

[Act 2001 No 1]



New South Wales

Corporations (Commonwealth Powers) Bill 2001

Explanatory note

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

Overview of Bill

The object of this Bill is to refer certain matters relating to corporations, corporate regulation and financial products and services to the Commonwealth Parliament, so as to enable the Commonwealth Parliament to make laws about those matters. The proposed Act will be enacted for the purposes of section 51 (xxxvii) of the Commonwealth Constitution, which enables State Parliaments to refer matters to the Commonwealth Parliament.

The Bill operates by reference to the text of the following proposed Commonwealth Bills tabled in the Legislative Assembly of New South Wales:

Corporations Bill 2001

Australian Securities and Investments Commission Bill 2001.

Background

The Commonwealth Constitution gives the Commonwealth Parliament limited powers to regulate corporations under section 51 (xx) of the Commonwealth Constitution. That provision allows the Commonwealth Parliament to legislate with respect to “foreign corporations, and trading or financial corporations formed within the limits of the Commonwealth”. The Commonwealth Parliament also has other legislative powers under the Commonwealth Constitution that assist it to regulate corporate activities, such as the interstate trade and commerce power (section 51 (i)), and the postal, telegraphic, telephonic, and other like services power (section 51 (v)).

However, the High Court has held that the Commonwealth’s constitutional powers do not extend to regulating aspects of a number of important commercial areas such as the incorporation of companies, certain activities of non-financial and non-trading corporations, and certain activities of unincorporated bodies that engage in commerce.

In contrast, the States have broad powers to regulate corporations and corporate activities (subject to the Commonwealth Constitution).

As a result of the restrictions on the powers of the Commonwealth Parliament, a national scheme of corporate regulation requires co-operation among the Commonwealth and the States and Territories. Several different schemes of co-operation have been implemented at different times since 1961.

The current scheme commenced on 1 January 1991. Under that scheme, the substantive law of corporate regulation (known as the *Corporations Law*) is contained in an Act of the Commonwealth enacted for the Australian Capital Territory and the Jervis Bay Territory (the *Capital Territory*). Laws of each State and the Northern Territory apply the Corporations Law of the Capital Territory (as in force for the time being) as a law of the State or the Northern Territory. The effect of this arrangement is that, although the Corporations Law operates as a single national law, it actually applies in each State and the Northern Territory as a law of that State or Territory, not as a law of the Commonwealth.

The Corporations Law is administered by a Commonwealth body, the Australian Securities and Investments Commission (*ASIC*) established by the *Australian Securities and Investments Commission Act 1989* of the Commonwealth (*ASIC Act*). Each State and the Northern Territory have passed legislation applying relevant provisions of the ASIC Act as a law of that jurisdiction (known as the *ASC Law* or *ASIC Law*).

Legislation of each State and the Northern Territory confers functions relating to the administration and enforcement of the Corporations Law on ASIC, the Commonwealth Director of Public Prosecutions and the Australian Federal Police. These bodies are responsible for the investigation and prosecution of offences under the Corporations Law.

As part of the Corporations Law scheme, the Commonwealth, the States and the Northern Territory established a regime of vesting and cross-vesting jurisdiction between the Federal Court and the State and Territory Supreme Courts. Under this arrangement, the Federal Court could exercise the jurisdiction of the State Courts, and the State Courts could exercise the jurisdiction of the Federal Court.

The Corporations Law scheme is underpinned by an intergovernmental agreement (the *Corporations Agreement*), to which the Commonwealth, all the States and the Northern Territory are parties. The Agreement establishes a process for amending the Corporations Law by which any changes proposed by the Commonwealth to the core company law aspects of the Corporations Law require approval from the Ministerial Council for Corporations.

High Court decisions affecting the Corporations Law

Recent decisions of the High Court have cast doubt on the constitutional validity of important elements of the Corporations Law scheme.

In *Re Wakim; Ex parte McNally* (1999) 163 ALR 270, the High Court held that State jurisdiction could not be conferred on federal courts. The High Court decided that the Commonwealth Constitution permits jurisdiction to be conferred on federal courts in matters arising under laws made by the Commonwealth Parliament only, and not under laws made by State Parliaments. As a result, only State courts can exercise jurisdiction in Corporations Law matters that arise under State laws. Territory courts continue to exercise jurisdiction in Corporations Law matters that arise under Territory law.

In *The Queen v Hughes* (2000) 171 ALR 155, the High Court indicated that, where a State gave a Commonwealth authority or officer a power to undertake a function under State law together with a duty to exercise the function, there must be a clear nexus between the exercise of the function and one or more of the legislative powers of the Commonwealth set out in the Commonwealth Constitution.

If this view prevails, the Commonwealth would not be able to authorise its authorities or officers to undertake a function under State law involving the performance of a duty (particularly a function having potential to adversely affect the rights of individuals) unless the function could be supported by a head of Commonwealth legislative power.

Although the Court found that the particular exercise of the prosecution function by the Commonwealth Director of Public Prosecutions in question in *Hughes* was valid, it made no finding about the validity of the conferral of the prosecution function generally, or of other functions under the Corporations Law scheme.

The reference of Corporations Law matters to the Commonwealth

The effect of *Wakim*, *Hughes* and other cases has been to create uncertainty and inefficiency in the regulation of a wide range of corporate and commercial activities. In order to overcome these perceived constitutional gaps in the Corporations Law scheme, the States have agreed with the Commonwealth that the States will in effect refer the Corporations Law to the Commonwealth Parliament as a matter about which the Commonwealth Parliament has power to legislate.

This is made possible by section 51 (xxxvii) of the Commonwealth Constitution, which gives the Commonwealth Parliament the power to legislate with respect to “matters referred to the Parliament of the Commonwealth by the Parliament or Parliaments of any State or States”. A Commonwealth law made with respect to a referred matter only extends to States by whose Parliaments the matter is referred, or which afterwards adopt the law.

The overall effect of the proposed State, Territory and Commonwealth Bills is that the Corporations Law will be re-enacted as a law of the Commonwealth, rather than as laws of the Commonwealth, the States and the Northern Territory. There will therefore be no barrier to Commonwealth legislation incorporating companies, or conferring jurisdiction with respect to the Corporations Law on the Federal Court, or conferring functions and powers with respect to Corporations legislation on Commonwealth authorities and officers.

The Bill operates by reference to the proposed Commonwealth Bills mentioned above in the Overview. They are defined collectively in the Bill as the *tabled text*, and when enacted will be defined collectively as the *Corporations legislation*.

Because the Commonwealth Bills contain matters that are not within the legislative competence of any of the States or of any one of the States, the Bill contains a definition of *referred provisions*, which means the tabled text to the extent to which that text deals with matters that are included in the legislative powers of the Parliament of the State.

The Bill makes two references of matters to the Commonwealth Parliament:

- (a) The first reference (the *initial reference*) is of the matters to which the “referred provisions” relate, but only to the extent of the making of laws with respect to those matters by including the referred provisions in Acts enacted in the terms, or substantially in the terms, of the “tabled text”. This ensures that the text of the new Commonwealth Acts will be substantially the same as

the existing Corporations Law and ASIC Law, together with changes preserving the operation of other State and Territory laws and changes consequential on the Corporations Law and ASIC Law becoming Commonwealth Acts.

- (b) The second reference (the *amendment reference*) is of the matters of the formation of corporations, corporate regulation and the regulation of financial products and services, but only to the extent of making “express amendments” to the proposed Corporations legislation. The expression *express amendment* is defined as the direct amendment of the text of the Corporations legislation, but as not including enactment of a provision having substantive effect otherwise than as part of the text of the Corporations legislation. This ensures that the matters covered by the second reference cannot be the source of power for other Commonwealth legislation.

The amendment reference is intended to enable the Commonwealth Parliament to amend all aspects of the tabled text from time to time, including by way of enacting legislation dealing with the matters dealt with in the draft *Financial Services Reform Bill* released for public comment by the Commonwealth Minister for Financial Services and Regulation on 11 February 2000. The Bill contains an objects clause to the effect that the Bill is not intended to enable the making of a law pursuant to the amendment reference with the sole or main underlying purpose or object of regulating industrial relations matters.

The Bill makes it clear that instruments affecting the operation of the Corporations legislation will be able to be made under that legislation, but not instruments making express amendments to that legislation.

It is intended that the Corporations Agreement will ensure that future amendments to the Corporations legislation are made by the Commonwealth after examination by the Ministerial Council for Corporations. If the Commonwealth Parliament makes amendments to the Corporations legislation that do not comply with the Corporations Agreement, a State could respond by terminating its references.

The references relate only to matters that are within the legislative powers of the State and are not within the legislative powers of the Commonwealth. That is, the Bill does not refer matters with respect to which the Commonwealth Parliament already has power to legislate. Substantial parts of the Corporations Law could currently be enacted by the Commonwealth Parliament relying on the existing heads of power in the Commonwealth Constitution. These parts of the proposed Corporations legislation will be supported by those heads of power, not by the referred matters, though future amendments in this area are intended to be the subject of provisions in the Corporations Agreement. At the same time, the specific

limitation of the references to matters that are within the legislative powers of the State gives recognition to the fact that certain matters simply cannot be referred by the State, particularly as determined by *Wakim*.

Termination of references

The Bill provides that the references can terminate in one of two ways:

- (a) The references will terminate 5 years after the proposed Corporations legislation commences. However, the Governor can extend the date of termination by a proclamation before the references would terminate.
- (b) The Governor may proclaim that the references terminate on an earlier day, or that the amendment reference terminates on an earlier day. The earlier day must be at least 6 months after the date of publication of the proclamation.

The Bill provides that early termination of the amendment reference does not affect the Corporations legislation as then in force.

Effect of references on State and Territory legislation

The proposed Corporations legislation contains provisions that will allow the continued operation of State and Territory laws that may otherwise be affected by the federalisation of the Corporations Law (such as legislation dealing with co-operatives and incorporated associations). The Corporations legislation will be wound back to avoid conflicts with State or Territory laws. Regulations may also be made under the Corporations legislation modifying its operation so that no inconsistency arises between it and the operation of a State or Territory law specified in the regulations.

Outline of provisions

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

Clause 1 (3) provides that nothing in the proposed Act is intended to enable the making of a law pursuant to the amendment reference with the sole or a main underlying purpose or object of regulating industrial relations matters.

Clause 2 provides for the commencement of the proposed Act by proclamation.

Clause 3 defines certain words and expressions used in the proposed Act.

Clause 4 deals with the references described in the Overview. Clause 4 (1) makes the references.

Clause 4 (1) (a) in effect refers the text of the current Corporations Law (with appropriate amendments) to the Commonwealth Parliament, and provides for the inclusion of the referred provisions in Acts enacted in the terms, or substantially in the terms, of the tabled text (ie the text of the *Corporations Bill 2001* and the *Australian Securities and Investments Commission Bill 2001*). The expression “substantially in the terms” of the tabled text will enable minor adjustments to be made to the tabled text.

Clause 4 (1) (b) in effect refers matters to the Commonwealth Parliament in connection with the future amendment of the Corporations legislation.

Clause 4 (2) makes it clear that the reference of a matter has effect only to the extent that the matter is not otherwise within the legislative power of the Commonwealth Parliament and to the extent that the matter is within the legislative power of the State Parliament.

Clause 4 (3) removes a possible argument that one of the references might be limited by the other.

Clause 4 (4) makes it clear that the State Parliament envisages that the Corporations legislation can be amended or affected by Commonwealth legislation enacted in reliance on other powers (though this may be the subject of provisions in the Corporations Agreement), that instruments under the Corporations legislation may affect the operation of that legislation otherwise than by express amendment, and that the references are not subject to any condition relating to either of those matters.

Clause 4 (5) specifies the period during which a reference has effect.

Clause 5 provides that the references terminate on the fifth anniversary of the commencement of the proposed Corporations legislation, unless a proclamation is made that fixes an earlier or a later date of termination. Clause 5 (4) makes it clear that the separate termination of the amendment reference does not affect laws already in place or the making of instruments under laws already in place.

Clause 6 empowers the making of one or more proclamations to extend the term of the references.

Clause 7 empowers the making of one or more proclamations to reduce the term of the references. Such a proclamation must be published at least six months in advance of the date of termination.

Clause 8 provides for the accuracy of a copy of the tabled text containing the proposed Corporations legislation to be certified by the Clerk of the Legislative Assembly of New South Wales. Such a certificate is evidence of the accuracy of the tabled text and that the text was in fact tabled as contemplated by the Bill.

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Clause 9 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 Bill from affecting the operation of that Act.