



Securities Amendment Act 2004

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Commencement see section 2

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The Parliament of New Zealand enacts as follows:

1 Title

- (1) This Act is the Securities Amendment Act 2004.
- (2) In this Act, the Securities Act 1978 is called “the principal Act”.

2 Commencement

This Act comes into force on the day after the date on which it receives the Royal assent.

3 Interpretation

- (1) Section 2(1) of the principal Act is amended by repealing the definition of **chattel**, and substituting the following definition: “**chattel** includes livestock, but does not include a book debt or negotiable instrument”.

- (2) Section 2(1) of the principal Act is amended by repealing the definition of **company**, and substituting the following definition:
- “**company** means a company, or an overseas company, within the meaning of section 2(1) of the Companies Act 1993”.
- (3) Section 2(1) of the principal Act is amended by omitting from the definition of **convertible note** the expression “section FZ 2”, and substituting the expression “section OB 1”.
- (4) Section 2(1) of the principal Act is amended by omitting from the definitions of **date of a prospectus** and **date of a registered prospectus** the words “section 39(a) of this Act”, and substituting in each case the expression “section 39(1)(a)”.
- (5) Section 2(1) of the principal Act is amended by omitting from the definition of **expert** the words “and includes an accountant, engineer, valuer, quantity surveyor, and geologist;”.
- (6) Section 2(1) of the principal Act is amended by repealing the definitions of **labour share** and **local authority**.
- (7) Section 2(1) of the principal Act is amended by repealing paragraph (a) of the definition of **manager**, and substituting the following paragraph:
- “(a) in relation to a participatory security,—
- “(i) means a person—
- “(A) on whose behalf any money paid in consideration of the allotment of the security is received; or
- “(B) with a substantial obligation to security holders to act in the continuing administration or management of the scheme to which the security relates; or
- “(C) to whom both subparagraphs (A) and (B) apply; but
- “(ii) does not include a person who is a participatory security trustee in relation to the security if the person acts in the continuing administration or management of the scheme to which the security relates solely in the person’s capacity as a participatory security trustee; and”.

- (8) Section 2(1) of the principal Act is amended by inserting, after the definition of **participatory security**, the following definition:

“**participatory security trustee** means a person appointed as a trustee in respect of participatory securities”.

4 Meaning of advertisement

Section 2A(3) of the principal Act is amended by repealing paragraph (b).

5 Construction of references to offering securities to the public

- (1) Section 3(2)(a)(i) of the principal Act is amended by adding the words “or of a director of the issuer”.

- (2) Section 3(2)(a) of the principal Act is amended by inserting, after subparagraph (ii), the following subparagraph:

“(iia) persons who are each required to pay a minimum subscription price of at least \$500,000 for the securities before the allotment of those securities:”.

- (3) Section 3 of the principal Act is amended by repealing subsection (6).

- (4) Section 3 of the principal Act is amended by adding the following subsections:

“(8) In calculating the subscription price payable, or paid, for securities for the purposes of subsection (2)(a)(iia), any amount payable, or paid, must be disregarded to the extent to which it is to be paid, or was paid, out of money lent by the issuer, the offeror, or any associated person of the issuer or offeror.

“(9) The Governor-General may, by Order in Council, amend the minimum subscription price that applies under subsection (2)(a)(iia).”

6 Application of this Act

Section 4 of the principal Act is amended by adding the following subsection:

- “(5) Despite subsection (4), nothing in the Illegal Contracts Act 1970 applies to sections 37 and 37A.”

7 Exemptions from this Act

- (1) Section 5(1)(h) of the principal Act is amended by omitting the words “a labour share or”.
- (2) Section 5 of the principal Act is amended by inserting, after subsection (2C), the following subsections:
 - “(2CA) Nothing in Part II (except sections 38B and 58) or the regulations applies to an advertisement made by or on behalf of an issuer that—
 - “(a) states that—
 - “(i) the issuer is considering making an offer of securities to the public; and
 - “(ii) no money is currently being sought and that no applications for securities will be accepted or money received unless the subscriber has received an investment statement; and
 - “(b) if the issuer wishes, states that the issuer is seeking preliminary indications of interest and, in this case, also states—
 - “(i) how indications of interest may be made; and
 - “(ii) that no indication of interest will involve an obligation or commitment of any kind; and
 - “(c) contains no other information, except any or all of the following:
 - “(i) the name of the issuer:
 - “(ii) a description of the securities intended to be offered, including a brief description of any rights or privileges to be attached:
 - “(iii) the rate or rates of interest (if any) that may be earned by holding the securities intended to be offered:
 - “(iv) the total number of securities intended to be offered:
 - “(v) a statement of the intended use of the subscriptions:
 - “(vi) the terms of the intended offer:
 - “(vii) a description of the class of persons to whom it is intended the offer will be made:
 - “(viii) the date at which the issuer expects that the offer will be made; and
 - “(d) is dated and is not distributed to any person later than 6 months after its date.

- “(2CB) Nothing in Part II (except sections 38B and 58) or the regulations applies in respect of a security if—
- “(a) the only persons who are able, under the terms of the offer of the security, to subscribe for the security are eligible persons; and
 - “(b) the subscriber is an eligible person.
- “(2CC) For the purposes of subsection (2CB), a person is an **eligible person** if the person is 1 or more of the following:
- “(a) wealthy (as defined in subsection (2CD));
 - “(b) experienced in investing money (as defined in subsection (2CE));
 - “(c) experienced in the industry or business to which the security relates (as defined in subsection (2CE)).
- “(2CD) For the purposes of subsection (2CC)(a), a person is **wealthy** if an independent chartered accountant certifies, no more than 6 months before the offer is made, that the chartered accountant is satisfied on reasonable grounds that the person—
- “(a) has net assets of at least \$2,000,000; or
 - “(b) had an annual gross income of at least \$200,000 for each of the last 2 financial years.
- “(2CE) For the purposes of subsection (2CC)(b) and (c), a person is **experienced** in investing money or in the industry or business to which the security relates (as the case may be) if—
- “(a) an independent financial service provider is satisfied on reasonable grounds that the person to whom the offer is made, as a result of having experience of that kind, is able to assess—
 - “(i) the merits of the offer; and
 - “(ii) the value of the security; and
 - “(iii) the risks involved in accepting the offer; and
 - “(iv) that person’s own information needs; and
 - “(v) the adequacy of the information given by the person making the offer; and
 - “(b) the financial service provider gives the person to whom the offer is made, before the security is allotted to the person, a written statement of the financial service provider’s reasons for being satisfied as to those matters; and
 - “(c) the person to whom the offer is made signs a written acknowledgment, before the security is allotted to the

person, that the financial service provider has given the person neither an investment statement nor a registered prospectus relating to the security.

“(2CF) For the purposes of subsection (2CE),—

“**financial service provider** means a person whose principal business consists of 1 or more of the following:

“(a) the giving of investment advice:

“(b) the receiving of investment money:

“(c) the receiving of investment property

“**investment advice** has the same meaning as in section 2(1) of the Investment Advisers (Disclosure) Act 1996

“**investment money** means any money received from, or on account of, a member of the public in relation to buying or selling securities

“**investment property** means security certificates or other valuable property received from, or on account of, a member of the public in relation to buying or selling securities.

“(2CG) The Governor-General, by Order in Council, may make regulations for all or any of the following purposes:

“(a) amending the amounts of minimum net assets and minimum annual gross income that apply under subsection (2CD):

“(b) prescribing how net assets referred to in subsection (2CD) are to be determined and valued, either generally or in specified circumstances:

“(c) prescribing how gross income referred to in subsection (2CD) is to be calculated, either generally or in specified circumstances.”

- (3) Section 5 of the principal Act is amended by repealing subsections (2E) and (2F).
- (4) Section 5(5) of the principal Act is amended by inserting, after the words “person or class of persons”, the words “or any transaction or class of transactions”.
- (5) Section 5 of the principal Act is amended by inserting, after subsection (5), the following subsections:

“(5A) The Commission’s reasons for granting an exemption under subsection (5) (including why the exemption is appropriate) must be notified in the *Gazette* together with the exemption.

“(5B) However, the Commission may defer notifying or not notify the reasons for granting an exemption if the Commission is satisfied that it is proper to do so on the ground of commercial confidentiality.”

8 New sections 5A to 5C inserted

The principal Act is amended by inserting, after section 5, the following sections:

“5A Exemption for employer superannuation schemes

Nothing in sections 37, 37A(1)(c), and 39 to 44 applies to any interest in a superannuation scheme that is an employer superannuation scheme.

“5B Conditions of exemption for employer superannuation schemes

The exemption in section 5A is subject to the conditions that—

“(a) each annual report prepared under section 14 of the Superannuation Schemes Act 1989 for a financial year during which the superannuation trustees of the scheme relied on that exemption must include the following statements and information:

“(i) if any superannuation trustee, promoter, or manager of the scheme, or any director of that superannuation trustee, promoter, or manager, has, during the 5 years preceding the specified date, been adjudged bankrupt or insolvent, convicted of any crime involving dishonesty, prohibited from acting as a director of a company, or placed in statutory management or receivership, a statement to that effect including the name and any alternative or former name or names of the superannuation trustee, promoter, manager, or director concerned:

“(ii) if more than 10% of the value of the scheme’s assets (calculated in accordance with generally accepted accounting practice) was, at any time during the year preceding the specified date, represented directly or indirectly by any securities that were issued by a superannuation trustee, manager, or custodian of the scheme (or any

associated person of any of them), a description of those securities:

“(iii) a brief description of any legal proceedings or arbitrations that are pending at the specified date and that may have a material adverse effect on the scheme:

“(iv) a statement by the superannuation trustees of the scheme (or, if a superannuation trustee is a body corporate or unincorporate, by the directors of that body) as to whether, in their opinion, after due enquiry by them, either or both of the following have materially and adversely changed since the specified date:

“(A) the value of the scheme’s assets relative to its liabilities (including contingent liabilities):

“(B) the ability of the scheme to pay its debts as they become due in the normal course of business; and

“(b) the superannuation trustees of the scheme must, within 5 working days of receiving a member’s request for a description of the investment objectives and policy for the scheme or of the means by which changes can be made to those objectives and that policy, without fee, send, or cause to be sent, to that member a brief description of those matters, except to the extent that those matters have been disclosed in the investment statement.

“5C Definitions for the purposes of sections 5A to 5C

“(1) For the purposes of this section and sections 5A and 5B, unless the context otherwise requires,—

“**crime involving dishonesty** has the same meaning as in section 2(1) of the Crimes Act 1961

“**custodian** does not include a bare trustee

“**de facto partner** has the same meaning as in the Property (Relationships) Act 1976

“**employer superannuation scheme** means a registered superannuation scheme (within the meaning of section 2(1) of the Superannuation Schemes Act 1989) that is promoted by an employer—

- “(a) admission to the membership of which is conditional on either or both of the following:
- “(i) being an employee of that employer or an employee of an associated person of that employer;
 - “(ii) being a relative, spouse, de facto partner, or dependant of a person who is an employee of that employer or an employee of an associated person of that employer; and
- “(b) in respect of which that employer is required to incur in any financial year costs (by way of contributions, expense payments, or both) at least equal to the amount of the costs of administering the scheme in respect of that financial year that are not met in that year from any excess in the value of the scheme’s assets over the value of the members’ accrued benefits

“**manager** means an administration manager or an investment manager (as those terms are defined in section 2(1) of the Superannuation Schemes Act 1989)

“**specified date** means, in relation to an annual report for a financial year, the date on which the financial year ends

“**spouse** has the same meaning as in the Property (Relationships) Act 1976.

- “(2) For the purposes of the definition of **employer superannuation scheme**, the costs of administering a scheme do not include costs that are directly attributable to the management of the investments of the scheme.”

9 Delegation of powers by Commission

- (1) Section 27(1) of the principal Act is amended by inserting, after the expression “5(5),”, the expression “38B,”.
- (2) Section 27(1) of the principal Act is amended by omitting the expression “44A,”.

10 New section 36A inserted

The principal Act is amended by inserting, before section 37, the following section:

“36A Subscriptions must be held in trust

An issuer must ensure that subscriptions for securities offered to the public are held in trust for the subscribers until the

securities are allotted or until the subscriptions are repaid to the subscribers under this Act.”

11 Void irregular allotments

- (1) Section 37(2) of the principal Act is amended by omitting the words “if the allotment is the first allotment of such security to the public”.
- (2) Section 37 of the principal Act is amended by inserting, after subsection (2), the following subsection:

“(2A) Subsection (2) does not apply if there is no minimum amount which, in the opinion of the directors of the issuer, must be raised by the issue of the securities in order to provide for the matters specified in regulations made under this Act.”
- (3) Section 37 of the principal Act is amended by repealing subsection (3), and substituting the following subsection:

“(3) An allotment of a participatory security offered to the public for subscription must not be made unless, at the time of allotment, a written statement from the subscriber authorising the subscription for that particular security has been received by—
“(a) the statutory supervisor; or
“(b) a person appointed by the statutory supervisor to receive, on the statutory supervisor’s behalf, that written statement or written statements of that class.”
- (4) Section 37(5) of the principal Act is amended by repealing paragraph (a).
- (5) Section 37 of the principal Act is amended by adding the following subsection:

“(7) For the purposes of the Limitation Act 1950, any sum recoverable under subsection (5) or subsection (6) is not a penalty or forfeiture or sum by way of penalty or forfeiture.”

12 New headings and sections 37AA to 37AL inserted

The principal Act is amended by inserting, after section 37, the following headings and sections:

“Relief orders in respect of section 37

“37AA Applications for relief orders in respect of section 37

“(1) An application to the Court for a relief order in respect of the application of section 37 to the allotment of a security may be made—

“(a) in respect of a contravention of section 37; and

“(b) regardless of whether the contravention occurred before or after this section comes into force; and

“(c) in connection with 1 or more subscribers.

“(2) However, an application to the Court for a relief order in respect of the application of section 37 to the allotment of a security may not be made if the subscription for the security has been repaid to the subscriber under section 37(5) or (6).

“(3) In this section and sections 37AB to 37AL, unless the context otherwise requires,—

“(a) **security holder** means the person who would be the current security holder but for the application of section 37(4); and

“(b) the references to the security holder apply if the security holder is a person other than the subscriber.

“37AB Effect of relief order in respect of section 37

Section 37(4) to (6) does not apply to the allotment of a security if a relief order under section 37AC or section 37AH or section 37AI is made in respect of the application of section 37 to the allotment of the security.

“Mandatory relief orders

“37AC Court must make relief order in certain circumstances

“(1) The Court must make a relief order in respect of the application of section 37 to the allotment of the security if the application for that order is made by—

“(a) the subscriber; or

“(b) the security holder; or

“(c) the issuer, if the subscriber consents in writing to the making of the relief order; or

“(d) the issuer, if the security holder consents in writing to the making of the relief order; or

“(e) the issuer, if—

- “(i) the contravention of section 37 was caused by a failure to comply with a condition of an exemption granted under section 5(5) or provided under section 5A; and
 - “(ii) the issuer has given notice of that contravention to the subscriber in accordance with sections 37AE and 37AF; and
 - “(iii) the subscriber has not objected to the Court making a relief order by—
 - “(A) notifying the issuer in writing within 30 working days after the day on which the notice is given that the subscriber objects to the making of the relief order; and
 - “(B) including in the subscriber’s objection a description as to how the contravention has materially prejudiced the interests of the subscriber.
- “(2) An order may be made under this section regardless of whether the contravention of section 37 occurred before or after this section comes into force.
- “(3) An application under this section may be made in conjunction with an application under section 37AH or section 37AI.

“37AD Consent for purposes of section 37AC(1)(c) or (d)

- “(1) The issuer must not obtain the consent of a person under section 37AC(1)(c) or (d) until after—
- “(a) the contravention in relation to the proposed application for the relief order has occurred; and
 - “(b) a notice that contains, or has attached to it, the following is sent by the issuer to the person:
 - “(i) any information that is necessary to enable a reasonable person to understand the nature and implications of the contravention that has occurred;
 - “(ii) a statement to the effect that the notice concerns the legal rights of the person and that, if there is anything about the person’s legal rights that the person does not understand, then the person should seek legal advice before giving their consent to the making of a relief order:

- “(iii) any information, documents, or copies of documents required to be sent, delivered, or provided to the person in accordance with an exemption granted under section 5(5) or provided under section 5A, if the contravention of section 37 was caused by a failure to send, deliver, or provide that information, those documents, or those copies to the person in accordance with that exemption:
 - “(iv) an investment statement relating to the security, unless an exemption from section 37A(1)(a) granted or provided under section 5 applies to the security or to the issuer in respect of the security (or would have applied but for a failure to comply with a condition of that exemption):
 - “(v) a statement to the effect that there is a registered prospectus in relation to the security and that, at the request of the person and on payment of any prescribed fee, the issuer will send the registered prospectus to the person:
 - “(vi) a statement that describes the effect of section 363 of the Companies Act 1993 (as applied by section 66) in relation to that prospectus.
- “(2) Subsection (1)(b)(v) and (vi) does not apply if an exemption from section 37(1) granted or provided under section 5 or section 5A applies to the security or to the issuer in respect of the security (or would have applied but for a failure to comply with a condition of that exemption).
- “(3) A person’s consent is of no effect for the purposes of section 37AC(1)(c) or (d) if either or both of the following apply:
- “(a) that consent is given before the date on which the notice referred to in subsection (1)(b) has been received by the person:
 - “(b) that consent is given before there is a registered prospectus relating to the security if the notice referred to in subsection (1)(b) is required to contain, or have attached to it, the statements referred to in subsection (1)(b)(v) and (vi).

“37AE Notice to subscriber for purposes of section 37AC(1)(e)

- “(1) The issuer must, if an application is to be made under section 37AC(1)(e), give a notice to the subscriber in accordance with this section and section 37AF after the contravention in relation to the proposed application for the relief order has occurred.
- “(2) The notice must contain statements or information to the following effect:
- “(a) a description of the securities to which the notice relates; and
 - “(b) a description of the manner in which the issuer has contravened section 37; and
 - “(c) a summary of the effect of section 37(4) and (6) if a relief order is not made; and
 - “(d) a summary, if appropriate, of the effect of section 37(5) if a relief order is not made; and
 - “(e) that the Court has the power to make an order that grants relief from the application of section 37(4) to (6); and
 - “(f) that the issuer is seeking, or may seek, a relief order; and
 - “(g) that the subscriber may object to the making of a relief order by notifying the issuer in writing within 30 working days after the day on which the notice is given that the subscriber objects to the making of the relief order; and
 - “(h) that, if the subscriber objects to the making of the relief order, then the subscriber must include in the subscriber’s objection a description as to how the contravention has materially prejudiced the interests of the subscriber; and
 - “(i) that the Court must make a relief order if the subscriber does not object to the making of the relief order in the manner referred to in paragraphs (g) and (h); and
 - “(j) the address of the issuer to which objections must be sent; and
 - “(k) that the notice affects the subscriber’s legal rights and that, if there is anything about the subscriber’s legal rights that the subscriber does not understand, then the subscriber should seek legal advice immediately; and

- “(l) a summary of the effect of section 37AF(1)(d) and the names and addresses of the persons to whom the notice will be sent under section 37AF(1)(d); and
 - “(m) any further information and explanation as may be necessary to enable a reasonable person to understand the nature and implications of an application for a relief order and the notice.
- “(3) The notice may contain statements and information in connection with 1 or more subscribers.
- “(4) The form of the notice must be approved by the Court before the notice is given to any subscriber.
- “(5) The Court may—
- “(a) grant its approval subject to any terms and conditions concerning the form and content of the notice that it thinks fit; and
 - “(b) require the notice to contain any information concerning the security or the issuer that it considers may assist the subscriber to decide whether or not to object to the making of the relief order.

“37AF How notice must be given

- “(1) The notice to be given to a subscriber under section 37AE must be given by—
- “(a) sending the notice to a current address for the subscriber; and
 - “(b) publishing the notice in each of the daily newspapers published in Whangarei, Auckland, Hamilton, Rotorua, Hawke’s Bay, New Plymouth, Palmerston North, Wellington, Nelson, Christchurch, Dunedin, and Invercargill (unless a daily newspaper is not published in that place); and
 - “(c) publishing the notice on the issuer’s website (if the issuer has a website) in an electronic form that is publicly accessible; and
 - “(d) sending a copy of the notice to,—
 - “(i) in the case of a participatory security, the statutory supervisor (if any); and
 - “(ii) in the case of a debt security, the trustee (if any); and
 - “(iii) in the case of a unit in a unit trust, the unit trustee (if any); and

“(iv) the Commission.

- “(2) The issuer must comply with subsection (1)(a) to (d) within a consecutive period of 5 working days.
- “(3) However, the issuer does not have to comply with subsection (1)(a) if the issuer does not have knowledge of a current address for a subscriber and has taken reasonable steps to obtain a current address for the subscriber.
- “(4) The notice must be treated as having been given to the subscriber on the day within the consecutive period of 5 working days—
- “(a) on which subsection (1)(a) to (d) was complied with by the issuer; or
 - “(b) on which subsection (1)(b) to (d) was complied with by the issuer if subsection (3) applies.
- “(5) The form of the notice that is published under subsection (1)(b) and (c) must not contain any personal information (within the meaning of the Privacy Act 1993) unless the Court orders otherwise.

“37AG Court may make order for compensation

- “(1) The Court may, on the application of a subscriber, order an issuer to pay compensation to the subscriber for any loss or damage suffered by the subscriber that is caused by a contravention of section 37.
- “(2) An application may be made under subsection (1) only if—
- “(a) an application has been made to the Court for a relief order under section 37AC; or
 - “(b) the Court has made a relief order under section 37AC.
- “(3) An application under subsection (1) may not be made 1 year or more after the date on which the Court makes a relief order under section 37AC (if the Court has made an order).
- “(4) Subsection (1) applies regardless of whether the contravention of section 37 occurred before or after this section comes into force.

“Discretionary relief orders

“37AH When Court may make relief order in respect of section 37

- “(1) The Court may in the course of any proceedings, or on the application of the issuer under this section, make a relief order

in respect of the application of section 37 to the allotment of a security if the Court considers that it is just and equitable to do so.

- “(2) An order may be made under this section regardless of whether the contravention of section 37 occurred before or after this section comes into force.
- “(3) In determining whether to make a relief order under this section, the Court must have regard to—
- “(a) all of the circumstances relating to the allotment of the security; and
 - “(b) the nature and seriousness of the contravention of section 37; and
 - “(c) whether the contravention has materially prejudiced the interests of the subscriber; and
 - “(d) whether the subscriber has disposed of the security to any other person; and
 - “(e) any other matters that the Court thinks fit.
- “(4) An application under this section may be made in conjunction with an application under section 37AC or section 37AI.

“Transitional provision for relief orders

“37AI Transitional provision for relief orders in respect of section 37

- “(1) This section applies to a contravention of section 37 in connection with the allotment of a security if that contravention is caused solely by a failure to comply, before this section comes into force, with—
- “(a) any of the requirements in paragraph (d) of the definition of **Australian prospectus** in clause 3 of the Securities Act (Australian Unit Trusts) Exemption Notice 1995 (SR 1995/105); or
 - “(b) any of the requirements in paragraph (d) of the definition of **Australian prospectus** in clause 4 of the Securities Act (Australian Unit Trusts) Exemption Notice 1996 (SR 1996/74); or
 - “(c) the condition in clause 5 of the Securities Act (Australian Unit Trusts) Exemption Notice 1997 (SR 1997/216); or
 - “(d) the condition in clause 5 of the Securities Act (Australian Registered Managed Investment Schemes) Exemption Notice 1999 (SR 1999/119); or

- “(e) the condition in clause 6 of the Securities Act (Great Britain Collective Investment Schemes) Exemption Notice 1999 (SR 1999/420).
- “(2) The Court must, on the application of the issuer, make a relief order in respect of the application of section 37 to the allotment of the security if the contravention has not materially prejudiced the interests of the subscriber.
- “(3) If the contravention has materially prejudiced the interests of the subscriber, the Court may make a relief order in respect of the application of section 37 to the allotment of the security if the Court considers that it is just and equitable to do so having regard to—
- “(a) whether the subscriber has disposed of the security to any other person; and
- “(b) any other matters that the Court thinks fit.
- “(4) An application under this section may be made in conjunction with an application under section 37AC or section 37AH.

“Other orders in relation to section 37AH and section 37AI relief orders

“37AJ Other orders that Court may make in relation to relief orders under section 37AH or section 37AI

If the Court makes a relief order under section 37AH or section 37AI, the Court may—

- “(a) make the relief order subject to any terms and conditions that it thinks fit if the contravention of section 37 has materially prejudiced the interests of the subscriber; and
- “(b) in respect of a security, order the issuer to pay compensation to—
- “(i) the subscriber for any loss or damage suffered by the subscriber that is caused by the contravention of section 37; and
- “(ii) any person who has, at any time, been a security holder in relation to the security for any loss or damage suffered by the person that is caused by the contravention of section 37; and
- “(c) grant any mandatory, restrictive, or prohibitory injunction that the Court thinks fit; and
- “(d) make an order for any consequential relief that the Court thinks fit, unless the Court makes the relief order under section 37AI.

“Service, rights to appear, and other proceedings

“37AK Service and rights to appear and adduce evidence in respect of section 37

- “(1) If an application for an order is made under section 37AC(1)(a) or (b) in connection with a security, the applicant must, as soon as practicable, serve notice of the application on the following persons:
- “(a) the issuer:
 - “(b) any other person that the Court orders must be served with notice of the application.
- “(2) If an application for an order is made under section 37AC(1)(c) or (d) in connection with a security, the applicant must, as soon as practicable, serve notice of the application on the following persons:
- “(a) the subscriber:
 - “(b) the security holder:
 - “(c) the Commission:
 - “(d) any other person that the Court orders must be served with notice of the application.
- “(3) If an application for an order is made under any of the provisions of sections 37AG to 37AI in connection with a security, the applicant must, as soon as practicable, serve notice of the application on the following persons (unless the person is the applicant):
- “(a) the issuer:
 - “(b) the subscriber or a representative defendant appointed by the Court:
 - “(c) the security holder or a representative defendant appointed by the Court:
 - “(d) the Commission:
 - “(e) in the case of a participatory security, the statutory supervisor (if any):
 - “(f) in the case of a debt security, the trustee (if any):
 - “(g) in the case of a unit in a unit trust, the unit trustee (if any):
 - “(h) any other person that the Court orders must be served with notice of the application.
- “(4) For the purposes of subsection (3)(b), a notice of an application does not have to be served on a subscriber if, in connection with the security, the issuer has given the subscriber a notice in accordance with sections 37AE and 37AF and the subscriber has not objected to the making of a relief order in the manner referred to in section 37AE(2)(g) and (h).

- “(5) If an issuer applies, in connection with a security, to the Court for the Court’s approval for the purposes of section 37AE(4), the issuer must, as soon as practicable, serve notice of that application on the following persons:
- “(a) the Commission:
 - “(b) in the case of a participatory security, the statutory supervisor (if any):
 - “(c) in the case of a debt security, the trustee (if any):
 - “(d) in the case of a unit in a unit trust, the unit trustee (if any):
 - “(e) any other person that the Court orders must be served with notice of the application.
- “(6) Despite subsections (1) to (5), the Court may, if it thinks fit, order that notice of an application does not have to be served on a person or a class of persons.
- “(7) If a person has been served, or should have been served, with notice of an application—
- “(a) in accordance with subsections (1) to (3), the person may appear and be heard on the application and on any related matter, in person or by a barrister or solicitor, in the Court:
 - “(b) in accordance with subsection (5), the person may appear and be heard in relation to the matters referred to in section 37AE(5), in person or by a barrister or solicitor, in the Court.
- “(8) A person has the right to adduce evidence and the right to cross-examine witnesses if the person appears under this section, unless the proceedings are by way of appeal.
- “(9) The rights referred to in this section apply whether or not the person was a party to the proceedings at any earlier stage in the proceedings.
- “(10) This section does not limit the rights of any person, under any other enactment or rule of law, to appear and be heard or to adduce evidence.

“37AL Other proceedings for relief in respect of section 37

- “(1) This section applies—
- “(a) to all proceedings commenced after this section comes into force that relate to an allotment of a security made in contravention of section 37; and
 - “(b) to all proceedings that have not been finally disposed of by the Court of first instance before this section comes

into force that relate to an allotment of a security made in contravention of section 37.

- “(2) The Court must not, in respect of an allotment of a security made in contravention of section 37, make any order or declaration, including an order or declaration in respect of moneys payable, relief, validation, restitution, compensation, variation of a contract, or relief of a contract in whole or part or for any particular purpose, other than any of the following orders:
- “(a) any order in accordance with any of the provisions of sections 37AA to 37AK, this section, and sections 37B to 37G:
 - “(b) any order or direction in relation to a matter of procedure:
 - “(c) any order as to costs:
 - “(d) any order to require the repayment of any subscriptions or interest under section 37(5) or (6):
 - “(e) any order in relation to proceedings under section 59:
 - “(f) any order in relation to proceedings under section 60(2).
- “(3) This section does not limit—
- “(a) the right of a person to discontinue any proceedings; or
 - “(b) the right of a person to commence proceedings in accordance with any of the provisions of sections 37AA to 37AK, this section, and sections 37B to 37G.
- “(4) Subsection (5) applies if—
- “(a) proceedings have been commenced to require the repayment of subscriptions or interest under section 37(5) or (6) in relation to the allotment of a security; and
 - “(b) an application has been made for a relief order in relation to the security under 1 or more of the following provisions:
 - “(i) section 37AC:
 - “(ii) section 37AH:
 - “(iii) section 37AI.
- “(5) The Court must, on the application of the issuer, order that the proceedings to require the repayment of subscriptions or interest under section 37(5) or (6) be stayed until after the determination of the application, or applications, for a relief order unless the application, or applications, for a relief order—
- “(a) is, or are, frivolous or vexatious; or
 - “(b) is, or are, an abuse of the process of the Court.

“(6) Nothing in this section applies to an appeal against a final judgment given or made before this section comes into force.”

13 Voidable irregular allotments

(1) Section 37A of the principal Act is amended by repealing subsection (2).

(2) Section 37A of the principal Act is amended by adding the following subsection:

“(8) For the purposes of the Limitation Act 1950, any sum recoverable under subsection (6) or subsection (7) is not a penalty or forfeiture or sum by way of penalty or forfeiture.”

14 New headings and sections 37B to 37G inserted

The principal Act is amended by inserting, after section 37A, the following headings and sections:

“Relief orders in respect of section 37A

“37B Relief orders in respect of section 37A

“(1) The issuer of a security may make an application to the Court for a relief order under section 37C or section 37D in respect of the application of section 37A to the allotment of a security if the subscriber has given notice to the issuer under section 37A(3).

“(2) However, an application to the Court for a relief order in respect of the application of section 37A to the allotment of a security may not be made if the subscription for the security has been repaid to the subscriber under section 37A(6) or (7).

“(3) If a relief order in respect of the application of section 37A to the allotment of a security is made,—

“(a) the notice given under section 37A(3) does not affect the validity of the allotment of the security; and

“(b) section 37A(6) and (7) does not apply to the allotment of the security.

“(4) An application to the Court may be made in connection with 1 or more subscribers.

“Discretionary relief orders

“37C When Court may make relief order in respect of section 37A

“(1) The Court may in the course of any proceedings, or on the application of the issuer under this section, make a relief order in respect of the application of section 37A to the allotment of

a security if the Court considers that it is just and equitable to do so.

- “(2) An order may be made under this section regardless of whether the contravention of section 37A occurred before or after this section comes into force.
- “(3) In determining whether to make a relief order under this section, the Court must have regard to—
 - “(a) all of the circumstances relating to the allotment of the security; and
 - “(b) the nature and seriousness of the contravention of section 37A; and
 - “(c) whether the contravention has materially prejudiced the interests of the subscriber; and
 - “(d) whether the subscriber has disposed of the security to any other person; and
 - “(e) any other matters that the Court thinks fit.
- “(4) An application under this section may be made in conjunction with an application under section 37D.

“Transitional provision for relief orders

“37D Transitional provision for relief orders in respect of section 37A

- “(1) This section applies to a contravention of section 37A in connection with the allotment of a security if that contravention is caused solely by a failure to comply, before this section comes into force, with the condition in clause 6 of the Securities Act (Great Britain Collective Investment Schemes) Exemption Notice 1999 (SR 1999/420).
- “(2) The Court must, on the application of the issuer, make a relief order in respect of the application of section 37A to the allotment of the security if the contravention has not materially prejudiced the interests of the subscriber.
- “(3) If the contravention has materially prejudiced the interests of the subscriber, the Court may make a relief order in respect of the application of section 37A to the allotment of the security if the Court considers that it is just and equitable to do so having regard to—
 - “(a) whether the subscriber has disposed of the security to any other person; and
 - “(b) any other matters that the Court thinks fit.
- “(4) An application under this section may be made in conjunction with an application under section 37C.

“Other orders

“37E Other orders that Court may make in relation to relief orders under section 37C or section 37D

If the Court makes a relief order under section 37C or section 37D, the Court may—

- “(a) make the relief order subject to any terms and conditions that it thinks fit if the contravention of section 37A has materially prejudiced the interests of the subscriber; and
- “(b) in respect of a security, order the issuer to pay compensation to—
 - “(i) the subscriber for any loss or damage suffered by the subscriber that is caused by the contravention of section 37A; and
 - “(ii) any person who has, at any time, been a security holder in relation to the security for any loss or damage suffered by the person that is caused by the contravention of section 37A; and
- “(c) grant any mandatory, restrictive, or prohibitory injunction that the Court thinks fit; and
- “(d) make an order for any consequential relief that the Court thinks fit, unless the Court makes the relief order under section 37D.

“Service, rights to appear, and other proceedings

“37F Service and rights to appear and adduce evidence in respect of section 37C or section 37D

- “(1) If an application for an order is made under section 37C or section 37D in connection with a security, the applicant must, as soon as practicable, serve notice of the application on the following persons:
 - “(a) the subscriber or a representative defendant appointed by the Court:
 - “(b) the security holder (being the person who would be the current security holder but for the application of section 37A(3)) or a representative defendant appointed by the Court:
 - “(c) the Commission:
 - “(d) in the case of a participatory security, the statutory supervisor (if any):
 - “(e) in the case of a debt security, the trustee (if any):
 - “(f) in the case of a unit in a unit trust, the unit trustee (if any):

- “(g) any other person that the Court orders must be served with notice of the application.
- “(2) Despite subsection (1), the Court may, if it thinks fit, order that notice of an application does not have to be served on a person or a class of persons.
- “(3) If a person has been served, or should have been served, with notice of an application, the person may appear and be heard on the application and on any related matter, in person or by a barrister or solicitor, in the Court.
- “(4) A person has the right to adduce evidence and the right to cross-examine witnesses if the person appears under this section, unless the proceedings are by way of appeal.
- “(5) The rights referred to in this section apply whether or not the person was a party to the proceedings at any earlier stage in the proceedings.
- “(6) This section does not limit the rights of any person, under any other enactment or rule of law, to appear and be heard or to adduce evidence.

“37G Other proceedings for relief in respect of section 37A

- “(1) This section applies—
 - “(a) to all proceedings commenced after this section comes into force that relate to an allotment of a security made in contravention of section 37A; and
 - “(b) to all proceedings that have not been finally disposed of by the Court of first instance before this section comes into force that relate to an allotment of a security made in contravention of section 37A.
- “(2) The Court must not, in respect of an allotment of a security made in contravention of section 37A, make any order or declaration, including an order or declaration in respect of moneys payable, relief, validation, restitution, compensation, variation of a contract, or relief of a contract in whole or part or for any particular purpose, other than any of the following orders:
 - “(a) any order in accordance with any of the provisions of sections 37AA to 37AL, sections 37B to 37F, and this section:
 - “(b) any order or direction in relation to a matter of procedure:
 - “(c) any order as to costs:

- “(d) any order to require the repayment of any subscriptions or interest under section 37A(6) or (7):
- “(e) any order in relation to proceedings under section 59:
- “(f) any order in relation to proceedings under section 60(2).
- “(3) This section does not limit—
 - “(a) the right of a person to discontinue any proceedings; or
 - “(b) the right of a person to commence proceedings in accordance with any of the provisions of sections 37AA to 37AL, sections 37B to 37F, and this section.
- “(4) Subsection (5) applies if—
 - “(a) proceedings have been commenced to require the repayment of subscriptions or interest under section 37A(6) or (7) in relation to the allotment of a security; and
 - “(b) an application has been made for a relief order under section 37C or section 37D (or both of them) in relation to the security.
- “(5) The Court must, on the application of the issuer, order that the proceedings to require the repayment of subscriptions or interest under section 37A(6) or (7) be stayed until after the determination of the application, or applications, for a relief order unless the application, or applications, for a relief order—
 - “(a) is, or are, frivolous or vexatious; or
 - “(b) is, or are, an abuse of the process of the Court.
- “(6) Nothing in this section applies to an appeal against a final judgment given or made before this section comes into force.”

15 Suspension and prohibition of investment statement

- (1) Section 38F of the principal Act is amended by repealing subsection (4), and substituting the following subsection:
 - “(4) Subject to subsection (6), while an investment statement is suspended no allotment may be made of the securities subscribed for, whether before or after the suspension order is made.”
- (2) Section 38F(9) of the principal Act is amended by repealing paragraphs (b) and (c), and substituting the following paragraph:
 - “(b) all subscriptions received for securities to which the investment statement relates, not being subscriptions for securities that were allotted before any order was made under subsection (1) in respect of the investment

statement, must be immediately repaid to the subscribers.”

16 Amendment of registered prospectus

Section 43(2)(ii) of the principal Act is amended by omitting the words “delivered in duplicate and”.

17 Suspension and cancellation of registration of registered prospectus

(1) Section 44 of the principal Act is amended by repealing subsection (3), and substituting the following subsection:

“(3) Subject to subsection (4A), while the registration of a registered prospectus is suspended no allotment may be made of the securities subscribed for, whether before or after the suspension order is made.”

(2) Section 44(6) of the principal Act is amended by repealing paragraphs (b) and (c), and substituting the following paragraph:

“(b) all subscriptions received for securities to which the registered prospectus relates, not being subscriptions for securities that were allotted before any power was exercised under subsection (1) in respect of the registered prospectus, must be immediately repaid to the subscribers.”

18 Issuers to keep registers of securities

Section 51(11) of the principal Act is amended by omitting the words “or the Companies Act 1955”.

19 Rights of inspection of registers of securities and to copies of registers and deeds

Section 52(6) of the principal Act is amended by omitting the words “or the Companies Act 1955”.

20 Financial statements to be audited

(1) Section 53E of the principal Act is amended by repealing subsection (2).

(2) Section 53E of the principal Act is amended by repealing subsection (3), and substituting the following subsection:

“(3) Every issuer of participatory securities, units in a unit trust, or interests in a superannuation scheme offered to the public

must ensure that the financial statements for the scheme to which the securities relate are audited at least once a year by a qualified auditor.”

21 Application of other Acts not affected

Section 53F of the principal Act is amended by omitting the words “the Companies Act 1955 or”.

22 Issuers to issue certificates evidencing securities

Section 54(4) of the principal Act is amended by omitting the words “section 90(2) of the Companies Act 1955 or section 95(2) of the Companies Act 1993, as the case may be,” and substituting the words “section 95(2) of the Companies Act 1993”.

23 New sections 61 to 61C substituted

The principal Act is amended by repealing section 61, and substituting the following sections:

“61 General prohibition on indemnities or insurance for directors, employees, and auditors of issuer

“(1) Except as provided in section 61A or section 61B, an issuer must not indemnify, or directly or indirectly effect insurance for, a director, employee, or auditor of an issuer in respect of—

“(a) liability for any negligence, default, breach of duty, or breach of trust in his or her capacity as a director, employee, or auditor; or

“(b) costs incurred by that director, employee, or auditor in defending or settling any claim or proceeding relating to that liability.

“(2) An indemnity given in breach of this section is void.

“61A Permitted indemnities for certain costs of directors, employees, and auditors of issuers

“(1) An issuer may indemnify a director, employee, or auditor of the issuer for—

“(a) any costs incurred by him or her in defending or settling a proceeding that relates to liability of a kind referred to in section 61(1)(a) if—

“(i) judgment is given in his or her favour or if he or she is acquitted; or

“(ii) the proceeding is discontinued; or

“(b) any costs incurred by him or her in connection with an application under section 63 in which he or she is relieved from liability by the Court.

“(2) This section does not limit section 162 of the Companies Act 1993.

“61B Permitted insurance for certain liability of directors and employees of issuer

“(1) An issuer may effect insurance for a director or employee of the issuer in respect of—

“(a) liability (other than criminal liability) of a kind referred to in section 61(1)(a); or

“(b) costs incurred by that director or employee in defending or settling any proceeding relating to that liability; or

“(c) costs incurred by that director, employee, or auditor in defending any criminal proceedings—

“(i) that have been brought against the director or employee in relation to any act or omission in his or her capacity as a director or employee; and

“(ii) in which he or she is acquitted.

“(2) The directors of the issuer who vote in favour of authorising the insurance under subsection (1) must sign a certificate stating that, in their opinion, the cost of effecting the insurance is fair to the issuer.

“(3) The director or employee who is insured is personally liable to the issuer for the cost of effecting insurance if—

“(a) subsection (2) has not been complied with in effecting the insurance; or

“(b) reasonable grounds did not exist for the opinion set out in the certificate given under subsection (2).

“(4) However, subsection (3) does not apply to the extent that the director or employee proves that the insurance was fair to the issuer at the time the insurance was effected.

“(5) A certificate signed for the purposes of section 162(6) of the Companies Act 1993 is effective also for the purposes of subsection (2); but this section does not limit section 162 of the Companies Act 1993.

“61C Interpretation for sections 61 to 61B

In sections 61 to 61B,—

“**director** includes a former director

“**effect insurance** includes pay, whether directly or indirectly, the costs of the insurance

“**employee** includes a former employee

“**indemnify** includes relieve, exempt, or excuse from liability, whether before or after the liability arises.”

24 Registers to be kept by Registrar for purposes of this Act

- (1) Section 66(2) of the principal Act is amended by omitting the words “Sections 7 and 9 of the Companies Act 1955 and sections 360, 361, and 363 of the Companies Act 1993, as the case may be, shall”, and substituting the words “Sections 360, 361, and 363 of the Companies Act 1993”.
- (2) Section 66(2) of the principal Act is amended by omitting the words “those Acts”, and substituting the words “that Act”.

25 Consequential amendments to Securities Regulations 1983

- (1) The Securities Regulations 1983 (SR 1983/121) are consequentially amended by revoking the definition of **manager** in regulation 2(1), and substituting the following definition:
“**manager** has the same meaning as in section 2(1) of the Act”.
- (2) The Securities Regulations 1983 (SR 1983/121) are consequentially amended by—
 - (a) revoking the definition of **small employer superannuation scheme** in regulation 2(1); and
 - (b) revoking regulation 2C; and
 - (c) omitting from clause 1(2) of Schedule 3D the words “a small employer superannuation scheme (as defined in regulation 2C)”, and substituting the words “an employer superannuation scheme (as defined in section 5C of the Act)”; and
 - (d) omitting from clause 1(2) of Schedule 3D the words “However, some small superannuation schemes have been exempted from this requirement on the condition that this exemption is drawn to the attention of prospective members.”, and substituting the words “However, employer superannuation schemes have been exempted from this requirement.”; and
 - (e) inserting in clause 1(2) of Schedule 3D, after the words “important decisions about investments.”, the words

“However, every prospective member of this scheme has a right, under the Superannuation Schemes Act 1989, to request to receive certain information about the scheme (including a copy of the trust deed).”

Legislative history

6 April 2004

Divided from Business Law Reform Bill (Bill 56-2),
third reading

14 April 2004

Royal assent

This Act is administered in the Ministry of Economic Development.
