

1988

THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

HOUSE OF REPRESENTATIVES

NATIONAL COMPANIES AND SECURITIES COMMISSION AMENDMENT  
BILL 1988

EXPLANATORY MEMORANDUM

(Circulated by authority of the Attorney-General, the  
Honourable Lionel Bowen, MP)

NATIONAL COMPANIES AND SECURITIES COMMISSION  
AMENDMENT BILL 1988

OUTLINE

The purpose of the Bill is to make a technical amendment to the National Companies and Securities Commission Act 1979 (NCSC Act) by clarifying the NCSC's power to make a direction to its Divisions either generally or specifically. In addition the Bill will retrospectively validate any past directions to Divisions under section 21 of the NCSC Act. The Bill will not however operate retrospectively where a past direction under section 21 is the subject of Court proceedings that are in progress when the amendment commences operation.

2. The amendment is necessary following doubts expressed by the Full Court of the Supreme Court of Victoria in National Companies and Securities v. Sim (23 February 1988, unreported) about the validity of directions given by the NCSC to its Divisions to perform and exercise all of its functions and powers. An immediate clarification of the NCSC's powers is necessary to avoid future challenges to NCSC acts on the basis of this possible technical defect.

3. The Bill, which has been approved by Ministerial Council for Companies and Securities, is submitted to the Commonwealth Parliament in accordance with the Commonwealth's obligations under the Formal Agreement entered into with the States on 22 December 1978.

Financial Impact Statement

4. The Bill has no financial impact.

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Cl.1 : Short title

4. When enacted, the Bill will be cited as the National Companies and Securities Commission Amendment Act 1988.

Cl.2 : Commencement

5. The Bill will come into operation on the day it receives Royal Assent.

Cl.3 : Divisions of the Commission

6. Background Subsection 21(1) of the NCSC Act permits the NCSC, by resolution, to direct that its functions or powers in relation to 'a matter' be performed or exercised by a Division of the NCSC comprised of at least two members. The NCSC has established five standing Divisions (Companies, Takeovers, Executive, Securities Industry and Futures Industry) which perform most of the NCSC's day-to-day decision making. The NCSC has interpreted 'a matter' widely and by resolutions made under section 21 has made general directions that all matters arising under companies and securities legislation shall be exercised by its Divisions.

7. In a recent unreported judgement (National Companies and Securities Commission v. Sim, delivered on 23 February 1988) the Full Court of the Supreme Court of Victoria said, obiter dicta, that the reference to 'a matter' would appear to contemplate a reference to specific matters in the resolution and not a general bestowal by the Commission of all its functions and powers upon a Division. Although these remarks were obiter dicta there is concern that much of the NCSC's operations through Divisions could be subject to challenge and consequent invalidity.

8. Proposed Amendment It is proposed that section 21 of the National Companies and Securities Act 1979 (NCSC Act) be amended to specify the power of the NCSC, by resolution, to direct that its functions of powers in relation to a matter, any particular matter or a class of matter shall be performed or exercised by a Division of the NCSC (proposed sub-s.21(1)). The amendment clarifies the reference to 'a matter' in section 21 of the NCSC Act to include a particular matter or a class of matters to overcome doubt of the ambit of 'a matter' as expressed in National Companies and Securities Commission v. Sim.

9. A direction to Divisions made by the Commission under section 21 before the commencement of the proposed amendment will not be, and will be deemed never to have been, invalid merely because it was a direction with a respect to a matter of a particular kind or a class of matters (proposed sub-s.21(1AA)).

10. The proposed amendment will not apply in relation to a direction by the NCSC, the validity of which has, before its commencement, been called in question on the ground that it was a direction of a matter of a particular kind or a class of matters, in any proceedings (whether or not the proceedings have been completed before that commencement), except proceedings in which the court holds that it is just and equitable that the direction should be treated as valid (proposed sub-s.21(1AB)).

11. Consequential amendments are proposed to be made to NCSC Act sub-ss.21(2) and (4) (Bill paras.3(1)(b), (c) and (d)).

12. The proposed amendments are for the avoidance of doubt only and are not to be taken to affect by implication the interpretation of section 21 of the NCSC Act (Bill sub-cl.3(2)).