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COMPANIES AND SECURITIES LEGISLATION AMENDMENT BILL 1986

Date introduced: 14 March 1986
House: House of Representatives
Presented by: Hon. Lionel Bowen, M.P.,
Attorney-General

DIGEST OF BILL

Purpose

To prohibit pro rata partial takeovers, to amend other areas of the law relating to partial takeover bids, and to alter the rules relating to the disclosure of changes in substantial shareholdings.

Background

Following negotiations between the Commonwealth and State Governments during the 1970s, a formal agreement was signed for a 'Commonwealth-State Scheme for Co-operative Companies and Securities Regulation' in December 1978. Under the scheme, a 'Ministerial Council for Companies and Securities' was created comprising the six States and Commonwealth Ministers responsible for companies and securities. Unanimous approval of the Ministerial Council is required before any law can be adopted. Furthermore, it was agreed that once the Council had approved company or security legislation, it would be first passed by the Commonwealth and then adopted by the States.[1] It was also agreed that amendments to the original legislation would only be made with unanimous Ministerial Council approval and, once passed into Commonwealth law, such amendments would automatically be adopted by the States.[2]

In 1984 the Ministerial Council requested the Companies and Securities Law Review Committee (CSLRC) to inquire into the regulation of takeover in Australia. As the first part of this process CSLRC decided to inquire into partial takeover bids. The CSLRC's report, Partial Takeover Bids, was released in March 1985.

There are two varieties of partial takeover offers, pro rata and proportional. A pro rata bid occurs when the offer is for all or part of any shareholder's holdings until the target number of shares is reached. Under this method there is no guarantee that all shareholders will be offered an opportunity to sell part of their holdings. A proportional offer, on the other hand, is for a specified proportion of each shareholder's holding and guarantees all shareholders a chance to participate.

In its report the CSLRC recommended that pro rata partial takeovers be abolished^[3] for two major reasons. The first relates to the 'control premium'. This refers to the additional amount an offeror will be willing to pay to gain control of a company and will reflect the value of control to the offeror. Under a pro rata bid there is no guarantee that all shareholders will be able to share the control premium. A further problem associated with the control premium in a pro rata takeover is that it provides an incentive to quick acceptance without full consideration in order to gain the control premium.

The second major problem identified with pro rata takeovers is uncertainty. In the period between when a shareholder notifies that they are willing to sell and the time when the results of the takeover are made known, the shareholder does not know how many of their shares will be bought. This results in uncertainty and prevents shareholders from dealing in the shares that will not be bought during this period.

In addition to suggesting that pro rata partial takeover bids be abolished, the CSLRC suggested that maximum acceptance conditions be prohibited.^[4] This will ensure that under proportional offer all shareholders will be able to accept. The CSLRC also suggested that companies should be able to include shareholder plebiscite provisions in its articles of association.^[5] Such provisions would require a takeover offer to be conditional on the approval of shareholders who hold over 50% of the voting rights in the target company.

Following the release of the CSLRC's report, a number of submissions on the topic were made. After consideration of the report and the submissions, the Ministerial Council announced in December 1985 that it had accepted the recommendations to prohibit pro rata partial takeover offers and maximum acceptance conditions, as well as those recommendations relating to shareholder plebiscites.

Under provisions of the Companies Act 1981 (CA) shareholders who hold 10% or more of the voting shares of a company are required to notify the company of that interest. Any change in that holding, no matter how minor, must also be notified. In the Second Reading Speech for this Bill, the Minister stated that a recent survey conducted by the National Companies and Securities Commission had indicated that 'these provisions, by requiring detailed notification each time the smallest change... occurs, are creating a major paperwork burden for companies and shareholders while often providing information of little or no value'.[6]

Main Provisions

For a detailed analysis of the clauses of the Bill, refer to the explanatory memorandum.

Clause 6 will amend section 16 of the Companies (Acquisition of Shares) Act 1980 (CASA) to:

- . abolish pro rata takeover offers (paragraph 16(a) of the Bill);
- . abolish maximum acceptance conditions (paragraph 16(d) of the Bill); and
- . deem all pro rata takeover offers outstanding at the time these amendments come into force (i.e. the day the Bill receives the Royal Assent - sub-clause 2(1)) to be proportional (paragraph 6(e) of the Bill).

A new section 25A will be inserted into CASA to deem an offer to a nominee or trustee who holds shares for a number of beneficiaries to be a separate offer in respect of each holding. The new section will allow the nominee or trustee to accept or decline the offer in respect of each holding (clause 8).

New sections 31A and 31B are to be inserted into CASA to allow companies to have a provision in their constituting documents (e.g. the articles of association) requiring a ballot by shareholders before it registers any shares acquired through a partial takeover scheme (clause 9).

A new section 39B will be inserted into the Principal Act by clause 10. The proposed section will prevent any benefit passing through pre-bid agreements entered into within six months of the takeover offer.

Clause 15 will substitute new sections 138 and 139 into the Companies Act 1981. As a result of the amendments, substantial shareholders (i.e. those who hold 10% or more of a companies voting shares) will only have to notify the company of a variation in their shareholding if their holding falls or rises by 1% or more of the total voting shares.

For further information, if required, contact the Law and Government Group.

11 April 1986

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References

1. Formal Agreement for a Commonwealth-State Scheme for Co-operative Companies and Securities Regulation, clause 9.
2. Guidebook to Australian Company Law, 7th ed., Commercial Clearing House, 1984, p.12.
3. Companies and Securities Law Review Committee, Partial Takeover Bids, Discussion Paper No. 2, March 1985, p.26.
4. Ibid., p.27.
5. Ibid., pp.17-23.
6. House of Representatives, Hansard, 14 March 1986, p.1394.

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