

[Act 2001 No 33]



New South Wales

Corporations (Administrative Actions) Bill 2001

Explanatory note

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

This Bill is cognate with the *Corporations (Ancillary Provisions) Bill 2001*.

Overview of Bill

The object of this Bill is to give validity to certain potentially invalid administrative actions taken before the commencement of the proposed Act by Commonwealth authorities or officers acting under powers or functions conferred on them by laws of the State relating to corporations.

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 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.

The High Court decision in Hughes

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 decision in *Hughes* may have implications for the validity of a range of administrative actions taken by Commonwealth authorities and officers under the Corporations Law scheme (the *current scheme*) and the previous co-operative scheme (the *previous scheme*). A number of Commonwealth authorities have functions and powers under the current scheme, including ASIC and the Commonwealth Director of Public Prosecutions. Commonwealth authorities, most notably the National Companies and Securities Commission (NCSC), had functions and powers under the previous scheme. Much of the work of the NCSC was carried out by State and Territory authorities as delegates of the NCSC, and the Bill applies to actions of those delegates on the basis that the actions of a delegate are treated as actions of the principal. Since the commencement of the Corporations Law, Commonwealth authorities have continued to carry out functions under the previous scheme, including ASIC and the Commonwealth Director of Public Prosecutions.

Many or all actions by these Commonwealth authorities are likely to be valid, because they could be supported by the Commonwealth's legislative powers. However, the validity of each action can only be determined on a case by case basis, having regard to the particular circumstances of each action.

Giving validity to Commonwealth administrative actions

The Bill provides that every invalid administrative action taken under the current or previous scheme has (and is deemed always to have had) the same force and effect as it would have had if it had been taken by a State authority or officer of the State on which or whom the relevant function or power had been conferred.

This provision overcomes any doubts about the validity of administrative actions by Commonwealth authorities or officers under the current and previous schemes. Other jurisdictions propose to introduce similar legislation to achieve a uniform effect.

The Bill preserves rights and liabilities potentially affected by invalid administrative actions, and specifically confirms the validity of the registration or incorporation of companies under the current and previous schemes.

The Bill applies to administrative actions taken before the commencement of the proposed Corporations legislation. The validity of future actions by Commonwealth authorities and officers will be assured by the reference of matters to the Commonwealth Parliament by the *Corporations (Commonwealth Powers) Bill* proposed to be enacted by each State. The NSW *Corporations (Commonwealth Powers) Bill* has been enacted and commenced on 4 April 2001 and the new Corporations legislation of the Commonwealth has been introduced into the Commonwealth Parliament in reliance on that reference of powers.

Outline of provisions

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

Clause 2 provides for the commencement of the proposed Act immediately before the proposed new Corporations legislation of the Commonwealth comes into operation.

Clause 3 defines certain words and expressions used in the proposed Act. The expression *invalid administrative action* is defined as an administrative action that was taken before the commencement of the proposed Act by a Commonwealth authority or officer pursuant to a function or power conferred under the current or previous scheme (the *relevant function* or *power*), and that is invalid because its conferral on the Commonwealth authority or officer is not supported by a head of power in the Commonwealth Constitution.

Clause 4 deals with the application and operation of the proposed Act. Clause 4 (1) provides that the proposed Act binds the Crown. Clause 4 (2) 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. Clause 4 (3) provides that the proposed Act extends to affect

Explanatory note

rights and liabilities that are or have been the subject of legal proceedings. Clause 4 (4) provides that the proposed Act does not affect rights and liabilities arising between parties to legal proceedings heard and finally determined before the commencement of the proposed Act to the extent to which they arise from, or are affected by, an invalid administrative action.

Clause 5 provides that every invalid administrative action has (and is deemed always to have had) the same force and effect as it would have had if it had been taken by a duly authorised State authority or officer of the State. The clause does not in terms validate administrative actions taken by Commonwealth authorities and officers, but rather attaches to the actions retrospectively the same force and effect as would have ensued had the actions been taken by State authorities and officers (a similar distinction was drawn in *The Queen v Humby, Ex parte Rooney* (1973) 129 CLR 231).

Clause 6 complements clause 5 and does not affect the generality of clause 5. The clause declares that the rights and liabilities of all persons are (and always have been) for all purposes the same as if every invalid administrative action had been taken by a duly authorised State authority or officer of the State.

Clause 7 complements clauses 5 and 6 and does not affect the generality of those clauses. The clause specifically declares that clauses 5 and 6 extend to the registration or incorporation of companies. The formation of corporations was held by the High Court in *The State of New South Wales v The Commonwealth of Australia* (1990) 169 CLR 482 to lie outside the legislative competence of the Commonwealth Parliament.

Clause 8 ensures that the proposed Act does not reinstate administrative actions that, since the action was taken, have been affected by another action or process. For example, if a decision has been altered on review, the proposed Act does not reinstate the decision in its original form. The Bill applies to the decision as it is affected by later actions from time to time.

Clause 9 provides that it is immaterial for the purposes of the proposed Act that a Commonwealth authority or officer does not have a counterpart in the State, or that the powers and functions of State authorities or officers do not correspond to the powers and functions of Commonwealth authorities or officers.

Clause 10 provides that the proposed Act does not give rise to any liability against the State.