

1980

THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

HOUSE OF REPRESENTATIVES

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COMPANIES (ACQUISITION OF SHARES) AMENDMENT BILL 1980

EXPLANATORY MEMORANDUM

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

## CONTENTS

Item	Paragraph
OUTLINE	1
PROPOSED NEW AUSTRALIAN SHARE ACQUISITION CODE	4
Formal Agreement	5
Proposed new Australian code on the acquisition of company shares	8
COMPANIES (ACQUISITION OF SHARES) AMENDMENT BILL 1980	
cl. 1 : short title, &c.	12
cl. 2 : commencement	13
cl. 3 : restriction of acquisition of shares	14
cl. 4 : acquisitions to which section 11 does not apply	16
cl. 5 : pari passu allotments	18
cl. 6 : take-over offers	20
cl. 7 : take-over announcements	21
cl. 8 : Part B statement	24
cl. 9 : offeror connected with target company	26
cl. 10 : substitution of section - 27. Variation of take-over offers	28
cl. 11 : forecasts of profits	34
cl. 12 : statements on asset valuations	35
cl. 13 : provisions relating to dissenting shareholders	37
cl. 14 : court may excuse contravention or non-compliance due to inadvertence &c.	38
cl. 15 : new section - 49A Reduction of capital or cancellation of allotment	39
cl. 16 : continuing offences	41
cl. 17 : power of NCSC to declare acquisition of shares or other conduct to be unacceptable	42
cl. 18 : schedule	44

## OUTLINE

### Companies (Acquisition of Shares) Amendment Bill 1980

The Companies (Acquisition of Shares) Amendment Bill amends the Companies (Acquisition of Shares) Act 1980 which has not yet come into operation.

2. The most important amendments are in the following
  - (a) Expert's report accompanying a Part B statement. Where an expert's report accompanies a Part B statement the target company will now lodge with the National Companies and Securities Commission (NCSC) a notice signed by the expert stating that the expert consents to his report accompanying the Part B statement. If such a report contains a profit forecast or a statement on the target company's asset valuations then it may not accompany the Part B statement unless the NCSC consents;
  - (b) Variation of offers. A new provision of the variation of formal take-over offers will be inserted into the Principal Act. Variations are to be made only with the consent of the NCSC unless the variation is in accordance with the provisions of the relevant section or the regulations; and
  - (c) Part A and C statements. Part A and Part C statements will be required to set out the bidder's intentions regarding continuing the target company business, any major changes to be made to the business and also the future employment of its staff.
3. This Amending Bill will come into operation on the same day on which the Principal Act comes into operation.

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## INTRODUCTION

4. The remainder of this explanatory memorandum contains a brief outline of the co-operative companies and securities scheme and the Companies (Acquisition of Shares) Act 1980 (hereafter referred to as 'the Share Acquisition Act' or 'the Principal Act') and then deals sequentially with each clause of the Companies (Acquisition of Shares) 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 provides 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.

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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 code on the acquisition of company shares

8. The Share Acquisition Act sets out the substantive provisions of the proposed new Australian code on the acquisition of company shares and applies these provisions in the A.C.T. substantive provisions of the code are in an appropriate form any State or Territory that is covered by the co-operative scheme to apply in that jurisdiction by appropriate legislation.

9. The new code will be administered by the NCSC which, far as is practicable, will delegate its administrative responsibilities to the relevant corporate affairs office in each jurisdiction.

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10. Basically, the proposed new share acquisition code will prohibit (unless exempted) acquisitions above 20% and below 90% of a company's shares unless one of the following methods is adopted:

- (a) a gradual acquisition of shares in any way the acquirer chooses at the rate of 3% every six months;
- (b) by a formal take-over bid, based on the procedure that existed under the superseded take-over legislation; or
- (c) a take-over announcement on the floor of the home exchange of the offeree company, under-taking unconditionally to take, for a period of one month and at a specified price, all shares offered

11. Following further work on the scheme legislation it has become apparent that there is a need for amendment of the Companies (Acquisition of Shares) Act. The remainder of the explanatory memorandum deals, sequentially, with each clause of the Amending Bill.

COMPANIES (ACQUISITION OF SHARES) AMENDMENT BILL 1980

Cl. 1 : short title, &c.

12. When enacted the Bill will be cited as the Companies (Acquisition of Shares) Amendment Act 1980 (Bill cl. 1).

Cl. 2 : commencement

13. The provisions of the Bill will come into effect when the Principal Act comes into operation (Bill cl. 2).

Cl. 3 : restriction on acquisition of shares

14. S-sec. 11(6) of the Principal Act provides that the provisions of the A.C.T. Companies Ordinance relating to schemes of arrangement (ss. 181, 183 and 185) have effect subject to the take-overs provisions. This was done to overcome the danger that if the take-over provisions were tightened up, companies seeking to effect take-overs would attempt to do so under the guise of schemes of arrangement or reconstructions. S-sec. 11(6) of the Principal Act will now be omitted (Bill cl. 3).

15. The effect of the proposed amendment will be that s-sect 181, 183 and 185 of the Companies Ordinance will no longer have effect subject to the general restrictions on the acquisition of shares in s. 11 of the Principal Act. However, certain modifications have been made to provisions in the proposed Companies Bill corresponding to ss. 181, 183 and 185 of the

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Companies Ordinance to ensure that the provisions of the Principal Act are not avoided. For example, the Court will not be able to approve a compromise or arrangement unless it is satisfied that the compromise or arrangement is not proposed for the purpose of enabling any person to avoid the operation of the Principal Act (Companies Bill s-cl. 315(20); 317(4)).

Cl. 4 : acquisitions to which section 11 does not apply

16. S. 12 of the Principal Act sets out a number of acquisitions to which the share acquisition code does not apply.

17. Consequential on the amendment to s. 11 of the Principal Act, it will now be provided that the share acquisition code will not apply to share acquisitions pursuant to a compromise or arrangement approved by the Supreme Court under Part VII of the A.C.T. Companies Ordinance (Bill cl. 4).

Cl. 5 : pari passu allotments

18. The restrictions on acquisition in the proposed code do not apply to an acquisition by a shareholder pursuant to a pari passu allotment of shares or by an underwriter or sub-underwriter of the allotment (Principal Act s-sec. 14(1)) provided that the allotment is to all persons registered as the holders of shares in proportion to their shareholding (Principal Act s-sec. 14(2)). Where

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there are foreign share-holders, a company is deemed to comply with the provisions of s-sec. 14(2) if, instead of making offers to the foreign shareholders, it allots the foreigner entitlement to a nominee for sale on approved terms, and then pay the proceeds of the sale to the foreign shareholders (Principal Act s-sec. 14(3)).

19. The effect of the amendment is that the nominee of a listed public company may now only be approved by its home exchange and not also by the NCSC (Bill cl. 5).

Cl. 6 : take-over offers

20. It will be made clear that it is not necessary for an offeror holding shares in a target company to dispatch an offer under his take-over scheme to himself (Bill cl. 6).

Cl. 7 : take-over announcements

21. One form of acquisition that will be permitted under the proposed new code is a take-over conducted by means of an on-market announcement (Principal Act s. 17). In such a case the shares must be acquired as a result of the acceptance of take-over offers made by the on-market announcement and in compliance with the other relevant requirements of s.17 (Principal Act s-sec. 17(1)).

7.

22. The Principal Act will now be amended to provide that, in addition, such an acquisition of shares must not take place pursuant to a transaction that is a “crossing” within the meaning of the business rules or listing rules of the home stock exchange (Bill cl. 7).

23. The practical effect of this amendment is to extend that current prohibitions on crossings (Principal Act para 8(9) (a) and s-secs. 13(3) and 40(3) to the broker acting for an on-market offeror pursuant to that offeror’s on-market announcement.

Cl. 8 : Part B statement

24. Under s-sec. 22(4) of the Principal Act, a target company is required to lodge a copy of its Part B statement, together with any accompanying report or statement, with the NCSC, and if the target is a listed company then the material must also be copied to this home stock exchange.

25. In addition to these existing requirements, where a report by an expert accompanies the Part B statement, the target company will also be required to lodge with the NCSC a notice signed by the expert, stating that the expert consents to his report accompanying the Part B statement (Bill cl. 8).

Cl. 9 : offeror connected with target company

26. Where an offeror holds 30% or more of the share target company, or the offeror and target company have co-directors, the Part B statement must be accompanied by an independent expert (Principal Act s. 23).

27. Where such a report contains a statement concerning forecasts or asset valuations then the report will not be used for the purposes of compliance with s. 23 and may accompany a Part B statement unless the NCSC gives its consent in writing (Bill cl. 9, proposes s-sec. 23 (2A)).

Cl. 10: substitution of section –

27. Variation of take-over offers

28. Except for the variation of the dates by which consideration must be paid, an offer under a take-over scheme can only be varied, and the offer period can only be extended, accordance with s. 27 of the Principal Act. Under this section an offeror may not vary the terms of a take-over offer, or the period for which the take-over offer remains open, unless:

- (a) the variation or extension is permitted by the regulations; or
- (b) the NCSC consents in writing to the variation or extension, which may be subject to conditions

(Principal Act s-sec. 27(1)).

29. This section will be replaced by new provisions relating to the variation of offers (Bill cl. 10). The details of these new provisions are set out in paragraphs 30 to 33.

30. An offeror may not vary a take-over offer without the consent of the NCSC unless the variation is permitted under this section or by the regulations (Proposed new s-sec. 27(1)). The NCSC may consent to the variation either unconditionally or subject to conditions (Proposed new s-sec. 27(2)). Where an offeror varies a take-over offer he must make a corresponding variation to all unaccepted offers (Proposed new s-sec. 27(3)).

31. The following types of variations will be permitted:

- (a) certain specified increases in the consideration (Proposed new s-sec. 27(4)) : amongst other things, an offer involving a share consideration can be varied by specifying a cash sum in addition (Proposed new para 27(4)(b)) : earlier acceptors will be entitled to receive the increased consideration (Proposed new s-sec. 27(5)).
- (b) the inclusion of a cash sum as an alternative where the consideration formerly consisted only of securities (Proposed new s-sec. 27(6)) : earlier acceptors will have the option of taking the cash alternative (Proposed new s-sec. 27(7)).

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- (c) extension of the offer period for up to 12 months (Proposed new s-sec. 27(8) and (9) – see also Principal Act s-para 16(2) (f) (ii) which provides for a basic period of up to 6 months); this extension will only be effective if an appropriate notice is sent to the target company with copies to each other offeree (plus copies to the house exchange of a listed target company). (See proposed new s-sec. 27(11)).

32. The procedures in relation to variations will be as follows:

- (a) Variations of associated offers must be by written notice to the target company (with copies to each other offeree) setting out the terms of the variation and particulars of necessary modifications to the relevant Part A statement.

(Proposed new s-sec. 27(10)).

- (b) An attempt to extend an offer beyond 6 months will be ineffective unless the required notice is sent to the target company with copies to each other offeree (plus copies to the home exchange of a listed target company) during the sixth month (Proposed new s-sec. 27(11)). Amongst other things, the notice must inform the offeree of his right to withdraw if he has already accepted the offer and where an offeree does withdraw his acceptance of an offer, the offeror must return his script to him within 14 days (Proposed new s-sec. 27(12)).

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- (c) A copy of certain notices of variation must be registered with the NCSC before dispatch (Proposed new s-sec. 27(13)). The NCSC will have the same powers to refuse registration as it has in relation to Part A statements (Proposed new s-sec. 27(14) – see Principal Act s-sec. 18(2) dealing with Part A statement). Registrable notices must include a disclaimer of responsibility by the NCSC for the contents of the notice (Proposed new s-sec. 27(15)).

33. An acquisition of shares pursuant to a take-over offer will not be invalid where the offeror has purported to vary the take-over offer but has contravened or failed to comply with:

- (a) a requirement of s. 27;
- (b) a requirement of the regulations; or
- (c) a condition imposed by the NCSC.

(Proposed new s-sec. 27(16)).

Cl. 11 : forecasts of profits

34. The prohibition of forecasts of profits by bidders and target companies contained in s. 37 of the Principal Act will not now apply to forecasts:

- (a) issued with the consent of the NCSC and in accordance with any conditions imposed by it (the present paras 37(3) (a) and (b)); or

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- (b) contained in a report accompanying a Part B statement with the consent of the NCSC given under s-sec. 23(2A) and in accordance with any conditions imposed by the NCSC. (See paras 26 and 27 of this explanatory memorandum).

(Bill cl. 11)

Cl. 12: statements on asset valuations

35. The prohibition on statements concerning asset valuations by directors of target companies contained in s. 38 of the Principal Act will not now apply to statements:

- (a) in writing and issued with the consent of the NCSC and in accordance with any conditions imposed by it (the present paras 38(2)(a) and (b)); or
- (b) contained in a report accompanying a Part B statement with the consent of the NCSC given under s-sec.23 and in accordance with any conditions imposed by NCSC (see paras 26 and 27 of this explanatory memorandum).

(Bill para 12(a)).

36. Sub-para 38(4) (b) (ii) of the Principal Act refers to accounts made out and lodged "in accordance with a provision of a law of another State or Territory." This reference will be corrected to read "in accordance with a provision of a law of a State or another Territory." (Bill para 12(b)).

Cl. 13 : provisions relating to dissenting shareholders

37. S-sec. 42(17) of the Principal Act refers to the transfer of marketable securities of a company “under the law of a State or of another Territory that corresponds with this section”. This reference will be corrected so that it reads “under the provision of the law of a State or of another Territory that corresponds with this section” (Bill cl. 13).

Cl. 14 : court may excuse contravention or non-compliance due to inadvertence, &c.

38. The Supreme Court will be given an additional power to direct that offers are to be deemed to have been varied in accordance with the requirements of the proposed code where:

- (a) an offeror purports to vary an offer under a take-over scheme in accordance with s. 27 or the regulations;

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(b) a requirement of s. 27 or the regulations has not been met; and

(c) the Court is satisfied that the non-compliance is due to inadvertence, mistake or circumstances beyond the offeror's control and that the non-compliance ought to be disregarded.

(Bill cl. 14 – proposed new s-sec. 48(3A)).

Cl. 15: new section –

49A. Reduction of capital or cancellation of allotment

39. S. 64 of the A.C.T. Companies Ordinance and the Companies Act of each State allows a company, if authorized by its articles (and subject to confirmation by the Court) to reduce its share capital in any way by special resolution.

40. The requirements of s. 64 will not apply in relation to a reduction of capital or to a cancellation of allotted shares resulting from the operation of the Principal Act and do not invalidate any such reduction or cancellation of shares (Bill cl. 15 – proposed new s. 49A). Such a reduction or cancellation could arise in connection with the withdrawal of offers under s. 21 of the Principal Act and the variation of offers under proposed new s. 27.

Cl. 16 : continuing offences

41. The reference to offences in s-sec. 54(3) of the Principal Act will be made more specific (Bill cl. 16).

Cl. 17 : power of NCSC to declare acquisition of shares or other conduct to be unacceptable

42. Under s. 60 of the Principal Act, the NCSC is empowered to declare that, for the purposes of that Act, a specified acquisition is an unacceptable acquisition and that specified conduct (once a Part A statement has been served, or a take-over announcement has been made) is unacceptable conduct. Before the NCSC makes a declaration under this section it must be satisfied of certain matters set out in s-sec. 60(7).

43. The precise matters as to which the NCSC must be satisfied in a particular case will be clarified by providing separate criteria for unacceptable acquisitions and for unacceptable conduct (Bill cl. 17). The proposed amendment will effect a drafting change only. The matters about which the NCSC must be satisfied pursuant to s-sec. 60(7) which now applies only to unacceptable acquisitions, are identical to those set out in proposed s-sec. 60(7A), which applies to unacceptable conduct.

Cl. 18 : schedule

44. Under the Principal Act, a formal offeror is required to serve on the target company a Part A statement which must set out detailed information in relation to the offeror. Similarly, an on-market offeror (who makes a take-over announcement to the home exchange of the target company) must serve on the target a Part C statement which sets out similar information in relation to the on-market offeror.

45. The proposed amendment will require a formal offeror to state in its Part A statement and an on-market offeror to state in its Part C statement their intentions regarding:

- (a) the continuation of the business of the target company;
- (b) major changes to be made to that business, including any redeployment of the company's fixed assets; and
- (c) the future employment of the company's present employees

(Bill cl. 18).

46. Similar requirements are contained in Rule 15 of the London City Code on Take-overs and Mergers and in s. 13(d) (1) (c) of the Securities Exchange Act of 1934 (of the United States of America).