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THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

HOUSE OF REPRESENTATIVES

SECURITIES INDUSTRY AMENDMENT
BILL 1980

EXPLANATORY MEMORANDUM

(Circulated by authority of the
Minister for Business and Consumer Affairs,
the Hon. J.C. Moore, M.P.)

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OUTLINE

Securities Industry Amendment Bill 1980

The Securities Industry Amendment Bill 1980 amends the Securities Industry Act 1980 which has not yet come into operation.

2. The most important amendments are in two areas:

- (a) Powers of inspection of the National Companies and Securities Commission (NCSC). These powers will only be exercisable for the purposes of the co-operative scheme. The NCSC will be able to require information from a person only if that person is able to provide such information. Any lien on books will be protected. There will now be a defence to a prosecution for offences relating to false or misleading information if the defendant had reasonable grounds to believe that the information was true and not misleading. Proven copies will be allowable as evidence.
- (b) The special investigation provisions. It will now be mandatory to make a record of an examination. Where the record is reduced to writing the inspector may require the person being examined to sign the record. Copies of the written record will be able to be provided to certain persons subject to conditions imposed by the NCSC.

3. This Amending Bill will come into operation on the same day on which the Principal Act comes into operation.

PROPOSED NEW AUSTRALIAN SECURITIES INDUSTRY CODE

4. The remainder of 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' or 'Bill').

Formal Agreement

5. 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.

6. 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 4 to 18 of the explanatory memorandum on the National Companies and Securities Commission Amendment Bill 1980.

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

- the NCSC Act (which has already been discussed);
- 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 securities industry code

8. In accordance with the Formal Agreement the proposed new Australian 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').

9. 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 SIAs.

10. 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) provisions dealing with conditions relating to a dealers 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, and the power of the NCSC to intervene in proceedings and provisions dealing with injunctions, have been included (see Principal Act ss. 147-149).

11. 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.

12. Following further work on the scheme legislation it has become apparent that there is a need for amendment to the Securities Industry Act. The remainder of this explanatory memorandum deals, sequentially, with each clause of the Amending Bill.

SECURITIES INDUSTRY AMENDMENT BILL 1980

Cl. 1: Short title, etc.

13. When enacted the Bill will be cited as the Securities Industry Amendment Act 1980 (Bill s-cl. 1(1)). The Securities Industry Act 1980 is referred to as the Principal Act (Bill s-cl. 1(2)). (In this explanatory memorandum the Securities Industry Act 1980 is referred to as the 'SIA').

Cl. 2: Commencement

14. The Bill will come into operation on the day on which the SIA comes into operation (Bill cl. 2).

Cl. 3 : Interpretation

15. Section 4 of the SIA is an interpretative provision. There will be a number of amendments to section 4 so that some of the definitions in this provision are brought into line with corresponding definitions in the Companies Bill (hereafter referred to as the 'CB', being the Companies Bill introduced into the House of Representatives on 27 August 1980). These amendments are as follows:

- (a) There is a new definition of "banker's books" and "banking corporation" is now defined (Bill para 3(a)).

- (b) There have also been changes to the definitions of "executive officer", "officer" and "voting share" (Bill paras 3(b) to (d)).

16. An amendment will also be made to SIA s-sec. 4(7) to delete the incorrect reference to "that Act" and substituting the words "that Ordinance" (Bill para 3(e)).

Cl. 4: Relevant interests in securities

17. Section 5 of the SIA sets out the circumstances in which a person will be regarded as having a relevant interest in securities. Among other things, where a person has the power to exercise, or to control the exercise of, the voting power attached to no less than 20% of the voting shares in a body corporate then:-

- (a) that person shall be deemed to have the same power as the body corporate in relation to securities in which it has the power set out in paras (a) or (b) of s-sec. 5(4) of the SIA SIA s-sec. 5(4)); and
- (b) the person will be deemed to have a relevant interest in any securities that the body corporate is deemed to have an interest in under s-sec. 5(6) of the SIA SIA s-sec. 5(7).

18. This threshold figure will be removed and replaced by the words "the prescribed percentage" (Bill para 4(a)). It is currently envisaged that the initial prescribed percentage will be 20% but the Securities Industry Regulations have not yet been approved by the Ministerial Council for Companies and Securities. This amendment will bring the provisions relating to relevant interests into line with the corresponding provisions (s. 9) in the Companies (Acquisition of Shares) Act 1980.

19. A typographical error is corrected by the deletion of the words "in a share" from SIA s-sec. 5(7) (Bill para 4(b)).

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

20. The powers of the NCSC (SIA s-sec. 8(1)) or of an authorised person (SIA s-sec. 8(2)) to require the production of books will only be able to be exercised 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 (Bill para 5(a)).

21. 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) and (f)).

22. The power to require production of books will now be able to be exercised against any other person who, in the opinion of the NCSC, has been a party to any dealing in securities (Bill paras 5(c), (d) and (e) - the term 'securities' is defined widely in SIA s-sec. 4(1)).

23. 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

24. Taking possession of books under a magistrate's warrant or securing those books against interference will not prejudice any lien (Bill para 6(a)). This amendment will bring SIA s-sec. 9(3) into line with the corresponding provision in CB s-cl. 13(3). The production of books when required under s. 8 of the SIA will also not prejudice a lien (SIA s-sec. 8(5) - a similar provision is contained in CB s-cl. 12(5)).

25. 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 pursuant to a magistrate's warrant 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)).

26. A typographical error in the spelling of 'aircraft' (SIA s-sec 9(6)) will be corrected (Bill para 6(c)).

Cl. 7: Offences

27. It will now be a defence to a prosecution (under s-sec. 10(2)) for furnishing false or misleading statements in purported compliance with SIA ss. 8 or 9 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)). This amendment will bring SIA s. 10 into line with the corresponding provisions in s-cl. 14(3) of the CB.

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

28. There will be a new provision that a copy or extract of a book (widely defined in SIA s-sec.4(1)) 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 orally or by affidavit or by statutory declaration by a person who has compared the copy with the original. (Bill cl. 8 - proposed s. 10A). This provision is similar to cl. 15 of the CB and is designed to cut down the

expense of producing evidence.

Cl. 9: Privilege

29. Where a legal practitioner refuses to hand over a book on grounds of privilege, that practitioner will now 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 or she knows that person's name and address (Bill para 9(a)). The restrictions on the powers of inspection in relation to a banking corporation (SIA s-secs. 11(2) and (3)) have been omitted (Bill para 9(b)). These amendments will bring the SIA into line with the corresponding provisions in cl. 16 of the CB. A similar amendment is being made in relation to claims of privilege in special investigations (SIA s. 32) (see Bill cl. 15 - similar provision in CB cl. 308).

Cl. 10: Disclosure to Commission

30. The NCSC will be given additional powers to obtain information (Bill cl. 10). These additional powers are being sought to ensure that the NCSC has the capacity to ascertain with considerable speed the underlying facts relating to market activity, particularly with respect to takeovers.

The SIA at present contains general enquiry powers (Part II Division 1.) that may be summarised as powers to inspect books of corporations and dealers and to obtain information in relation to those books. More extensive enquiries can only be conducted (in cases where a person or body corporate is not minded to volunteer information) either through a formal hearing under the NCSC Act or a special investigation under the SIA.

31. It can be argued that these hearings and special investigations are likely to be cumbersome, time consuming, expensive and could have a potentially adverse effect on innocent transactions. They are or would thus be seen as 'tools of last resort', not means of implementing the fast fact finding so essential to the fluidity of the securities market.

32. It is considered that if the NCSC is to be effective it must be vested with power to demand and obtain, with minimum formality, essential market information from corporations whose securities are traded and from persons who have had dealings in those securities. Essential market information in this context is "corporate information" that may have affected the market, or information relating to a person's interests or associations in dealing in securities.

33. In these cases it is essential that the fact finding process continue pursuant to these powers whether or not information sought to be obtained is claimed to be incriminating, especially as prosecution may not be the primary object of NCSC's enquiry. The usual provision for exclusion from evidence in criminal proceedings of material obtained after a claim of privilege against self-incrimination can therefore be applied to these powers as it is at other points in both the SIA and the CB.

34. What is proposed is not a change in the substance of information gathering powers already given to the NCSC under other provisions in the codes to be administered by it, but in the method by which enquiries to obtain certain limited information may be made. The proposal is for a limited essential information gathering process to be undertaken in a more summary way than was originally envisaged in SIA. These summary procedures are outlined in para 36 of this explanatory memorandum.

35. 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 the provisions in the securities industry code relating to stock market manipulation, market rigging, or fraudulent stock market activities (see SIA ss. 123, 124, 125, 126, 127, 128 and 132);
- (c) that a person may have contravened the substantial shareholder provisions of the ACT Companies Ordinance (Division 3A Part IV) (this reference to the A.C.T. Companies Ordinance will, so far as the application of the securities industry code in a particular State is concerned, be converted to a reference to the Companies Act of that State by the Securities Industry (Application of Laws) Bill of that State - once the proposed new Australian companies code is brought into operation it will be converted to a reference to the corresponding provisions of that code - see cl. 4 of the Securities Industry Amendment Bill (No. 2) introduced into the House of Representatives on 27 August 1980); or
- (d) that an acquisition of shares may have occurred as a result of unacceptable circumstances or conduct under s-sec. 60(7) or 60(7A) of the Companies (Acquisition of Shares) Act 1980 (Bill para 10(a) - proposed paras 12(3A)(a) to (e)).

36. In these circumstances the NCSC will be able:

(a) 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 affect any dealing that may take place, in securities of, or made available by, that body corporate (Bill para 10(a) - proposed para 12(3A)(f) - see also Bill cl. 5 - paras 20 to 23 of this explanatory memorandum).

(b) to require information from a person whom it believes on reasonable grounds is capable of giving information about:

- . certain dealings in securities;

- . certain advices given in relation to securities;

- . the financial position of a person giving such advice; or

- . a relevant audit or auditor's report (Bill para 10(a) - proposed para 10(3)(g) - see also proposed s-sec. 12(3B) which defines relevant securities for the purposes of para 12(3A)(g)).

37. 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 SIA s. 12 (Bill para 10(a) - 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 this provision in relation to self-incrimination (Bill para 10(a) - proposed s-sec. 12(3D)).

38. It will be an offence to fail to comply with a requirement (under SIA s-sec. 12(1) - (3) or proposed s-sec. 12(3A)) to provide information (Bill para 10(b)) or to disclose false or misleading information (Bill para 10(c) - proposed s-sec. 12(5)).

39. It will be a defence to such a prosecution if the defendant proves that he believed on reasonable grounds that the information or statement was true and not misleading (Bill para 10(c) - proposed s-sec. 12(6)).

Cl. 11: Powers of inspectors

40. The notice to be given by an inspector in a special investigation requiring a person to produce books, give assistance or appear for examination (SIA s-sec. 19(1)) must now contain prescribed matters as distinct from being in the prescribed form (Bill para 11(a)). Where the notice requires a person to appear for examination, the notice must set out the relevant provisions (in SIA s-secs. 19(8) and (9)) relating to legal representation and self-incriminating answers (Bill para 11(b)).

41. The Supreme Court will be able to exercise its powers (in SIA s-sec. 19(14)) to require a person to comply with a requirement of an inspector or to punish that person for failure to comply even if that person has been convicted of an offence relating to the same matter (Bill para 11(c) - proposed s-sec. 19(15)).

Cl. 12: Record of examination

42. There will be new provisions relating to the record of an examination (Bill cl. 12 - replacing SIA present s. 21).

43. Where a record of examination is reduced to writing, the inspector may require the person being examined to read and sign the record (proposed para 21(2)(a)). 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 para 21(2)(b)). Such a written record is prima facie evidence of the questions asked and the answers given at an examination (proposed s-sec. 21(3)).

44. Any conditions imposed by the inspector when giving a copy of the record must be complied with (proposed s-sec. 21(4)). This requirement applies not only to the person examined but also to other persons who come into possession of a copy of the record of examination.

45. 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

46. Evidence given in an examination will no longer be admissible in both civil and criminal proceedings other than proceedings against the person examined if the only reason for its admissibility is that the court concerned considers that the person cannot reasonably be expected to have any recollection of the matter dealt with in the question or answer or if undue delay or expense would be caused by calling the person as a witness (presently SIA s-paras 24(a)(iv) and (v)) (Bill cl. 13).

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

47. Where a record of examination is before a court or tribunal, that body will now 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 after notice (under SIA s-sec. 27(2)) was served on him (Bill cl. 14 - amending SIA s-sec. 27(6)).

Cl. 15: Privileged communications

48. Where a legal practitioner refuses to disclose a privileged communication then that 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).

This amendment will bring the SIA into line with the corresponding provision in CB cl. 308. A similar amendment is being made in relation to claims of privilege following a requirement to produce books (SIA s. 11) (see Bill cl. 9 - similar provision in CB cl. 16).

Cl. 16: Grant of representatives licence

49. This clause corrects a typographical error. The reference to "advisers" (SIA s-sec. 49(1)) should read "representatives".

Cl. 17: Conditions to which licence is subject

50. Where the NCSC requires (SIA present para 51(2)(d)) a security is to be lodged as a condition for the granting of a licence, this security will now be lodged with the local corporate affairs office rather than with the NCSC (Bill cl. 16). In the A.C.T. this will be the A.C.T. Corporate Affairs Commission (Bill para 16(c) - proposed s-sec. 51(10)).

Cl. 18: Penalties

51. The word "indictable" will be deleted from the general penalty provisions of the securities industry code (SIA s. 129) (Bill cl. 17). S. 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. 19: Power of Court to prohibit payment or transfer of
moneys, securities or other property

52. The powers conferred on the Supreme Court to ensure that a person who is subject to investigation or to legal proceedings does not transfer all his property out of the jurisdiction (SIA s. 147) will be strengthened by the following amendments:

- (a) The Court will be able to make any one or more of the orders which it has power to make (Bill para 18(a)).
- (b) The Court will be able to prohibit a payment of money or a transfer etc. of property either absolutely or subject to conditions (Bill paras 18(b) and (c)).

- (c) The Court will also now be able to appoint a receiver of property, require the delivery up of a passport or other documents, or prohibit the person from leaving Australia without consent (Bill para 18(d) - proposed paras 147(1)(h) to (k)).

53. These amendments will bring SIA s. 147 into line with the corresponding provisions in CB cl. 573.

Cl. 20: Regulations

54. The regulation making power (SIA s. 150) will be amended:

- (a) to enable regulations to be made specifying that the provisions of the SIA do not have effect in relation to a specified transaction or class of transactions (Bill paras 19(a) and (b)) - this will remove any doubts as to the extent of the powers of the regulations to contain exemptions from various provisions of the securities industry code; and
- (b) to correct an incorrect reference in relation to witnesses' expenses (Bill para 19(c)).