

1986

The Parliament of the
Commonwealth of Australia

House of Representatives

Companies and Securities Legislation
Amendment Bill 1986

Explanatory Memorandum

(Circulated by authority of the
Deputy Prime Minister and Attorney-General,
the Honourable Lionel Bowen, M.P.)

COMPANIES AND SECURITIES LEGISLATION
AMENDMENT BILL 1986

OUTLINE

1. The purposes of the Companies and Securities Legislation Amendment Bill 1986 ('the Bill') is to amend the law relating to partial takeover bids and the disclosure of substantial shareholdings. The proposals in the Bill on partial takeover bids are based on recommendations made by the Companies and Securities Law Review Committee ('CSLRC') in its Report on Partial Takeover Bids. The Bill also includes certain other amendments agreed to by the Ministerial Council for Companies and Securities ('Ministerial Council').
2. This Bill, which has been approved by the 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.
3. If enacted, these amendments will, subject to the making of regulations for each State to effect any necessary local modifications (sometimes referred to as "translator regulations"), have automatic effect in each State without the need for further and separate substantive State legislation.
4. In the event of the Commonwealth Parliament not enacting these amendments within six months of their approval by the Ministerial Council, each State has the right to take action separately to implement the decision of the Ministerial Council (see Formal Agreement cl. 44).

Financial Impact Statement

5. The changes made by this Bill should not have any financial impact on Government revenues and expenditure.

The proposals on partial takeovers can be expected to improve the position of the small shareholder although the benefits are difficult to quantify. The proportional bid route is not 'costless' for the bidder to the extent that it does increase his risks. However, it is impossible to quantify such costs.

The proposals on the disclosure of substantial shareholdings should result in cost savings to companies.

Explanatory Memorandum

6. The remainder of this explanatory memorandum.

- (a) contains a brief outline of the CSLRC Report on Partial Takeover Bids and other proposals on the disclosure of substantial shareholdings;
- (b) contains a brief outline of the main amendments contained in the Bill; and
- (c) deals sequentially with the content of each clause of the Bill.

CSLRC Report on Partial Takeovers Bids

7. The CSLRC received a general reference from the Ministerial Council in 1983 to enquire into and review the appropriateness of the Companies (Acquisition of Shares) Act 1980 (CASA) as a mechanism for regulating takeovers in Australia.

8. Pursuant to this reference, the CSLRC examined partial takeover bids. The CSLRC issued a discussion paper in March 1985 and invited interested persons to make submissions on the various issues raised in the discussion paper.

9. After consideration of submissions, the CSLRC prepared its report on Partial Takeover Bids. The report was considered by the Ministerial Council in December 1985.

10. The major problems identified with partial bids in the CSLRC report are:

- (a) shareholders accepting a takeover offer not on its merits but under coercion for fear of becoming a locked-in minority;
- (b) uncertainty as to how many shares will be sold until the end of the offer period; and
- (c) inequality of opportunity arising from high pre-bid prices paid to, and escalation agreements with, strategic shareholders up to the 20% takeover threshold.

11. The main recommendations of the CSLRC are as follows:

- (a) Partial bids to be confined to proportional bids
The CSLRC recommended that partial takeover bids be confined to bids for a specified proportion of each shareholder's holding. This would reduce the coercive pressures on shareholders to accept partial takeover offers and would remove the uncertainty as to the maximum number of shares that an offeror will eventually purchase from each accepting shareholder under a partial bid.

(b) Bidders to be prohibited from including maximum acceptance conditions in proportional bids the CSLRC drew attention to the practical difficulties which would arise where a partial bid is made subject to a maximum acceptance condition and the uncertainty it would create for shareholders in the target company. The CSLRC recommended that maximum acceptance conditions be prohibited.

(c) Bidders to be prohibited from making a partial bid if this could result in an obligation to make a payment under any pre-existing escalation agreement The CSLRC commented on the problems of inequality arising in a partial bid where an escalation agreement has operated in the pre-bid period. The CSLRC concluded that there was a need to inhibit the use of escalation agreements in the context of partial bids.

(d) That the Ministerial Council not disallow amendments to stock exchange rules permitting shareholder plebiscite articles The CSLRC suggested that it would be undesirable to declare ineffective shareholder plebiscite articles (ie articles that require approval being given by a stipulated percentage of independent shareholders before a partial bid may proceed). The CSLRC commented that in general it should be within the discretion of shareholders to include in their articles provisions that relate to partial takeovers bids.

Substantial shareholdings

12. Section 138 of the companies Act 1981 (CA) requires a substantial shareholder in a company to give a prescribed notice to the company whenever there is a change in the relevant interest(s) of the substantial shareholder, or an associate, in the voting shares of the company.

13. In order to reduce the paperwork burden on companies and shareholders, it is proposed that the notice need not be given by a substantial shareholder under CA s.138 where the change in the relevant interest(s) is less than 1% of the voting shares of the company.

Outline of major amendments

14. The main amendments proposed in the Bill are as follows"

(a) Partial offers will be restricted to proportional bids for each shareholder's holding, rather than the present position whereby partial bids can be made for a proportion of the total share in the company (a pro-rata

bid) or a proportion of each shareholder's holding (a proportional bid).

(b) Maximum acceptance conditions will be prohibited.

(c) Where offers under a pro-rata bid are open at the commencement of the Bill, the bid will be deemed to be a proportional bid.

(d) A company will be able to include shareholder plebiscite provisions in its constituent documents.

(e) An offeror will not be able to give benefits under an escalation agreement entered into within 6 months of a bid or proposed bid.

(f) The present policy underlying CASA s.25 (dealing with the right of assignees of an original offeree shareholder to accept an offer) has been clarified.

(g) Substantial shareholders will only be required to notify net variations of 1% in their entitlement.

Contents of the Bill

15. The Bill is divided into the following Parts:

Part I - Preliminary

Part II - Amendments of Companies (Acquisition of Shares) Act 1980

Part III - Amendments of Companies Act 1981

BILL PART I - PRELIMINARY

Cl. 1: Short title

16. When enacted the Bill will be cited as the Companies and Securities Legislation Amendment Act 1986 (Bill cl.1).

Cl. 2: Commencement

17. Parts I and II of the Bill will come into operation on Royal Assent. Part III will come into operation when proclaimed (Bill cl.2).

BILL PART II - AMENDMENTS OF COMPANIES (ACQUISITION OF SHARES) ACT 1980

Cl. 3: Principal Act

18. The Companies (Acquisition of Shares) Act 1980 (referred to in this explanatory memorandum as 'CASA') is referred to in Part II of the Bill as the Principal Act (Bill cl.3).

Cl. 4: Other interpretative and evidentiary provisions

19. Background Although an offeror makes an offer for all of the shares of an offeree (CASA s-para.16(2)(a)(i)) the offeror is construed as an offeror who does not propose to acquire all the shares in a company if he specified in his offer (CASA s-para.16(2)(f)(iii)) that he proposes to acquire less than 100% of the shares in the company to which he is not already entitled. (CASA s-sec.8(2)).

20. Proposed amendment It is proposed that CASA s-sec.8(2) be omitted (Bill para.4(a)). This amendment, as well as the amendment proposed by cl.5, is consequential. The amendments have the effect of simplifying and standardising the terminology used in CASA in relation to full and partial offers. Thus the two types of offers that can be made under CASA are s-para.16(2)(a)(i) offers ('full bids') and s-para.16(2)(a)(ii) offers ('partial bids').

21. The proposed amendment to CASA s-sec.8(3) is related to proposed amendments to CASA s.25 (Bill para.4(b) - see para. 36 of this explanatory memorandum). Sub-section (3) will also be altered by s.6 of the Companies and Securities legislation (Miscellaneous Amendments) Act 1985 so that it is subject to a contrary intention in another provision.

Cl. 5: Acquisition of shares permitted in certain circumstances

22. Background An offeror making a full bid is entitled to acquire shares on a stock market in certain circumstances (CASA s-secs13(3) and (4)).

23. Proposed amendment The proposed amendment to CASA para.13(4)(a) is consequential on the standardisation of terminology (see para.20 of this explanatory memorandum) (Bill cl.5).

Cl. 6: Takeover offers

24. Background CASA s.16 deals with formal offers under a takeover scheme. Generally, separate takeover schemes are required for each class of share, the offers must be the same, must bear the same date and must be made to each shareholder in the class (accompanied by a copy of the Part A statement).

25. Proposed amendments Partial offers will be restricted to proportional offers for each shareholder's holding, rather

than at present where partial bids can be made for a proportion of the total shares in the company or a proportion of each shareholder's holding (Bill para.6(a)).

26. Sub-paragraph 16(2)(f)(iii) will be omitted. This provision relates to a partial bid for a proportion of all the company's shares and is hence redundant (Bill para.6(c)).

27. Where the consideration to be paid for the acquisition of shares consists solely of cash (or includes alternative considerations one of which consists solely of cash) the amount must not be less than that paid or agreed to be paid in the 4 months before the bid or such amount as the NCSC approves if, for example, the target company has during the 4 month period allotted or granted options over its shares (Bill paras.6(d) and (e) - proposed CASA para.16(2)(g) and s-sec.16(2AB)). This will bring the rules relating to pre-bid prices for "cash" takeover schemes and on-market takeover announcements more closely into line (see CASA s-secs.17(6), (7) and (11)).

28. For the purposes of proposed para. 16(2)(g), any price variation specified in a pre-bid agreement will be deemed to be the price payable (Bill para.6(e) - proposed CASA s-sec.16(2AA)). This amendment make it clear that the price that is relevant in calculating a price for the purposes of later takeover offers is the price originally specified in the pre-bid agreement, regardless of any subsequent variation, in accordance with the terms of the agreement, in the price payable for the shares.

29. An offer may no longer be subject to maximum acceptance conditions (Bill para.6(d) - proposed CASA paras. 16(2)(h) and (j)). These provisions are widely drafted to ensure that a condition (or combination of conditions) that has the same effect as a maximum acceptance condition will be prohibited. Thus a conditions, however expressed, that enable an offeror to acquire shares from some but not all of the accepting shareholders will come within the prohibition. The provisions is intended to deal with the situation identified by the CSLRC (viz that use of conditions may introduce uncertainty for offerees and may enable offerors to avoid honouring over generous bids), and to ensure that an offeror cannot achieve what is in effect a pro-rata bid by use of these conditions. Proposed para.16(2)(j) is also specifically directed at any attempt to structure a bid so that in effect a 'first come first served' bid is established.

30. If offers under a pro-rata partial bid remain open when Part II of the Bill comes into operation, the offers will be deemed to be for a proportion of each shareholder's holding

(Bill para.6(e) - proposed CASA s-sec.16(2AD)). The provision has effect so that a pro-rata bid for say 30 percent of the outstanding share capital of a target company is deemed to be converted to an offer for 30 percent of each shareholder's holding in the company. The Ministerial Council decided to include this retrospective element in the Bill in the light of the announcement in December 1985 of the intention to introduce legislation and the concern that this announcement and the imminence of legislation could provoke a spate of pro-rata bids primarily designed to pre-empt the proposed legislation.

31. If the offer period of a pro-rata partial bid would remain open for a period less than 7 days after the commencement of Part II of the Bill, the period during which the offers remain open shall, except for the purposes of CASA s-sec.27(8), be deemed to be extended until the end of that period of 7 days (proposed CASA para.16(2AD)(h)).

32. A Court will be able to have regard to the CSLRC Report on Partial Takeover Bids when interpreting the proposed amendments (proposed CASA s-sec.16(2AE)).

Cl. 7: Takeover Announcements

33. Background The second form of takeover provided for under CASA is the acquisition of shares in a listed public company through announcement to the home exchange of the offeree company of an unconditional undertaking to stand in the market. The undertaking is to purchase on the floor of the exchange during a period of one month all shares tendered at or above the specified minimum cash price (CASA s.17). an offeror or its associates may not use escalation clauses in the 4 months preceding a takeover announcement to achieve an artificially low minimum price (CASA s-sec.17(7)).

34. Proposed amendment The proposed amendment to CASA s-sec.17(7) is consequent upon proposed CASA s-sec.16(2AA), discussed at para.28 of this explanatory memorandum.

Cl. 8: Repeal of Sections 25 and 26 and substitution of new sections -

Proposed s25: Acceptance of takeover offers by third parties

35. Background Takeover offers extend to all persons registered or entitled to be registered as the holder of shares to which the offers relate (CASA s.25).

36. CASA s.25 operates in the following way:

(a) the offer period defined in CASA s-sec.8(3) specifically excludes CASA s.25;

(b) CASA s.25 ceases to operate as soon as an offer is accepted (thus there are no multiplier effects in the sense that a person who acquired shares from an offeree after acceptance is not able to accept an offer made for that offeree's shares because once the offeree has accepted, any shares that have been on-sold to a third person are not the subject of an offer);

(c) CASA s.25 only applies where an offeree has transferred shares before acceptance, in which case a proportional offer could only ever be for a proportion of the offeree's reduced shareholding.

37. Proposed amendment The proposed amendment adopts the policy of the existing CASA s.25 and clarifies its operation in relation to proportional bids (Bill cl.8 - proposed new CASA s.25 - see also proposed CASA s.25C, discussed at para.42 of this explanatory memorandum, and proposed CASA s-sec.16(2AF)).

Proposed s25A: Acceptance of takeover offers by trustees, nominees, &c.

38. Background Where a nominee or trustee holds shares on behalf of different persons, a takeover offer made to that nominee or trustee is only capable of being accepted in relation to the whole of the nominee's or trustee's holding. This may result in a nominee or trustee being unable to protect the differing interest of the underlying beneficial owners.

39. Proposed amendment To ensure that a nominee or trustee can accept or reject a takeover offer according to the differing interests of each of the underlying beneficial shareholders, an offer to a nominee or trustee will be deemed to be a separate offer in respect of each distinct part of the shareholding (Bill cl.8 - proposed CASA s.25A).

40. It will be an offence for a trustee or nominee knowingly to give the offeror a notice that the trustee or nominee is not entitled to give, but this will not affect the validity of the notice (proposed CASA s-sec.25A(2)).

Proposed s25B: Avoidance of odd lots where takeover offer relates to proportion of offeree's shares

41. Proposed amendment Under a proportional partial takeover bid for the shares in a listed company, a shareholder will not be left holding an odd lot of shares. In such a case, where

the offer is accepted, the offer will be deemed to be for the percentage specified in the offer plus any odd lots that would otherwise remain with the offeree (Bill cl.8 - proposed s25B).

Proposed s.25C: Offeror not entitled to bid for balance where takeover offer relates to proportion of offeree's shares

42. Proposed amendment Proposed CASA s.25C will make it clear that any proportional offer made or purported to be made by a bidder that is not either an offer for the purposes of s.16 or a deemed offer under either ss.25 or 25A will be deemed to have been made otherwise than under a relevant takeover scheme. This provision reinforces the present policy underlying CASA s.25 (discussed at para.36 above).

Proposed repeal of section 26

43. Background An offeror making a partial bid who receives acceptances in excess of the number proposed to be acquired must pro-rata acceptances equally amongst all shareholders in the same proportions (CASA s.26).

44. Proposed amendment CASA s.26 will be repealed. This provision will be redundant as partial bids will only be for a part of each shareholder's shares. (Bill cl.8).

Cl. 9: Insertion of new sections -

31A. Constituent documents of a company may require a resolution approving certain acquisition of shares in the company

31B. Provisions relating to the inclusion, effect and renewal of takeover approval provisions

45. Proposed amendments A company will be able to have provisions in its constituent documents enabling it to refuse to register shares acquired under a partial bid unless a resolution has been passed by the shareholders. (Bill cl.9 - proposed CASA s.31A).

46. Other features of this provision are as follows:

(a) Unless the company's constituent documents otherwise provide, the laws and articles etc. that apply in relation to a general meeting of the company will apply to a meeting of shareholders convened to vote on the resolution (proposed CASA s-sec.31A(3)).

(b) Where the company's constituent documents contain takeover approval provisions, the directors will be obliged to hold a meeting or postal ballot to vote on the

partial bid 14 days before the close of the offer period (proposed s-sec.31A(4)).

(c) Where the company's constituent documents contain takeover approval provisions and no resolution to approve a partial bid has been voted on 14 days before the close of the offer period, a resolution approving the bid will be deemed to have been passed (proposed CASA s-sec.31A(6)).

(d) Where a resolution is rejected, all offers will be deemed to be withdrawn and the offeror will be required to rescind any accepted offers (proposed CASA s-sec. 31(7)).

(e) Proposed CASA ss.31A and 31B apply notwithstanding any stock exchange rules or any other agreement (proposed CASA s-sec.31A(8)).

47. Takeover approval provisions referred to in proposed s.31A will cease to have effect after 3 years or such lesser time as the company's constituent documents provide (proposed CASA s.31B).

48. Other features of proposed s.31B are as follows:

(a) Takeover approval provisions will be able to be renewed (proposed s-sec.31B(3)).

(b) A company will be required to provide an explanatory statement (setting out various matters including the effects and advantages of the provisions) where a resolution to include a takeover approval provision in the company's constituent documents is despatched to shareholders (proposed s-sec.31B(4)). The maximum penalty for contravening this requirement will be a fine of \$5000 or imprisonment of 1 year, or both (proposed s-sec.31B(5) and (6)).

(c) 10% of the shareholders will be able to apply to the Court to have a takeover approval provision set aside (proposed s-sec.31B(7) and (8)).

(d) The Court has a discretion to set aside the takeover approval provision (proposed s-sec.31B(9)).

Cl. 10: Insertion of new section -

39B. Persons selling shares before the making of takeover offers or of a takeover announcement not to be given additional benefits in certain cases

49. Proposed amendment The proposed amendment deals with pre-bid agreements that enable a person to give or receive a benefit where the benefit is attributable to a takeover offer or proposed takeover offer.

50. A bidder or its associate will not be able to give or receive benefits under an agreement (defined widely in proposed s-sec.39B(4)) entered into within 6 months of a takeover offer (Bill cl.10 - proposed s-sec.39B(1)).

51. The same prohibition will be placed on a bidder or associate where a takeover offer is proposed to be made (proposed s-sec.39B(2)).

52. An agreement that purports to give a benefit in contravention of these provisions is void (proposed s-sec. 39B(3)).

53. Proposed s.39B has the following features:

(a) The provision is designed to overcome avoidance techniques (eg where a pre-bid seller retains a relevant interest in shares).

(b) "Benefit" need not be a cash benefit (see proposed s-sec.39(4)).

(c) The prohibition catches benefits given by a bidder to a person as well as benefits given by a person to the bidder.

Cl. 11: Provisions relating to dissenting shareholders

54. Proposed amendment A drafting alteration will be made to bring CASA s.42 into line with the standardised wording referred to at para.20 of this explanatory memorandum (Bill cl.11).

Cl. 12: Offences

55. Proposed amendment The general offence provisions in CASA s.53 will not apply in relation to proposed s.31B (discussed at paras. 47 to 48 of this explanatory memorandum) which provides its own penalties (Bill cl.12).

BILL PART III - AMENDMENTS OF COMPANIES ACT 1981

Cl. 13: Principal Act

56. The Companies Act 1981(referred to in this explanatory memorandum as 'CA') is referred to in Part III of the Bill as the Principal Act (Bill cl.13).

Cl. 14: Substantial shareholdings, substantial shareholders, notifiable changes, &c

57. Background A person entitled to 10% of the voting shares in a company or 10% of a class of voting shares in a company is deemed to have a substantial shareholding in that company (CA s.136).

58. Proposed amendments Several interpretative provisions will be added to CA s.136 for the purposes of amendments made by Bill cl.15.

Cl. 15: Repeal of section 138 and 139 and substitution of new sections -

138. Substantial shareholder to notify company of changes in interests

139. Person who ceases to be a substantial shareholder to notify company

59. Background Written notice of a change in the relevant interests of a substantial shareholder or his associates must be given to the company by the substantial shareholder (CA s.138). Written notice is also required from a person who ceases to be a substantial shareholder (CA s.139).

60. Proposed amendments Where a 1% variation occurs in the entitlement of the substantial shareholder which does not result in his being entitled to less than 10% of a company's voting shares (or class of voting shares), the substantial shareholder must give the company, within 2 business days, notice setting out details of the variation (Bill cl.15 - proposed new CA s.138).

61. A person ceasing to be a substantial shareholder will also be required to give the company a notice within 2 business days setting out details of changes in his entitlement (Bill cl.15 - proposed new CA s.139).