

1988

THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

HOUSE OF REPRESENTATIVES

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)

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 Representatives 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 co-operative scheme under which the Commonwealth shares regulatory responsibilities with the States and Northern Territory. The Bill was introduced together with the Corporations Bill and the Close Corporations Bill.

2. The amendments to the Bill to be moved on behalf of the Government can be grouped as follows:

- (a) A new Part 12A dealing with the jurisdiction of the Supreme Courts and the Federal Court under the Corporations Bill, the Australian Securities Commission Bill and the Close Corporations Bill;
- (b) An amendment to replace certain existing rights to Court review of administrative decisions with rights to have those decisions reviewed by the Administrative Appeals Tribunal;
- (c) An amendment to preserve the role of the Director of Public Prosecutions;
- (d) Amendments to require the Corporations and Securities Panel and the Companies Auditors and Liquidators Disciplinary Board to prepare annual reports;
- (e) An amendment to permit the ASC to disclose confidential information to a wider class of agencies and organisations where appropriate;
- (f) An amendment to clarify the ASC's power to enter into contracts of investment; and
- (g) Amendments to clarify aspects of the ASC's and Corporations and Securities Panel's investigation and hearings powers.

FINANCIAL IMPACT STATEMENT

3. The amendments will not have a significant financial impact. Some additional resources will be required in the Administrative Appeals Tribunal but little more in the Federal Court than would be required under the legislation as introduced. By giving an exclusive judicial review jurisdiction to the Federal Court, some cases that might have been brought in the State or Territory Supreme Courts under the legislation as introduced will have to be brought in the Federal Court. It is also proposed to empower the Federal Court to hear appeals from decisions of single Supreme Court judges.

4. Because the legislation confers jurisdiction on State and Federal Courts it is difficult to quantify what additional resources will be required for the Federal Court. It will depend to a large extent on the preferences of litigants and their advisers. Much of the winding-up jurisdiction, to the extent brought in the Federal Court, could be exercised by Registrars under delegation from the judges.

5. Whilst the simpler procedures of the AAT may give rise to more applications for review of administrative decisions than at present, there have been very few appeals to the Supreme Courts against decisions of either the NCSC or its delegates.

NOTES ON CLAUSES - AMENDMENTS TO AUSTRALIAN SECURITIES COMMISSION BILL

Amendment (1): Cl.13 - General powers of investigation

6. Under C1.13 the ASC has power to investigate matters where it has reason to suspect that a national scheme law may have been contravened. The amendment makes it clear that the ASC has power to investigate unacceptable conduct in connection with a takeover that may fall short of a breach of the law. This will assist the ASC in determining whether to apply to the Corporations and Securities Panel for a declaration of unacceptable conduct under C1.733 of the Corporations Bill.

Amendment (2): Cl.19 - Notice requiring appearance for examination

7. Where the ASC wishes to examine a person in an investigation it must give that person a notice in the prescribed form under C1.19 requiring the person to appear and answer questions. To ensure that natural justice is afforded to the person whose attendance before the ASC is required, the amendment to C1.19 will make clear that the notice to the person must contain, among other things, a statement of the nature of the matter to which the investigation relates. This will enable the person to be aware of the relevance of the inquiry to him or her.

8. The amendment will also require the notice to set out the person's right to legal representation and the right to claim the privilege against self-incrimination (Cls.23 and 68).

Amendment (3): C1.43 - Exercise of certain powers of the Commission in relation to securities

9. The amendment makes a minor drafting correction.

Amendments (4) and yo • C1 49 - Commission to cause prosecution to be begun

10. Clause 49 requires the ASC to have the sole duty to cause a prosecution to be begun and carried on for offences revealed by an investigation or record of examination where the ASC considers that it is necessary to do so.

11. The amendments to C1.49 seek to preserve the statutory functions and powers of the Director of Public Prosecutions and, in particular, the DPP's general functions which are to institute and carry on proceedings for commitment for trial, and to institute and carry on proceedings for summary conviction, in relation to Commonwealth offences.

12. The amendments will empower the ASC to commence and carry on prosecutions but without prejudice to the DPP's statutory powers and functions. In particular, the DPP's powers to take over, to carry on or to terminate a proceeding for commitment for trial or summary conviction and to give directions or furnish guidelines with respect to the prosecution of offences will not be prejudiced.

13. In accordance with Commonwealth prosecution policy the ASC will have to send the DPP a brief of evidence if as a result of an investigation an offence appears to have been committed. Although the ASC will be able to make an initial decision to prosecute, the DPP has the responsibility to determine whether a prosecution should proceed.

14. Similar amendments are proposed to the corresponding provisions in the Corporations Bill (C1.1315) and the Close Corporations Bill (C1.142).

15. The amendment proposed to C1.127 will enable the ASC to provide the DPP with all the information necessary to enable it to exercise all relevant powers and functions in relation to the prosecution of offences created by the Bill.

Amendment (6): C1.50 - Commission may cause civil proceeding to be begun

16. Under C1.50 the ASC is empowered to undertake civil proceedings in a person's name if, following an investigation or examination, it appears to be in the public interest to undertake such proceedings for that person. There is no express requirement that the ASC obtain the person's consent. By contrast, Sub-c1.1325(3) of the Corporations Bill requires the ASC to obtain a person's written consent before applying to the Court on the person's behalf for an order to compensate the person for loss or damage suffered as a result of illegal conduct in relation to securities.

17. The amendment to C1.50 will bring it into line with Sub-c1.1325(3) of the Corporations Bill so that the ASC will not be able to undertake civil proceedings in a person's name without the person's written consent.

Amendments (7) and (8): C1.63 - Non-compliance with requirements made under this Part

18. The amendments make minor drafting corrections.

Amendment (9): C1.65 - Obstructing Person acting under this Part

19. The amendment brings the penalty into line with the penalty for this offence under co-operative scheme legislation.

Amendment (10): C1.70 - Powers of Court where non-compliance with Part

20. Where the ASC is satisfied that a person has unreasonably failed to comply with a requirement made during an investigation or at a hearing it may certify to the Court that such a failure has taken place. The Court will then be able to order that person to comply with the requirement or to punish that person as if in contempt of court, or both. The Court may do so even if the person has been convicted of an offence in respect of the failure.

21. To overcome the possibility of double jeopardy, the amendment will eliminate the capacity of the court to punish for contempt.

Amendments (11) and (12): C1.72 - Orders in relation to securities of a body corporate

22. The amendments make minor drafting corrections.

Amendment (13): C1.75 - Orders under Division 8, Part 3

23. This amendment, which deletes Sub-c1s.75(5) and (6), is consequent upon new C1.230G which provides for AAT review of orders made by the ASC under Division 8 of Part 3 of the Bill.

Amendment (14): C1.121 - Consultants etc.

24. The amendment makes a minor drafting correction.

Amendment (15): C1.127 - Confidentiality

25. Clause 127 authorises the ASC to disclose confidential information as required or permitted by law or to assist an Australian or overseas authority to perform or exercise a function or power analogous to any of the ASC's functions or powers.

26. The amendment to C1.127 (which may be compared with s.14 of the Customs Administration Act 1985) widens these categories of authorised disclosure. It will enable an ASC member, officer or delegate or other authorised person to disclose information to a person or organisation for the,; purposes of the performance of that person's functions (otherwise than by law - e.g. disclosure to a stock or futures exchange).

27. The amendment will also permit the disclosure of information to the Advisory Committee, the Panel, the Companies Auditors and Liquidators Disciplinary Board, the Accounting Standards Review Board and to domestic or foreign governments or agencies that do not perform or exercise functions or powers analogous to those of the ASC if the ASC Chairperson or his or her delegate is satisfied that the disclosure will assist such governments or agencies in the performance of their functions or powers.

Amendment (16): C1. 137 - Limitation on contracts and leases

28. Except as otherwise provided by the Regulations C1.137 prohibits the ASC, without the Minister's approval, from entering into a contract (other than a contract for employment of staff or consultants) under which the ASC is to pay or receive an amount exceeding \$250,000 or, if a higher amount is prescribed, that higher amount.

29. Sub-clause 135(3) permits the ASC to invest its surplus funds on deposit with an approved bank, in Commonwealth securities or in any other approved manner. These investments are very low risk. Therefore, to the extent that making such investments amounts to 'entering into a contract' under C1. 137 there is no reason why they should be subject to ministerial approval. The amendment is designed to obviate the need to obtain Ministerial approval in these circumstances. It may be compared with s.37A of the Housing Loans Insurance Act 1965.

Amendment (17): Insertion of new C1.180A - Annual Report

30. Clauses 138, 164 and 230 require the ASC, the Companies and Securities Advisory Committee and the Accounting Standards Review Board to prepare an annual report. There is however no requirement for either the Corporations and Securities Panel or the Companies Auditors and Liquidators Disciplinary Board to prepare an annual report. As these bodies are involved in the administration of important investigatory and disciplinary powers contained in the legislation it is desirable that they be obliged to prepare annual reports.

31. The amendment will require the Panel to prepare an annual report and furnish it to the Minister by 31 October in each year. The Minister will be required to table the Panel's report in each House of Parliament within 15 sitting days after it is received.

Amendments (18), (19) and (20): C1.181 - Constitution of Panel in relation to particular matters

32. Clause 181 presently requires the President of the Corporations and Securities Panel to sit on each hearing that the Panel conducts in relation to alleged unacceptable conduct during a takeover.

33. The amendments are intended to ensure that the President will not have to sit on each hearing. The President will be able to appoint another member of the Panel to preside at a hearing instead of the President and to designate one of the additional members of the Panel to deputise for the member presiding over the hearing. This flexibility is desirable to enable the Panel to hold more than one hearing at a particular time.

Amendment (21): C1.184 - Interpretation

34. The amendment is consequent upon the amendments proposed to be made to cl.181 above.

Amendments (22) and (23): C1.185 - Power to hold private hearings

35. Under cl.185 hearings of the Corporations and Securities Panel are to take place in private. The primary reason for this was to avoid the unnecessary and damaging litigation which could arise from defamatory allegations made at a public hearing. However this will not be as much of a problem where the parties likely to be affected agree to the hearing being held in public.

36. The amendments therefore will allow hearings to be held in public where the parties likely to be affected agree and the Panel agrees that it is appropriate. In deciding whether or not to hold the hearing in public when all parties agree, the Panel will be able to take into account the likelihood of the hearing being frustrated or damage occurring to other persons if a public hearing were held. The amendments are based on the ASC's discretions to hold hearings in public or private (Cls.52 and 53).

Amendment (24): C1.198 - Power of Court where non-compliance with section 189

37. Where the Corporations and Securities Panel is satisfied that a person has unreasonably failed to comply with a requirement made by a Panel member it may certify the failure to the Court. The Court will then be able to order the person to comply with the requirement and may punish the person as if the failure constituted a contempt of Court. The Court may do so even if the person has already been convicted of an offence in respect of the failure.

38. To overcome the possibility of double jeopardy, the amendment will eliminate the capacity of the Court to punish for contempt.

Amendment (25): Insertion of new cl.210A - Annual Report

39. Clauses 138, 164 and 230 require the ASC, the Companies and Securities Advisory Committee and the Accounting Standards Review Board to prepare an annual report. However, there is no requirement for either the Corporations and Securities Panel or the Companies Auditors and Liquidators Disciplinary Board to prepare an annual report. As these bodies are involved in the administration of important investigatory and disciplinary powers contained in the legislation it is desirable that they be obliged to prepare annual reports.

40. The amendment will require the Disciplinary Board to prepare an annual report and furnish it to the Minister by 31 October in each year. The Minister will be required to table the Disciplinary Board's report in each House of Parliament within 15 sitting days after it is received.

Amendment (26): C1.215 - Failure of witnesses to attend and answer questions

41. Sub-clause 215 (3) provides that a person shall not, at a hearing before the Companies Auditors and Liquidators Disciplinary Board, give evidence that is false or misleading. This

provision is based on sub-s. 30H (3) of the existing companies legislation. The Senate Scrutiny of Bills Committee has criticised this provision in that it appears to create a strict liability offence.

42. The amendment will provide a defence to a prosecution for the giving of materially false or misleading evidence.

43. The defence will allow the defendant to prove that when giving the evidence he or she believed on reasonable grounds that it was true and not misleading.

Amendment (27): C1.230 - Annual Report

44. The amendment makes a minor drafting correction.

Amendment (28): Insertion of New Part 12A - Jurisdiction of Courts under National Scheme Laws

45. The legislation presently provides a general right of appeal to the Federal Court and the Supreme Courts for persons aggrieved by acts, omissions or decisions of the Australian Securities Commission ('ASC') or of the Companies Auditors and Liquidators Disciplinary Board (see Corporations Bill, C1s.1299, 1320; Close Corporations Bill, C1.137). Decisions of the Corporations and Securities Panel ('Panel') may be reviewed by the Federal Court under the Administrative Decisions (Judicial Review) Act 1977 ('AD(JR) Act'). Accounting standards made by the Accounting Standards Review Board ('ASRB') under C1.283 of the Corporations Bill will be able to be disallowed by Parliament. Concurrent jurisdiction is conferred on the State and Territory Supreme Courts and the Federal Court in respect of matters arising under the legislation (see C1.1329 of the Corporations Bill, C1.237 of the ASC Bill, and C1.144 of the Close Corporations Bill).

46. These amendments alter this position in the following respects:

(a) the general appeal rights to the Courts conferred by C1s.1299 and 1320 of the Corporations Bill and C1.137 of the Close Corporations Bill are to be omitted;

(b) except in relation to certain decisions in respect of which administrative review is not appropriate, the Administrative Appeals Tribunal ('AAT'), rather than the Courts, is to be conferred with jurisdiction under the Administrative Appeals Tribunal Act 1975 ('AAT Act') to review the merits of decisions of the ASC, the Minister and the Companies Auditors and Liquidators Disciplinary Board - "decisions" having the same meaning as in sub-s.3(3) of the AAT Act.;

(c) the Courts' power to review decisions of the above bodies on the merits is to be removed - however the Federal Court would have power to review their decisions under the AD(JR) Act as well as having power under the AAT Act to deal with appeals from the AAT on questions of law;

(d) concurrent jurisdiction in the Federal Court and the Supreme Courts is to be retained for other civil matters arising under the legislation; and

(e) criminal jurisdiction is to be confined to State and Territory Courts (the conferral of jurisdiction in respect of offences created by the legislation being left to the ordinary provisions of the Judiciary Act investing State and Territory Courts with jurisdiction in respect of federal offences).

47. Clause 237 currently provides for concurrent jurisdiction in matters arising under the Bill to be invested in the Federal Court and the State and Territory Supreme Courts. This would include jurisdiction to try offences created by the legislation, and would notionally, at least, confer criminal jurisdiction on the Federal Court. The Federal Court's present criminal jurisdiction is limited to certain matters under the Conciliation and Arbitration, Bankruptcy and certain other Acts, and is not ordinarily exercised. It is therefore preferable to leave the exercise of criminal jurisdiction in respect of matters arising under the legislation to the State and Territory Courts in the ordinary way. However, for civil matters arising under the legislation, concurrent jurisdiction is vested in the State and Territory Courts and the Federal Court. To achieve these purposes, C1.237 is proposed to be omitted and replaced with a new Part 12A, dealing with jurisdiction of Courts under national scheme laws.

New C1.230A - Jurisdiction of Federal Court of Australia

48. New C1.230A provides that jurisdiction in any matter arising under a national scheme law is conferred on the Federal Court (Sub-cl.(1)). However, Sub-cl.(2) makes clear that prosecutions for offences against a national scheme law are not to be instituted in the Federal Court, and should be brought in a State or Territory Court.

New C1.230B - Jurisdiction of State and Territory Supreme Courts

49. New C1.230B provides that jurisdiction in any matter arising under a national scheme law is also conferred on the State Supreme Courts subject to s.9 of the Administrative Decisions (Judicial Review) Act 1977 (Sub-cl.(1)) and on the Territory Supreme Courts (Sub-cl.(2)). The effect of s.9 of the AD(JR) Act is that decisions of the Minister, the ASC, and the Companies Auditors and Liquidators Disciplinary Board will not be able to be reviewed by a State court. Most of these decisions will be reviewable on the merits by the AAT and by the Federal Court under the AD(JR) Act. Decisions of the Corporations and Securities Panel will not be reviewable by the AAT, but will be reviewable by the Federal Court under the AD(JR) Act.

50. Sub-cl.(3) clarifies some jurisdictional matters and also makes clear that the jurisdiction conferred by C1.230B on the State and Territory Supreme Courts shall be exercised by a single judge.

New C1.230C - Transfer of Proceedings

51. New C1.230C, which is based on s.35 of the Bankruptcy Act 1966, enables proceedings to be transferred from the court in which the proceedings were commenced to another court having jurisdiction in the matters for determination. The proceedings may be transferred on the application of a party or of the court's own motion. This provision will enable proceedings to be transferred to the most appropriate Court. It may also assist in limiting forum shopping.

New C1.230D - Courts to act in aid of each other

52. New C1.230D, which is based on sub-s.29(1) of the Bankruptcy Act 1966, provides that all courts having jurisdiction in matters arising under national scheme laws and the officers of those courts shall act in aid of each other in such matters. This should ensure that, where matters are transferred between courts, the transfer is speedy and efficient.

New C1.230E - Appeals from State and Territory Supreme Courts

53. New C1.230E deals with the course of appeals from the State and Territory Supreme Courts in matters arising under national scheme laws. An appeal lies as of right from a single judge

decision of a State or Territory Supreme Court to the Federal Court (Sub-cl.(1)). An appeal may also lie to the High Court, if that Court gives special leave (Sub-cl.(2)). Appeals from the Federal Court may proceed in accordance with the terms of 'the Federal Court of Australia Act 1976.

New C1.230F - Effect of Part on other laws

54. New C1. 230F makes clear that new Part 12A is not intended to affect the operation of s.68 of the Judiciary Act 1903 dealing with the jurisdiction of State and Territory Courts in criminal matters, or the Jurisdiction of Courts (Cross-vesting Act 1987 which enables the Family Court of Australia to exercise jurisdiction in certain circumstances.

Amendment (29): New C1.230G- Review by Administrative Appeals Tribunal of certain decisions

55. New C1.230G provides for AAT instead of Court review of orders or other decisions made by the ASC where a person has failed to comply with a requirement during an ASC investigation or hearing. The orders involve restrictions on the exercise of property rights (e.g. restraining the acquisition or disposal of securities).

56. Because of judicial power constraints in the Constitution, under Commonwealth legislation full merits review is not available before a court. For this reason, new C1.230G and new Part 9.4A of the Corporations Bill and new Division 1A of Part 18 of the Close Corporations Bill provide for AAT review of certain administrative decisions.

57. The amendment provides that in new C1.230G 'decision' will have the same meaning as in the AAT Act. The relevant provision of that Act is sub-s.3(3) which defines 'decision' widely to include:

- (a) making, suspending, revoking or refusing to make an order or determination;
- (b) giving, suspending, revoking or refusing to give a certificate, direction, approval, consent or permission;
- (c) issuing, suspending, revoking or refusing to issue a licence, authority or other instrument;
- (d) imposing a condition or restriction;
- (e) making a declaration, demand or requirement;
- (f) retaining, or refusing to deliver up, an article; or
- (g) doing or refusing to do any other act or thing.

58. AAT review will be available with respect to a decision by the ASC:

- (a) to make an order under C1.72, 73 or 74 (restraining the exercise of rights relating to securities or futures contracts);
- (b) to make an order under Sub-cl.75(1) varying an order made under ss.72-75; or
- (c) to refuse to vary or revoke such an order.

Amendment (30): C1.237 - Jurisdiction of courts

59. The omission of C1.237 is consequent upon the insertion of new Part 12A outlined above.