60
21. Allowances and expenses	62
22. Delegation by Attorney-General	63
23. Regulations	65



## MUTUAL ASSISTANCE IN BUSINESS REGULATION BILL 1991

### OUTLINE

#### 1. The main features of the Bill are:

- . prescribed Australian business regulatory agencies will, with Ministerial approval, be able to compel the giving of evidence, the provision of information and the production of documents to assist foreign business regulators;
- . the regime for collecting such information will be administratively simple and flexible - requests for assistance will be made on an agency to agency basis;
- . appropriate safeguards will protect persons giving evidence from self-incrimination and will preserve legal professional privilege as well as allowing for legal representation; and
- . the legislation will complement the scheme for assistance in criminal matters which is embodied in the Mutual Assistance in Criminal Matters Act 1987.

2. The provisions of the Privacy Act 1988, the Freedom of Information Act 1982 and the Archives Act 1983 will continue to apply to the collection and storage of information by Commonwealth business regulators.

### FINANCIAL IMPACT STATEMENT

3. The Bill is not expected to have a significant financial impact. Any additional functions carried out by the Australian agencies will be met from existing resources. Any costs to those agencies will be offset by the benefits they will receive by being better placed to seek reciprocal assistance from their overseas counterparts.

NOTES ON CLAUSESINTRODUCTION AND BACKGROUND

4. The internationalisation of the financial markets has increased in recent years with the greater movement of financial instruments and participants in those markets resulting in the interdependence of national trading systems with those of other countries. At the same time this process creates administrative, jurisdictional, detection and enforcement problems in the regulation of national markets and the international aspects of trading. These problems are reflected by the increased scope for the pursuit of undesirable market practices across national boundaries, and the penetration of another country's markets by offenders and undesirable participants known to, or even prohibited from, operating in their home country, but who are unknown to that other country.

5. As a result of these issues there is now an increasing awareness amongst governments that the internationalisation of the financial system requires an appropriate policy response across a wide range of regulatory issues. Integral to the maintenance of investor confidence in and the efficiency of national financial markets must be the development of effective co-operation between the national business regulatory agencies responsible for administering and monitoring those markets. This co-operation involves the capacity to both seek from and provide to such agencies in other countries flexible, speedy and effective assistance.

6. There is a need for national business regulatory agencies to develop further the level of co-operation which is presently available under voluntary arrangements. There is also a need to develop legal structures for an enhanced level of assistance between business regulatory agencies so as to provide a capacity for the various agencies to gather compulsorily information on behalf of another agency in appropriate cases.

7. The International Organisation of Securities Commissions (IOSCO), in recognition of the impact of internationalisation on the enforcement of domestic securities and futures laws, adopted a resolution in 1986 calling for its member organisations to provide reciprocal assistance in obtaining information in respect of market oversight and prevention of fraud.

8. The Final Communique of the Commonwealth Law Ministers meeting in Auckland 1990 identified the need for mutual assistance in the area of business regulation. The meeting noted that voluntary cooperation between agencies needed to be reinforced by legislative provisions to enable powers of compulsion to be exercised in the fulfillment of requests in appropriate cases.

9. The OECD, in its review of the impact of internationalisation on financial markets, noted the need to achieve world wide regulatory coverage of international conglomerates. The OECD recommended the development of arrangements for exchanges of information between national regulators which supervise different parts of financial conglomerates as one way of ensuring appropriate regulation of these bodies.

10. The Mutual Assistance in Business Regulation Bill 1991 will meet these objectives by allowing Australian agencies to gather information necessary to assist their overseas counterparts. In turn Australian regulators will be better placed to seek similar assistance from overseas regulators. As a result, Australian business regulatory agencies will be able to work more effectively with overseas agencies in combatting business and corporate malpractice.

11. The proposed scheme will be flexible enough to accommodate the various regulatory schemes which operate overseas. It will be able to take account of the different structures and the varying types of agencies involved in business regulation ranging from those overseas jurisdictions having regulatory commissions with policing functions to those jurisdictions

where the regulatory system is based on a concept of self regulation. In particular, because of the need to act quickly in a fast moving market system, the scheme is designed to ensure that assistance can be provided quickly and with a minimum of procedural formalities appropriate to the circumstances of a particular request.

#### PART 1 - PRELIMINARY

##### Clause 1: Short Title

12. When enacted this Bill will be cited as the Mutual Assistance in Business Regulation Act 1992.

##### Clause 2: Commencement

13. The Bill will come into force on a day to be fixed by Proclamation. If the Bill does not commence in this fashion within six months after it has received the Royal Assent, the Bill will come into force on the first day after that six month period.

##### Clause 3: Interpretation

14. This clause will define the following terms for the purposes of the Bill:

- . 'business law' will mean a law that regulates or relates to the regulation of business or persons engaged in business;
- . 'Commonwealth regulator' will mean a Commonwealth authority that administers or enforces a business law and which is prescribed by regulation for the purposes of the definition;
- . 'foreign business law' will mean a business law of a foreign country; and



'foreign regulator' will be defined to mean:

- the Government of a foreign country or a part of a foreign country;
- an agency of such a foreign Government that administers or enforces a foreign business law; or
- a person or body that is certified by such a foreign Government as having functions of enforcing or administering foreign business laws.

15. The term 'foreign regulator' is drafted to ensure that the Bill will cover the widest possible range of foreign regulators and to take account of the various ways in which business laws are administered.

16. For example there may be no central authority responsible for regulating markets in some countries. In others there may be functional, regional or jurisdictional divisions of regulatory responsibility. In Switzerland for instance securities exchanges may be regulated by cantonal law.

17. This type of jurisdictional division is dealt with by subclause (3) which provides that a reference to a law of a foreign country includes a reference to a law of a part of that foreign country.

18. Under subclause (2) a colony, territory or protectorate of a foreign country or a territory for whose international relations a foreign country is responsible, is taken to be a part of that foreign country.

#### Clause 4: Act to extend to external Territories

19. The Bill, when enacted, will extend to every external Territory of Australia.

### Clause 5: Object of Act

20. Clause 5 will set out the object of the Bill which is to enable Australia's regulators to assist their foreign counterparts in carrying out their functions relating to the administration and enforcement of foreign business laws. In addition this provision will make it clear that this Bill is intended to complement the scheme of mutual assistance established by the Mutual Assistance in Criminal Matters Act 1987. The provisions of this Bill are not intended to be used as an alternative to that Act where a foreign regulator is investigating a criminal offence.

21. This Bill is intended to cover areas outside established channels for assistance in criminal matters such as:

- . the gathering of information regarding a decision whether to apply administrative sanctions, such as the refusal to admit persons to the markets and the disqualification or imposition of restrictions on participants in the markets;
- . the taking of civil legal proceedings by, for example, seeking injunctions or compliance orders, or the recovery of pecuniary penalties, for market fraud and misconduct;
- . the investigation and bringing of prosecutions for market regulation offences which may not be regarded as part of the traditional criminal law in all countries.

## PART 2 - REQUESTS BY FOREIGN REGULATORS

### Clause 6: Making of requests

22. Requests for assistance will initially be dealt with on an agency to agency basis. Consistent with the objectives of speed and effectiveness there will be no need for a formal Government to Government approach.

23. Under subclause 6(1) a foreign regulator, as defined in clause 3, will be able to request a Commonwealth regulator to obtain information, documents or evidence from a person for purposes relating to the administration or enforcement of a foreign business law.

24. Before the Commonwealth regulator will be able to act on a request the foreign regulator will have to provide an undertaking to the effect that the information and evidence collected from the person will not be used against that person for the purposes of criminal proceedings or for the imposition of a penalty. Such an undertaking is required to preserve, so far as is appropriate, the general rule that a person should not be compelled to provide self-incriminating evidence. This undertaking does not extend to the use of documents provided under the legislation.

25. In some countries the foreign regulator may not be the authority responsible for instituting criminal proceedings. Accordingly, the foreign regulator making a request under this legislation will also be required to provide an undertaking that, to the extent that it is able to do so, the foreign regulator will ensure that evidence or information collected from a person will not be used by any other person or authority against the person providing the evidence or information for the purposes of criminal proceedings or for the purposes of proceedings for the imposition of a penalty.

26. The foreign regulator will also have to provide such information in relation to the request as is required by the regulations.

#### Clause 7: Commonwealth regulator's consideration of requests

27. Where a request is received by a Commonwealth agency and the necessary undertakings and information have been provided, the Commonwealth agency will be able to refuse the request or advise the Attorney-General that it does not oppose the request.

28. The Commonwealth will also be able to inform the Attorney-General that it does not oppose the request subject to conditions being imposed. The regulator will be able to specify undertakings to be given by a foreign regulator to ensure those conditions are met. The range of conditions which may be specified by the Commonwealth regulator are not limited. They may include conditions relating to maintaining the confidentiality of information transmitted to it by the Commonwealth regulator. The Commonwealth regulator will also be able to specify conditions relating to the manner in which the foreign regulator is to store material provided under the legislation.

29. When considering what action to take in relation to a request the Commonwealth regulator will take into account the matters set out in subclause 7(2). These factors include, in addition to any other relevant matters:

- . the availability to the foreign regulator of the information sought in the request from other sources;
- . the resource cost to the Commonwealth regulator in meeting the request;
- . the likelihood of the Commonwealth regulator successfully obtaining the information sought by the foreign regulator;
- . the extent to which the foreign regulator has functions corresponding to those of the Commonwealth regulator; and
- . whether the foreign regulator is likely to respond to a similar request made by the Commonwealth regulator and, in particular, whether any arrangement, such as a memorandum of understanding, exists between the Commonwealth regulator and the foreign regulator relating to mutual assistance.

30. In addition under paragraph 7(2)(f) the Commonwealth regulator will consider whether it would be more appropriate for the request to be dealt with under the Mutual Assistance in Criminal Matters Act 1987. That Act sets out a legislative basis for Australia to provide assistance to other countries in relation to the investigation and prosecution of criminal matters and the proceeds of crime.

31. If for example, it were to appear from a request for assistance that the information was being sought as part of an investigation of criminal offences or was being sought for the purposes of criminal proceedings, the request would be dealt with under that Act.

32. Notwithstanding that the necessary undertakings and information may have been provided, a Commonwealth regulator will not act on a request until authorised to do so by the Attorney-General pursuant to clause 8.

Clause 8: Attorney-General's consideration of matter

33. Where the Commonwealth regulator advises the Attorney-General that it does not oppose the request, the Attorney-General will be able either to refuse the request or to authorise the provision of assistance in compliance with the request.

34. In considering whether to authorise the provision of assistance, the Attorney-General will have regard to the following matters, in addition to any other relevant matters:

- . whether it is in Australia's national interest to comply with the request;
- . whether complying with the request is consistent with international law and comity, that is the courtesies or conveniences which are not legally binding but which countries generally accord to other countries;

- . whether the material provided to the foreign agency is likely to be used for the purpose of punishing a person for an offence of a political nature or punishing or prejudicing a person on account of the person's race, sex, religion, nationality or political opinions; and
- . whether it would be more appropriate for the request to be dealt with under the Mutual Assistance in Criminal Matters Act 1987. As noted in respect of clause 7, requests which relate to criminal matters will normally be dealt with under the provisions of that legislation.

Clause 9: Conditions etc. relevant to an authorisation

35. In authorising a Commonwealth regulator to act upon a request, the Attorney-General will be able to impose conditions subject to which material may be provided. These conditions may be additional to those specified by the Commonwealth regulator under clause 7. To ensure compliance with these conditions the Attorney-General will also be able to require undertakings from the foreign regulator.

36. The Attorney-General will be able to add to, omit or vary conditions specified by the Commonwealth regulator.

37. Where conditions or undertakings have been specified by the Commonwealth regulator or the Attorney-General, the authorisation will be subject to compliance with those conditions or undertakings.

Clause 10: Taking of evidence etc.

38. Clause 10 will set out the procedures to be followed where the Attorney-General has authorised a Commonwealth regulator to obtain the material sought by the foreign regulator.

39. By serving a written notice on the person to whom the authorisation relates, the Commonwealth regulator will be able to require that person to provide information in the form of a

signed instrument within the time and manner set out in the notice (paragraph 10(2)(a)).

40. Under paragraph 10(2)(b) the person may also, by service of a written notice, be required to produce documents to the Commonwealth regulator or to a specified person acting on behalf of the Commonwealth regulator. The Commonwealth regulator will be able to specify the time and place at which the documents are to be produced. The regulator will, for example, be able to have books produced at the premises of the person to whom the request refers.

41. The Commonwealth regulator may also require the person to whom the authorisation relates, to give evidence before a person acting on behalf of the Commonwealth regulator at a specified time and place. Such evidence may be given orally or in writing and the person taking the evidence may require it to be given on oath or affirmation.

42. The material to be provided is material to which the foreign request for assistance relates or such other information, documents or evidence that the Commonwealth regulator considers relevant to the foreign request.

Clause 11: Appearance to be in private

43. Clause 11 will limit the persons who may be present when a person is giving evidence. Only the following persons will be able to be present:

- (a) the person giving the evidence and the person to whom the evidence is given;
- (b) an approved staff member of the Commonwealth regulator;
- (c) a representative of the foreign regulator;

- (d) a person whose presence is requested by the person giving the evidence (eg the person giving the evidence may wish to have their accountant present or an expert in the laws of the country of the foreign regulator making the request);
- (e) a person who is entitled to be present under a direction given by the person taking the evidence; and
- (f) a representative of the person giving evidence.

Clause 12: Representation

44. A person who appears to give evidence will be able to be represented by an admitted Australian legal practitioner or by any other person who by virtue of their expertise could be expected to be of assistance to the person giving evidence. For example, the person giving evidence may wish to be represented by an accountant or by a person who has expertise in the law of the country of the foreign regulator.

Clause 13: Information provider to comply with requirement

45. It will be an offence to fail to comply, without reasonable excuse, with a requirement made by a Commonwealth regulator under clause 10 to provide information, documents or evidence.

46. It will also be an offence to give information in compliance with such a requirement, knowing it to be false or misleading in a material particular.

Clause 14: Self-incrimination

47. The fact that answering a question may tend to incriminate the person giving the evidence, will not be a reasonable excuse to fail to comply with a requirement of a Commonwealth regulator under clause 10.

48. Clause 14 will apply where, before giving information or evidence, a person claims that the information or evidence



might tend to incriminate him or her or make him or her liable to a penalty and the information or evidence might in fact tend to incriminate the person. In these circumstances neither the information nor the evidence will be admissible against the person in criminal proceedings or proceedings for the imposition of a penalty, other than a proceeding in respect of the falsity of the information or evidence. However, regulators will not be precluded from making such use of any further information they are able to obtain as a consequence of a person providing evidence under this legislation.

Clause 15: Legal professional privilege

49. A lawyer will be permitted to withhold a privileged communication made to that lawyer in that capacity unless the person involved agrees to the furnishing of that communication. Where a privileged communication is withheld, the lawyer will be required to provide details of the identity of the document (if the communication was made in writing) or the person to whom or by whom the communication was made.

Clause 16: Taking of evidence - protection of persons

50. This clause will provide that a person taking evidence has the same protection and immunity in the performance of his or her duties as a Justice of the High Court. Protection and immunity is given to lawyers and other representatives and persons giving evidence as if they were appearing in a proceeding in the High Court.

51. This provision will, for example, ensure that persons taking or providing evidence cannot be liable for damages in defamation as a result of that evidence.

Clause 17: Evidence to be put in writing etc.

52. Clause 17 will provide that a person taking evidence is to have the evidence put in writing and to certify that the evidence was taken by that person.

Clause 18: Evidence etc to be sent to a foreign regulator

53. Clause 18 will set out the manner in which information is to be sent to the foreign regulator by the Commonwealth regulator. Where information has been provided, the Commonwealth regulator is to send the information or a certified copy of the information, to the foreign regulator.

54. Where documents have been produced to the Commonwealth regulator, certified copies of the documents are to be sent to the foreign regulator.

55. Where evidence has been taken by the Commonwealth regulator, a certified written version of the evidence is to be sent to the foreign regulator.

56. The Commonwealth regulator will be able to send information in such form as it considers appropriate. In particular the Commonwealth regulator will be able to edit the information or otherwise organise the material as seems appropriate.

57. Under subclause (3) the Commonwealth regulator will be able to refuse to send all, or any part of, the material collected to the foreign regulator if the Commonwealth regulator considers it appropriate.

58. Where the Attorney-General, under clause 8, requires certain undertakings to be given by the foreign regulator, the Commonwealth regulator will not be able to transmit the material until those undertakings are given.

PART 3 - MISCELLANEOUS

Clause 19: Act not to limit other provision of assistance

59. Apart from this legislation, a Commonwealth regulator may already be empowered to provide material to a foreign regulator. In these circumstances clause 19 will ensure that the Commonwealth regulator's powers arising outside this legislation are preserved.

Clause 20: Orders under Foreign Proceedings (Excess of Jurisdiction) Act not to be contravened

60. This clause will ensure that the legislation does not override any order given under section 7 of the Foreign Proceedings (Excess of Jurisdiction) Act 1984.

61. Section 7 of that Act empowers the Attorney-General to make an order prohibiting the production of evidence for the purposes of a foreign tribunal. The purpose of that Act is to protect Australian laws, policies and interests against the extraterritorial application of foreign laws. The Bill, when enacted, will not override any order made under that Act prohibiting the production of evidence.

Clause 21: Allowances and expenses

62. Clause 21 will authorise payments of travelling and other expenses to persons giving information or evidence, or producing documents under this legislation. The allowances will be specified by regulation.

Clause 22: Delegation by Attorney-General

63. Clause 23 will allow the Attorney-General to delegate his or her powers and functions under the Bill to a Secretary or Deputy Secretary of the Attorney-General's Department.

64. Where a delegate considers that a request raises questions of national interest the delegate will be required to refer the request to the Attorney-General. Such national interest matters must be dealt with personally by the Attorney-General.

Clause 23: Regulations

65. The Governor-General is to be empowered to make regulations for the purposes of the legislation.









