

[Act 2001 No 32]



New South Wales

Corporations (Ancillary Provisions) Bill 2001

Explanatory note

This explanatory note relates to this Bill as introduced into Parliament.

The *Corporations (Consequential Amendments) Bill 2001* and the *Corporations (Administrative Actions) Bill 2001* are cognate with this Bill.

Overview of Bill

The object of this Bill is to enact ancillary provisions, including transitional provisions, relating to the proposed new corporations legislation to be enacted by the Commonwealth Parliament following references of matters relating to corporations made by the States under section 51 (xxxvii) of the Commonwealth Constitution.

The New South Wales reference is made under the *Corporations (Commonwealth Powers) Act 2001*. That Act refers to the Commonwealth Parliament certain matters relating to corporations, corporate regulation and financial products and services. Victoria has enacted a similar Act and the other States have introduced corresponding legislation. The Commonwealth proposes to enact, under the powers conferred by these references and other powers available to it, a *Corporations Act 2001* and an *Australian Securities and Investments Commission Act 2001*.

This Bill, together with the *Corporations (Commonwealth Powers) Act 2001*, the *Corporations (Consequential Amendments) Bill 2001* and the *Corporations (Administrative Actions) Bill 2001*, make up the legislative package needed in New South Wales for the new corporations arrangements.

Outline of provisions

Part 1 Preliminary

Clause 1 sets out the name (also called the short title) of the proposed Act.

Clause 2 provides for the proposed Act to come into operation immediately before the new Commonwealth Corporations Act. Commencement at this time is necessary to ensure an effective transition to the new corporations arrangements.

Clause 3 sets out definitions of terms used in the proposed Act.

Clause 4 sets out rules for determining whether provisions of old and new legislation are corresponding provisions for the purposes of the proposed Act.

Clause 5 provides that the proposed Act has effect despite any provision of the *Corporations (New South Wales) Act 1990* or of the laws applied by that Act, and avoids a possible argument that section 5 of that Act would otherwise prevent the proposed Act from affecting the operation of that Act.

Part 2 Transitional provisions

Clause 6 limits the application of the national scheme laws (the *Corporations (New South Wales) Act 1990*, the *Corporations Law of New South Wales* and the *ASIC Law of New South Wales*) to matters arising before the beginning of the new corporations arrangements or matters arising out of such matters to the extent that those matters are not dealt with by the new Commonwealth legislation or the laws that pre-dated the national scheme laws in New South Wales (the *co-operative scheme laws*).

Clause 7 contains provisions dealing with the effect of clause 6.

Subclause (1) applies to the limitation of operation of the national scheme laws effected by clause 6 the provisions of the *Acts Interpretation Act 1901* of the Commonwealth that apply on a repeal. Thus all accrued rights and liabilities under

the national scheme laws are protected and legal proceedings in respect of those rights and liabilities may be commenced or continued. The Commonwealth provisions have been chosen so that a similar result is achieved in all jurisdictions moving to the new arrangements.

Subclause (2) cancels certain accrued rights and liabilities under the national scheme laws where substituted rights and liabilities are being provided under the new Commonwealth legislation.

Subclause (3) terminates certain legal proceedings commenced under the national scheme laws where the new Commonwealth legislation has the effect of deeming equivalent proceedings to have been brought under the new legislation in the same court.

Subclause (4) ensures that a person does not have to pay in respect of the same matter a fee or levy already paid under the national scheme laws.

Subclause (5) defines *pre-commencement right or liability* for the purposes of subclause (2).

Subclause (6) ensures that the limitation of operation of the national scheme laws effected by clause 6 does not lead to the revival of operation of laws previously superseded by the national scheme laws.

Clause 8 contains provisions designed to complement, and ensure the widest possible operation of, certain provisions of the new Corporations legislation.

Subclause (1) clarifies the continuing operation of existing State laws that are inconsistent with the new Commonwealth legislation by overcoming any argument against the effective operation of those laws based on non-compliance with section 5 of the *Corporations (New South Wales) Act 1990*.

Subclause (2) ensures the non-application of the new Commonwealth legislation to a matter if a previous State corporations law did not apply to the matter.

Subclause (3) allows regulations to be made disapplying subclause (1) or (2) in specified circumstances.

Subclause (4) provides a test of inconsistency for the purposes of subclause (1).

Subclause (5) preserves the operation of section 6 of the *Corporations (New South Wales) Act 1990*.

Subclause (6) defines *matter* and *relevant law of the State* for the purposes of the clause.

Clause 9 provides for the continuance of certain proceedings despite the cessation of operation of the national scheme laws and for certain court orders to cease to have effect.

Clause 10 saves existing court rules made under the national scheme laws.

Clause 11 deals with the construction of references to corporations legislation.

Subclause (1), in conjunction with the Table in Schedule 1, construes references in Acts, instruments made under Acts and laws applying as State laws to the national scheme laws as including references to the new Commonwealth legislation.

Subclause (2) enables regulations to be made providing for the non-application of subclause (1) in certain cases or for subclause (1) to operate in certain cases on an exclusive, rather than an inclusive, basis.

Subclause (3) excepts certain laws from the operation of subclause (1).

Subclause (4) enables regulations to be made construing references in Acts, instruments made under Acts and laws applying as State laws.

Subclause (5) provides that express references to the new Commonwealth legislation include, in connection with past events, circumstances or things, references to the corresponding old corporations legislation of this and other jurisdictions that participated in the national scheme.

Subclause (6) enables regulations to be made providing for the non-application of subclause (5) in certain cases or for subclause (5) to operate in certain cases to construe a reference as a reference to the old corporations legislation of a specified jurisdiction only.

Clause 12 deals with the construction of references to certain companies in Acts, instruments made under Acts and laws applying as State laws.

Subclause (1) construes references to companies incorporated or registered under the national scheme laws as references to companies taken to be registered under the new Commonwealth legislation in New South Wales or other relevant jurisdiction.

Subclause (2) construes references to foreign companies.

Subclause (3) construes references to the jurisdiction of incorporation of a company as references to the State or Territory in which the company is taken to be registered under the new Commonwealth legislation.

Subclause (4) enables regulations to be made providing for the non-application of subclause (1), (2) or (3) in certain cases or for subclause (1), (2) or (3) to operate in certain cases on an inclusive, rather than an exclusive, basis.

Part 3 Application of Commonwealth Corporations legislation to State matters

Clause 13 defines certain terms used in the Part.

Clause 14 facilitates the application of the new Commonwealth legislation for the purposes of State laws in circumstances where it has no application of its own force. The effect is not to extend the operation of the Commonwealth legislation but to enable it to be applied as State law. The clause enables the use of a legislative device (a *declaratory provision*) which will result in either the whole, or a specified portion, of the new Commonwealth legislation being applied for the purposes of State law.

Clause 15 sets out the effect of particular declaratory provisions.

Clause 16 makes certain modifications of the new Commonwealth legislation for the purposes of its application under this Part and enables further modifications to be made under the proposed Act or the Act containing the declaratory provision.

Clause 17 limits the circumstances in which a function may be conferred on the Australian Securities and Investments Commission (*ASIC*) by means of a declaratory provision and ensures that, even where a function is conferred on it, ASIC is not under a duty to perform the function.

Clause 18 translates references in applied laws to courts as references to the Supreme Court or other specified State court.

Clause 19 applies automatically certain other provisions of the new Commonwealth legislation where a declaratory provision is used but enables the application of these additional provisions to be modified by regulations under this Act.

Clause 20 deals with prosecutions under applied laws, including the procedure to be followed and the maximum penalties available.

Clause 21 makes it clear that the Part does not provide an exhaustive code of how the new Commonwealth legislation might be applied as State laws.

Part 4 General

Clause 22 enables regulations to be made under the proposed Act consequentially amending certain other statutory rules. Without this clause it would be necessary for each statutory rule to be amended by a separate statutory rule.

Clause 23 provides a rule-making power for the Supreme Court.

Clause 24 enables the Minister, or a person authorised by the Minister, to enter into an agreement or arrangement with ASIC for functions to be performed or powers to be exercised by it as an agent of the State.

Clause 25 enables regulations to be made for the purposes of the proposed Act. The regulations may modify the operation of the transitional provisions contained in Part 2 and may facilitate the operation of State laws under the regime provided by the new Commonwealth legislation.

Clause 26 gives effect to Schedule 2, which contains consequential amendments to certain Acts.

Clause 27 gives effect to Schedule 3, which contains provisions of a savings and transitional nature consequent on the enactment of the *Corporations (Consequential Amendments) Act 2001*.

Schedule 1 Table of corresponding references

This Schedule contains a table of reference translations for the purposes of clause 11.

Schedule 2 Amendment of Acts

Schedule 2.1 amends the *Companies (Application of Laws) Act 1981* consequentially on the proposed repeal by the Commonwealth of the laws underpinning the co-operative scheme laws.

Schedule 2.2 contains miscellaneous amendments to the *Corporations (New South Wales) Act 1990* that are:

- (a) consequential on the proposed repeal by the Commonwealth of the laws underpinning the national scheme laws, or
- (b) intended to ensure the continued effective operation of the national scheme laws to those matters to which those laws will still apply in light of the decision of the High Court in *The Queen v Hughes* (2000) 171 ALR 155, or
- (c) transitional on other amendments made by the proposed Act.

It also inserts a new Division 8 in Part 13 of the *Corporations (New South Wales) Act 1990* making it clear that Commonwealth authorities and officers are not under a duty to exercise functions conferred under the old corporations legislation and thus prevents challenges based on Hughes type arguments.

Schedule 2.3 amends the *Futures Industry (Application of Laws) Act 1986* consequentially on the proposed repeal by the Commonwealth of the laws underpinning the co-operative scheme laws.

Schedule 2.4 amends the *Jurisdiction of Courts (Cross-vesting) Act 1987* to exclude the operation of that Act from the circumstances regulated by the new Commonwealth legislation.

Schedule 2.5 amends the *Securities Industry (Application of Laws) Act 1981* consequentially on the proposed repeal by the Commonwealth of the laws underpinning the co-operative scheme laws.

Schedule 2.6 amends the *Subordinate Legislation Act 1989* to ensure that the provisions of that Act do not apply to regulations made under the proposed Act.

Schedule 3 Savings and transitional provisions consequent on enactment of Corporations (Consequential Amendments) Act 2001

This Schedule contains provisions of a savings and transitional nature consequent on the enactment of *Corporations (Consequential Amendments) Act 2001*.