

1987

THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

HOUSE OF REPRESENTATIVES

MANAGEMENT AND INVESTMENT COMPANIES LEGISLATION

AMENDMENT BILL 1987

EXPLANATORY MEMORANDUM

(Circulated by authority of the Honourable Barry O Jones MP
Acting Minister for Industry Technology and Commerce)

MANAGEMENT AND INVESTMENT COMPANIES LEGISLATION AMENDMENT

BILL 1987

OUTLINE

- 1 The Bill proposes to amend the Management and Investment Companies Act 1983 by permitting a Management and Investment Company (MIC) to raise non-tax concessional capital and to enable a MIC to leave the MIC Program by surrendering its licence without its investors risking the loss or reduction of their initial tax deduction.
- 2 These proposed amendments are spelled out in clauses 11,13,18,22, and 23 of the Memorandum.
- 3 The proposed amendments follow the Government's consideration of the Bureau of Industry Economics' review of the MIC Program.
- 4 The Government recognised the need to provide a suitable phasing-out mechanism that would allow a MIC to voluntarily leave the Program in an orderly and non-prejudicial fashion.
- 5 The proposed amendments provide such a phasing-out mechanism.
- 6 There are also a number of other proposed amendments that are necessary in order to clarify certain provisions, to remove a number of unnecessary restrictions and to resolve certain administrative difficulties. They are generally of a minor policy nature.
7. The Bill will also amend the Income Tax Assessment Act 1936 to extend the application of the provisions which withdraw ("claw-back") a deduction allowed in respect of moneys paid on shares in a MIC, where the shares are sold or disposed of within a 4 year statutory period. The amendments will ensure that the claw-back provisions apply in respect of shares in a company that has exited the MIC Program by surrendering or failing to renew its licence.

FINANCIAL IMPACT STATEMENT

- 8 The proposed amendments involve no additional costs. The cost of the MIC Program, in terms of revenue forgone, remains at \$20 million per annum.

ABBREVIATIONS

9 The following abbreviations are used in this Explanatory Memorandum:

Act: Management and Investment Companies Act 1983

Bill: Management and Investment Companies Legislation
Amendment Bill 1987

Board: Management and Investment Companies Licensing Board

MIC: Management and Investment Company licensed under the
Act.

Program: The Program operating under the Management and
Investment Companies Act 1983

Tax Act: Income Tax Assessment Act 1936

NOTES ON CLAUSES

PART I - PRELIMINARY

Clause 1: Short Title

Clause 2: Commencement

10 Clause 2 provides that the Act will come into operation on the day it receives Royal Assent.

PART II - AMENDMENT OF THE INCOME TAX ASSESSMENT ACT 1936

Clause 3: Principal Act

11 For the purposes of the amendments to the Income Tax Assessment Act 1936 made by Part II of the Bill clause 3 provides for that Act to be referred to as the "Principal Act".

Clause 4: Moneys paid on shares in Management and Investment Companies

12 Section 77F of the Tax Act provides an income tax deduction for amounts paid on shares issued by companies licensed under the MIC Act. The section also contains provisions which withdraw ("claw-back") those deductions where:

- . the shares are disposed of within 4 years of the MIC being licensed or of the shares becoming fully paid up, whichever is the later event (subsection 77F (5)); or
- . the MIC's licence is revoked or refused renewal (subsection 77F(9)).

13 The amendment of the MIC Act proposed by this Bill will allow a MIC to exit the MIC Program without triggering the claw-back provisions in subsection 77F(9), by voluntarily surrendering its licence. However, a sale or disposal of shares in such a former licensee is intended to be subject to the claw-back provisions of subsection 77F(5). Because subsection (5) refers to a sale or disposal of shares in a licensee, section 77F is being amended to make it clear that the provision also applies where there is a sale or disposal of shares in a MIC which is no longer licensed. As there are a number of references in section 77F to sale or disposal of shares in a licensee, paragraph 4(a) and (b) of the Bill will amend subsection 77F(2), which is an interpretation provision, to ensure that a reference to a sale or disposal of shares in a licensee includes a reference to a sale or disposal of shares in a former licensee. This will make it clear that the claw-back provisions apply in respect of companies that have exited the MIC Program either by surrendering their licences or not seeking to have them renewed.

14 Subsection 77F(10) of the Tax Act is a safeguarding provision that prevents the claw-back provisions being circumvented by persons who hold their interest in MIC shares through an interposed entity such as a company, trust or partnership. Where a person disposes of his or her interest in the interposed entity, the interposed entity is deemed to have disposed of shares in the MIC to the extent considered appropriate by the Commissioner having regard to certain specified factors. Paragraph (4c) will amend paragraph 77F(10)(f) to allow the Commissioner of Taxation to take into account the extent to which the assets of the interposed entity consisted of shares in a former licensee.

15 The amendment will take effect from the date when the amendments made by Part III of the Bill to the Management and Investment Companies Act 1983 take effect.

PART III -AMENDMENTS OF THE MANAGEMENT AND INVESTMENT COMPANIES
ACT 1983

Clause 5: Principal Act

16 Clause 5 provides that in this part a reference to the Principal Act is a reference to the Management and Investment Companies Act 1983.

Clause 6: Interpretation

17 The definition of "officer" in section 3 of the Act is amended so that :

- a independent experts such as accountants, auditors and consultants engaged for a short time are not treated as officers of a business entity (paragraph 3 (2A)(a)); and
- b officers of a MIC assisting a business entity to meet the requirements for its certification are not considered to be part of the management of that business entity (paragraph 3 (2A)(b)).

18 The purpose of these amendments is to exempt the above categories of people from the operation of subsection 29(8) of the Act which prohibits the Board from certifying a business entity where an officer of the MIC is also an officer of the business entity.

Clause 7: Delegation

19 Section 15 is amended so that the Board is prohibited from delegating its power to refuse to approve the surrender of a licence, in the same way that it is prohibited from delegating its power to grant, revoke or refuse to renew a licence.

Clause 8: Application for grant of licence

20 Paragraph 20(2)(h) is deleted because the Companies' legislation deals with prospectuses and the provision has caused confusion to some applicants for MIC licences.

21 As it is impractical for applicants for MIC licences to obtain the undertakings required under subsection 20(3) before the application is made, that subsection has been deleted and those undertakings are now required before a licence is granted (see Clause 9).

Clause 9: Grant of a licence

22 Subsection 21(1) has been replaced by new subsections 21(1) and (1A) which make it clear that the Board is required to specify in the licence the amount of approved capital.

23 Subsection 21(2A) provides that an applicant who has paid-up share capital of less than \$5,000,000, or other amount as may be prescribed, must give the Board a declaration that it has the required undertakings before it is granted a licence. Previously, such undertakings had to be given before application was made for a licence (see Clause 8).

Clause 10: Revocation of a licence

24 Clause 10 removes the power of the Board to revoke a licence on the ground that the MIC has not provided information requested by the Board for the certification of a business entity. This was an excessive remedy for a minor breach of the Act. Under subsection 29(4) the Board already has the power to refuse to give further consideration to an application for certification until such information is provided, which is remedy enough.

Clause 11: Surrender of a licence

25 This provision enables a MIC, subject to the approval of the Board, to surrender its licence and thereby leave the MIC Program without having to wait for its licence to expire.

26 The Board has 28 days to approve the surrender or to notify the MIC of its intention to refuse the surrender (subsection 23A(3)). If the Board does not make a decision within 28 days, it is taken to have approved the surrender (subsection 23A(5)). The Board may only refuse to approve the surrender on grounds similar to those on which it may revoke a licence, and must give the MIC 14 days to make submissions about why the surrender should not be refused (paragraph 23A(3)(a)). The Board must consider any such submission and make a decision within 14 days (subsection 23A(4)) or it will be deemed to have approved the surrender of the licence (subsection 23A(6)).

27 It is not appropriate to rely on the existing subsection 23(2) under which a MIC may request the Board to revoke its licence, as revocation under that provision would lead to the loss of the tax deduction for the investors in the MIC.

28 The power to refuse to approve the surrender of a licence is included so that a MIC cannot leave the Program when it has contravened a provision of the Act or regulations, when it has failed to comply with a condition of its licence or failed to comply with a direction of the Board under section 23 or section 26.

Clause 12: Renewal of licence

29 This amendment to section 25 enables the Board to require further particulars to be included in applications for renewal of licences without the need for regulations for that purpose.

Clause 13: Publication of the Board's decisions

30 The amendment requires the Board to publicise the surrender of a licence or a refusal to approve the surrender of a licence in the same manner as it is required to publicise a revocation, refusal to renew, or suspension under section 27.

Clause 14: Certification

31 The amendment to subsection 29(2) of the Act enables the Board to approve the manner and form of applications for certification of business entities without the need for regulations for that purpose.

32 All references in section 29 of the Act to "direct" are changed to "request" because the use of the word "direct" is inappropriate in the context of certification of business entities.

33 New subsection 29(5A) enables the Board to impose conditions when certifying a business entity as an eligible business entity or to impose conditions after it is certified, even if no conditions were originally imposed. This provision also allows the Board to vary or revoke any conditions so imposed.

34 The references in section 29 to "business" will be changed to "business activities" as this is more accurate.

35 Paragraph 29(6)(d) is amended so that the forecast period for sales of business entities starts within the period of six months before or after the date of application for certification. This amendment is necessary because sales projections are usually based on calendar or financial years, which often did not coincide with the previous requirements of this provision.

36 New subsections 29(9A) and (9B) are inserted to allow the Board to extend the certification period before it expires and to allow the Board to re-certify an eligible business. This allows the Board flexibility in dealing with certifications.

Clause 15: Cancellation of certification

37 The reference in section 30 to "business" is changed to "business activity" in the interests of accuracy in line with the changes to section 29.

38 Failure of an eligible business entity to comply with a condition imposed by the Board under subsection 29(5A) is an additional ground for the cancellation of a certification.

Clause 16: Guarantor interests in eligible business entities

39 The requirement in section 35 for a MIC to set aside an amount equal to 10 per cent of its guarantor interests in a separate account will be removed because lenders normally verify that a guarantor has assets to support a guarantee.

Clause 17: Prescribed interest in business entities that cease to be eligible

40 New subsections 36(2A) and (2B) empower the Board, on application by a MIC, to extend or alter the date specified as the expiry date in an approval to hold prescribed interests in businesses that have ceased to be eligible, and also to impose a date if one was not set initially.

Clause 18: Share capital

41 Subsection 38(5) of the Act is omitted so that a MIC is not prohibited from raising capital in excess of its approved capital as allocated by the Board. This will allow a MIC to raise capital that does not attract the tax concession.

Clause 19: Repeal of Section 39

42 Section 39 is repealed because it could operate to prevent a MIC from taking advantage of any favourable interest rates offered by its owners.

Clause 20: Share register

43 A person who acquires or disposes of prescribed interests in a MIC will no longer have to notify the Board of the change. This provision is superfluous since a MIC is required under subsection 42(3) to notify the Board in writing of changes in its share register.

Clause 21: Cross ownership to be notified

44 New subsection 45(2) provides that where a MIC becomes aware of cross ownership under subsection 45(1) it must notify the Board immediately.

Clause 22: Review of certain decisions of the Board

45 Section 47 is amended so that a decision of the Board not to approve the surrender of a licence is reviewable by the Administrative Appeals Tribunal, as are decisions to revoke or refuse to renew a licence.

Clause 23: Statement to accompany notice of reviewable decisions

46 Section 48 of the Act is amended so that the Board is required to notify a MIC of its right to apply for review of a decision by the Board to refuse to approve the surrender of its licence in the same manner that the Board must notify the right of review of its decision to revoke, or to refuse to renew a licence.

