

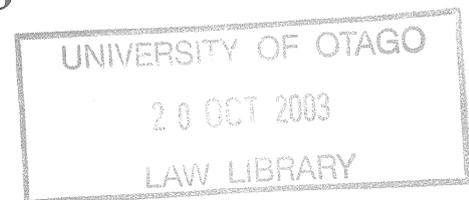
House of Representatives

Supplementary Order Paper

Thursday, 9 October 2003

Business Law Reform Bill

Proposed amendments



Hon Lianne Dalziel, in Committee, to move the following amendments:

New section 93A

To insert, after *clause 93* (after line 6 on page 33), the following clause:

93A New sections 37AA to 37AM inserted

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

“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) only in respect of a contravention of section 37(1); and
- “(b) regardless of whether or not the contravention occurred before or after this section comes into force; and
- “(c) in connection with 1 or more subscribers.

“(2) In this section and **sections 37AB to 37AM**, 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 in respect of a contravention of section 37(1) 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.

“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 the issuer has given notice to the subscriber in accordance with **section 37AE and section 37AF** and the subscriber has not objected to the Court making a relief order by—
 - “(i) 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
 - “(ii) 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 or not the contravention of section 37(1) occurred before or after this section comes into force.
- “(3) This section does not prevent an application being made for a relief order 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 provides any information that is necessary to enable a reasonable person to understand the nature and implications of the contravention that has occurred is sent by the issuer to the person.
- “(2) A person’s consent is of no effect for the purposes of **section 37AC(1)(c) or (d)** if that consent is given at any time before the date on which the notice referred to in **subsection (1)(b)** has been sent by the issuer to the person.

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

- “(1) The issuer must, for the purposes of **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(1); 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 consent to the making of a relief order by notifying the issuer in writing that the subscriber consents to the making of the relief order; and
 - “(h) 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
 - “(i) 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
 - “(j) 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 (h) and (i); and
 - “(k) the address of the issuer to which objections must be sent; and
 - “(l) 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
 - “(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 can grant its approval subject to any terms and conditions concerning the form and content of the notice that it thinks fit.

“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; 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 the Commission.
- “(2) The issuer must comply with **subsection (1)(a) to (d)** within a consecutive period of 5 working days.
- “(3) The notice must be treated as having been given to the subscriber on the day within that period on which **subsection (1)(a) to (d)** was complied with by the issuer.
- “(4) 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).
- “(5) 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.

“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(1).
- “(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 any of the provisions of **section 37AC(1)(b) to (e)**; or
 - “(b) the Court has made a relief order under any of the provisions of **section 37AC(1)(b) to (e)**.
- “(3) **Subsection (1)** applies regardless of whether or not the contravention of section 37(1) occurred before or after this section comes into force.

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

- “(1) The Court may, on the application of the issuer, 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 or not the contravention of section 37(1) 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(1); 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) This section does not prevent an application being made for a relief order under **section 37AC or section 37AI**.

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

- “(1) This section applies to a contravention of section 37(1) in connection with the allotment of a security if that contravention is as a result solely of 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) any of the conditions in clause 5(b) to (h) of the Securities Act (Australian Unit Trusts) Exemption Notice 1997 (SR 1997/216); or
 - “(d) any of the conditions in clause 5(b) to (g) of the Securities Act (Australian Registered Managed Investment Schemes) Exemption Notice 1999 (SR 1999/119); or
 - “(e) any of the conditions in clause 6(b) to (f) 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 unless the contravention has 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) This section does not prevent an application being made for a relief order under **section 37AC** or **section 37AH**.

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

- “(1) 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; and
 - “(b) make any other orders that it thinks fit.
- “(2) Without limiting **subsection (1)**, the Court may, in respect of a security, order the issuer to pay compensation to—
- “(a) the subscriber for any loss or damage suffered by the subscriber that is caused by the contravention of section 37(1); and
 - “(b) 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(1).

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

- “(1) In any proceedings brought (in whole or in part) under **sections 37AG to 37AJ** in connection with a security, the Commission, the issuer, the subscriber, and the security holder may appear and be heard, in person or by a barrister or solicitor, in the Court.
- “(2) In any proceedings brought (in whole or in part) under **section 37AC(1)(e)**, the Commission may appear and be heard, in person or by a barrister or solicitor, in the Court.
- “(3) The rights referred to in **subsection (1) and (2)** apply whether or not the Commission, the issuer, the subscriber, or the security holder was a party to the proceedings at any earlier stage in the proceedings.

- “(4) The Commission, the issuer, the subscriber, and the security holder each have the right to adduce evidence and the right to cross-examine witnesses if the Commission, the issuer, the subscriber, or the security holder appears under this section, unless the proceedings are by way of appeal.
- “(5) 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 **Costs in respect of sections 37AA to 37AJ**

- “(1) In any proceedings under **sections 37AA to 37AJ**, the Court may make an order for the payment by any party to the proceedings of the whole or any part of the full costs incurred in connection with the proceedings by any other party to the proceedings whether or not a relief order in respect of the application of section 37 to the allotment of a security is made.
- “(2) The costs so awarded are recoverable as a debt due by the party against whom they have been awarded to the party in whose favour they have been awarded.
- “(3) In this section, **full costs** includes reasonable costs incurred between solicitor and client, fees, and other expenses.

“37AM **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(1); 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(1).
- “(2) The Court must not, in respect of an allotment of a security made in contravention of section 37(1), 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 in accordance with **sections 37AA to 37AJ**.
- “(3) This section does not limit the right of a person—
 - “(a) to discontinue any proceedings; or
 - “(b) to commence proceedings in accordance with **sections 37AA to 37AJ**.
- “(4) Nothing in this section applies to an appeal against a final judgment given or made before this section comes into force.”

New clause 94A

To insert, after *clause 94* (after line 9 on page 33), the following clause:

94A New sections 37B to 37H inserted

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

“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) The notice given under section 37A(3) does not affect the validity of the allotment of a security if a relief order in respect of the application of section 37A to the allotment of the security is made.
- “(3) An application to the Court may be made in connection with 1 or more subscribers.

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

- “(1) The Court may, on the application of the issuer, 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 or not 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) This section does not prevent an application being made for a relief order under **section 37D**.

“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 as a result solely of a failure to comply, before this section comes into force, with any of the conditions in clause 6(b) to (f) 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 unless the contravention has 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) This section does not prevent an application being made for a relief order under **section 37C**.

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

- “(1) 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; and
 - “(b) make any other orders that it thinks fit.
- “(2) Without limiting **subsection (1)**, the Court may, in respect of a security, order the issuer to pay compensation to—
 - “(a) the subscriber for any loss or damage suffered by the subscriber that is caused by the contravention of section 37A; and
 - “(b) 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.

“**37F Rights to appear and adduce evidence in respect of sections 37B to 37E**

- “(1) In any proceedings brought (in whole or in part) under **sections 37B to 37E** in connection with a security, the Commission, the issuer, the subscriber, and the security holder (being the person who would be the current security holder but for the application of section 37A(3)) may appear and be heard, in person or by a barrister or solicitor, in the Court.
- “(2) That right applies whether or not the Commission, the issuer, the subscriber, or the security holder was a party to the proceedings at any earlier stage in the proceedings.
- “(3) The Commission, the issuer, the subscriber, and the security holder each have the right to adduce evidence and the right to cross-examine witnesses if the Commission, the issuer, the

subscriber, or the security holder appears under this section, unless the proceedings are by way of appeal.

- “(4) 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 **Costs in respect of sections 37B to 37E**

- “(1) In any proceedings under **sections 37B to 37E**, the Court may make an order for the payment by any party to the proceedings of the whole or any part of the full costs incurred in connection with the proceedings by any other party to the proceedings whether or not a relief order in respect of the application of section 37A to the allotment of a security is made.
- “(2) The costs so awarded are recoverable as a debt due by the party against whom they have been awarded to the party in whose favour they have been awarded.
- “(3) In this section, **full costs** includes reasonable costs incurred between solicitor and client, fees, and other expenses.

“37H **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 in accordance with **sections 37B to 37E**.
- “(3) This section does not limit the right of a person—
- “(a) to discontinue any proceedings; or
- “(b) to commence proceedings in accordance with **sections 37B to 37E**.
- “(4) Nothing in this section applies to an appeal against a final judgment given or made before this section comes into force.”
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Explanatory note

This Supplementary Order Paper inserts further amendments into the Securities Act 1978 to empower the High Court to make relief orders in connection with contraventions of sections 37(1) and 37A.

Section 37(1) provides that no allotment of a security offered to the public for subscription may be made unless at the time of the subscription for the security there was a registered prospectus relating to the security. Section 37(4) adds that any allotment made in contravention of the provisions of section 37(1) is invalid and of no effect. Section 37(5) and (6) provide for the repayment of subscriptions with interest.

New section 37AB provides that section 37(4) to (6) does not apply to an allotment if the Court has made a relief order.

New section 37AC provides that the Court must make a relief order if—

- the application for the order is made by the subscriber or the current security holder; or
- the application is made by the issuer in circumstances where—
 - the subscriber or the current security holder consents in writing to the making of the order; or
 - the issuer has given a notice to the subscriber that describes the contravention and the subscriber has not objected to the making of the order within 30 working days of the day on which the notice is given. The form of the notice must be approved by the Court and the Court may grant its approval subject to any terms and conditions that it thinks fit.

New section 37AG permits a subscriber to apply to the Court for compensation for any loss or damage suffered that is caused by the contravention of section 37(1). *New section 37AG* applies only if—

- an application has been made for a relief order under *new section 37AC(1)(b) to (e)*; or
- the Court has made a relief order under *new section 37AC(1)(b) to (e)*.

An application cannot be made under *new section 37AG* if a relief order is made under *new section 37AC* on the application of the subscriber.

New section 37AH provides that the Court has a discretion to make a relief order if it considers that it is just and equitable to do so having regard to all of the circumstances (including the interests of the current security holder), the nature and seriousness of the contravention, and whether the interests of the subscriber have been materially prejudiced.

New section 37AI contains a transitional provision that relates to contraventions of section 37(1) that occur before the new provisions come into force in connection with a failure to comply with certain terms or conditions in the Securities Act (Australian Registered Managed Investment Schemes) Exemption Notice 1999, certain corresponding previous notices, or the Securities Act (Great Britain Collective Investment Schemes) Exemption Notice 1999. These notices exempt certain persons from section 37 subject to certain terms or conditions. One of the terms or conditions relates to the provision of copies of

certain documents to the Registrar of Companies. *New section 37AI* applies if the contravention of section 37(1) is as a result solely of a failure to comply with these terms or conditions. In these circumstances, the Court must make a relief order unless the contravention has materially prejudiced the interests of the subscriber. If the contravention has materially prejudiced the interests of the subscriber, the Court may make a relief order if the Court considers that it is just and equitable to do so having regard to whether the subscriber has disposed of the security to any other person.

New section 37AJ provides that if a relief order is made under *new section 37AH* or *new section 37AI*, the Court may make the order subject to any other orders (including compensation orders) that it thinks fit.

New clause 94A inserts a number of new provisions into the Securities Act 1978 that are designed to allow the High Court to make certain relief orders in relation to the application of section 37A of that Act to the allotment of a security.

Section 37A(1)(a) provides that no allotment of a security offered to the public for subscription shall be made if the subscriber did not receive an investment statement relating to the security before subscribing for the security.

Section 37A(3) provides that an allotment made in contravention of that section is voidable at the instance of the subscriber by notice in writing to the issuer at any time within the prescribed period.

New section 37B provides that section 37A(3) does not affect the validity of the allotment of a security if a relief order is made. *New section 37C* provides that the Court has a discretion to make an order if it considers that it is just and equitable to do so having regard to all of the circumstances (including the interests of the current security holder), the nature and seriousness of the contravention, and whether the interests of the subscriber have been materially prejudiced.

New section 37D contains a transitional provision that relates to contraventions of section 37A that occur before the new provisions come into force in connection with a failure to comply with certain conditions in the Securities Act (Great Britain Collective Investment Schemes) Exemption Notice 1999. This notice exempts certain persons from various provisions of section 37A (subject to conditions). One of the conditions relates to the provision of copies of certain documents to the Registrar of Companies. *New section 37D* applies if the contravention of section 37A is as a result solely of a failure to comply with this condition. In these circumstances, the Court must make a relief order unless the contravention has materially prejudiced the interests of the subscriber. If the contravention has materially prejudiced the interests of the subscriber, the Court may make a relief order if the Court considers that it is just and equitable to do so.

New section 37E provides that if a relief order is made under *new section 37C* or *new section 37D*, the Court may make the order subject to any other orders (including compensation orders) that it thinks fit.

New sections 37AM and 37H apply to all proceedings commenced after the new sections come into force and all proceedings that have not been finally

disposed of by the Court before the new sections come into force. The sections provide that the Court must not make an order providing for relief, compensation, or a number of other remedies other than in accordance with the new sections. However, nothing in those sections applies to an appeal against a final judgment given or made before the new sections come into force.
