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# Corporations Bill 2001

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# Corporations Bill 2001

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Law and Bills Digest Group
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# Contents

# Corporations Bill 2001

**Date Introduced:** 4 April 2000

**House:** House of Representatives

**Portfolio:** Treasury

**Commencement:** The Act will commence on a day fixed by Proclamation. While the Government has indicated that the States will be given the opportunity to enact referral legislation, it is intended that the new regime will come into effect on 1 July 2001.

## Purpose

To remedy deficiencies in the framework of corporate regulation revealed by the High Court decisions in the cases of *Re Wakim; ex parte McNally*[1] and *The Queen v Hughes*[2].This Bill substantially re-enacts the existing Corporations Law of the ACT as a Commonwealth Act applying throughout Australia. The Commonwealth has been referred the constitutional power to enact this legislation by the Parliaments of New South Wales and Victoria. The other states are expected to soon follow suit.

## Background

### Brief History of Corporate Regulation

#### The Corporations Power

In order to understand the issues arising out of the recent High Court decisions it is necessary to briefly discuss the history of corporate regulation in Australia.

The Commonwealth's power to legislate in relation to corporations is not plenary. Section 51(xx) of the Constitution empowers the Commonwealth Parliament:

> To make laws for the peace, order and good government of the Commonwealth with respect to ... foreign corporations, and trading or financial corporations formed within the limits of the Commonwealth.

In *New South Wales v. The Commonwealth*[3] (the incorporations case) the High Court held that section 51(xx) relates only to 'formed corporations' and that as a consequence it was

constitutionally invalid for the Commonwealth to rely on the section to legislate in respect of the incorporation of companies.[4]

In addition, the power relates only to 'foreign', 'trading' or 'financial' corporations. The issue of determining whether a particular entity is a trading or financial corporation 'is very much a question of fact and degree'.[5] The High Court has held that it is the nature of an entity's *activities* that determines whether it is a trading or financial corporation.[6] Trading or financial activities must be 'substantial',[7] 'significant' [8] or 'not insubstantial'.[9]

Finally, it is unclear what aspects of a corporation's affairs the Commonwealth may regulate in reliance on 51(xx). In *Strickland v Rocla Concrete Pipes*[10] the High Court established that the corporations power extends at least as far as to permit the Commonwealth to regulate the *trading* activities of trading corporations. The broad view is that section 51(xx) extends to allow the Commonwealth to regulate all the activities of constitutional corporations.[11] At its most extreme, the narrow view is that the law must relate to the trading character of the corporation.[12] In the most recent High Court case on the scope of section 51(xx), three members of the Court held that a law is valid at least where it was 'expressed to operate on, or by reference to, the business functions, activities or relationships' of corporations.[13]

As a consequence of these limitations, the Commonwealth has not been able to use the corporations power to comprehensively regulate corporations.[14]

### The movement toward a uniform law

Prior to Federation, all the colonies had legislation based on the English Companies Act of 1862.[15] Despite the common origins in the English statute however, variations in the legislation developed around the country and it was not until the late 1950s that a momentum towards a uniform company law began to build. Key developments included:

- the passage in 1961 and 1962 of a uniform Companies Act based upon the Victorian legislation by the States and the Commonwealth (for the ACT, NT and PNG). However, in subsequent years the various jurisdictions did not co-ordinate amendments
- the recommendation by the Senate Select Committee on Securities and Exchange (the Rae Committee) in 1974 for the establishment of a Commonwealth regulatory body with responsibility for the securities industry
- the signing of the Interstate Corporate Affairs Agreement in 1974 by NSW, Victoria and Queensland. The participating states amended their companies legislation to ensure a large degree of uniformity, and
- the establishment of the co-operative scheme in 1978. Under this scheme the Commonwealth Parliament enacted companies and securities legislation applying in the ACT and the States passed legislation giving effect to the Commonwealth law in their jurisdictions. The Commonwealth also established the National Companies and

Securities Commission to oversee and co-ordinate the scheme. While the scheme delivered uniformity of text, in practice, the enforcement and administration of the scheme was not uniform as this was the function of the 8 state and territory corporate affairs commissions.

### The Current Corporations Law Scheme

In 1989 the Commonwealth passed legislation to establish a national scheme of companies and securities regulation based upon the corporations power. However, as noted above, the High Court struck down provisions of the legislation that related to the incorporation of companies. The Commonwealth then began negotiations with the States and Northern Territory to salvage the scheme. In June 1990, an agreement (the Alice Springs Agreement) was reached under which the Commonwealth's legislation was to be amended to apply as a law of the ACT. The Commonwealth was able to enact a comprehensive corporations law for the ACT by relying on the territories power in section 122 of the Constitution. The States and the Northern Territory agreed to enact application legislation adopting the law of the ACT as amended from time to time as the Corporations Law of their jurisdiction. The Alice Springs Agreement has since been superseded by a new Corporations Agreement signed in 1997.

The Corporations Law is contained in section 82 of the *Corporations Act 1989* (Cth). Under the national scheme, each State and the Northern Territory also has a uniform Corporations Act which applies the national Corporations Law in each of those jurisdictions. In a significant departure from the previous co-operative scheme State legislation also empowers the Australian Securities and Investments Commission (ASIC), a Commonwealth statutory body, to enforce the State Corporations Law.

## Cross-Vesting and *Re Wakim*

Cross-vesting is a term used to describe legislative arrangements which allow Federal, State and Territory courts to exercise each other's jurisdiction and which provide for transfers and removals to ensure that cases are heard in the appropriate court.

The general cross-vesting scheme was established by the *Jurisdiction of Courts (Cross-Vesting) Act 1987* (Cth) and by reciprocal legislation in the States and Territories. In introducing the legislation, the then Attorney-General, Mr Bowen, outlined the justification for the scheme in the following terms:

> The reasons for the proposed scheme are that litigants have occasionally experienced inconvenience and have been put to unnecessary expense as a result of, firstly, uncertainties as to the jurisdictional limits of Federal, State and Territory courts, particularly in the areas of trade practices and family law; and, secondly, the lack of power in these courts to ensure that proceedings which are instituted in different courts, but which ought to be tried together, are tried in the one court. Jurisdictional difficulties do the law and the community no good. They result in litigants with a

> genuine dispute requiring judicial determination being faced with the anguish, delay and additional expense which flow from the sterile and pointless need to search for a court, or courts, with jurisdiction to resolve the dispute.[16]

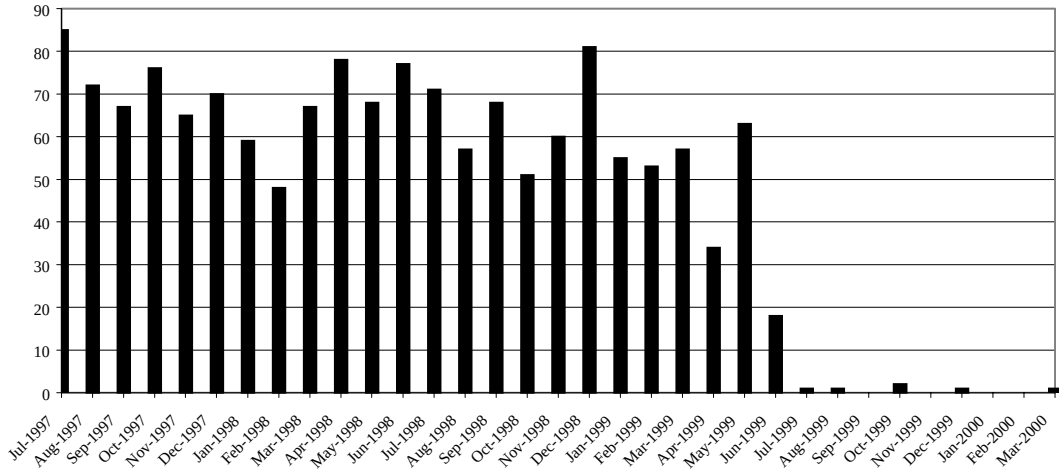
Prior to *Re Wakim*, the effect of the legislation was that, generally speaking, a litigant was able to institute a civil action[17] in any superior court in Australia. The matter could then be transferred to another court if it was deemed appropriate. The success of the scheme led to the establishment of separate cross-vesting schemes to deal with particular areas of the law. The Corporations Law scheme was established in 1991.

The High Court decision known as *Re Wakim* actually involved four proceedings. Two cases concerned litigation before the Federal Court alleging negligence at common law, another case involved a winding up application under the Corporations Law (NSW) and the other a liquidation order under the Corporations Law (ACT). All cases concerned the issue of whether federal courts (such as the Federal Court and the Family Court) could exercise jurisdiction conferred by State or Territory legislation.

On 17 June 1999, the High Court ruled that cross-vesting was invalid to the extent that it purported to invest federal courts with State jurisdiction. By a majority of six to one[18], the High Court ruled that the Constitution, in sections 75, 76, and 77, exhaustively sets out the matters that a federal court can deal with and that the States cannot confer additional jurisdiction even with the consent of the Commonwealth.[19] The cross-vesting schemes were valid to the extent that they conferred jurisdiction on Federal Courts on matters arising under the laws of the Territory. There is nothing in the High Court's decision that prevents the Commonwealth from conferring its jurisdiction on States courts. In fact, section 77(iii) of the Constitution expressly authorises such an action.

As a consequence of the decision the Federal Court can generally (unless the Court has accrued jurisdiction[20]) no longer hear matters arising under the state Corporations Acts. The expertise built up by the Federal Court judges in Corporations Law matters is presently lost to the community. In addition, cases commenced in the Federal Court have had to be recommenced in the State Supreme Courts resulting in increased costs and inconvenience for litigants and an increased workload for the State Supreme Courts. The chart below gives an indication of the volume of Corporations Law work that has been lost by the Federal Court.

**Corporations Law Cases Filed in the Federal Court**




Source: The Hon. Daryl Williams, House of Representatives, *Hansard* 30/5/2000 p. 15619.[21]

In order to address the implications of *Wakim*, all States have passed remedial legislation in the form of the *Federal Courts (State Jurisdiction) Act 1999*. This legislation has two principal elements: firstly, it provides that parties to 'ineffective' judgements of federal courts (that is judgements made on the basis of jurisdiction purported to be vested by the States) have the same rights as if those judgements were judgements of the State Supreme Court. Secondly, it provides for State matters commenced in a federal court and part heard to be transferred to the State Supreme Court.

This legislation itself has been subject to challenge but was recently upheld by the High Court in *Re Macks; Ex parte Saint*[22]. The Commonwealth also enacted the *Jurisdiction of Courts Legislation Amendment Act 2000* which amongst other things:

- provides, in relation to the Corporations Law and certain other co-operative schemes, for the vesting of jurisdiction in, and the transfer of proceedings between, State, Territory and federal courts, within constitutional limits
- provides generally for the cross-vesting of certain proceedings involving decisions by Commonwealth officials under State law, and
- preserves the Federal Court's exclusive jurisdiction in relation to proceedings under the Competition Codes and the Price Exploitation Codes of the Territories (but not the State Codes).[23]

This remedial legislation did not generally restore the jurisdiction of the Federal Court in Corporations Law matters.

### *The Queen v Hughes*

While *Wakim* was concerned with the ability of federal courts to exercise jurisdiction conferred by the States, *Hughes* was principally concerned with the capacity of the Commonwealth to accept powers and functions conferred on its officers and authorities (such as the Director Public Prosecutions or the Australian Securities and Investments Commission) by State Parliaments.

In 1997 Mr Hughes and another person were indicted by the Commonwealth Director of Public Prosecutions (CDPP) for offering prescribed interests contrary to the Corporations Law of Western Australia. In 1999 the accused applied to quash the indictment, arguing amongst other things that the CDPP had no authority under either Commonwealth or State law to prosecute in relation to the alleged offences.

In a unanimous decision[24], the Court in May 2000 rejected the accused's contentions. The decision was however narrowly based and fuelled concerns about the continued viability of the Corporations Law scheme and national schemes that similarly involve Commonwealth officers and authorities performing functions conferred under State law such as the Competition Code and the Price Exploitation Code.

The Court examined whether the Commonwealth had power to authorise the CDPP to perform functions conferred by State law. The Corporations Act (Cth) and regulations contain consent provisions that permit Commonwealth officers to exercise functions and powers conferred on them by the corresponding State law (ie State Corporations Acts).

The Court observed that a State could not unilaterally invest functions in officers of the Commonwealth. A State law that purported to grant a wider power or authority than the acceptance of which was prescribed by Commonwealth law would, to that extent, be inconsistent with the Commonwealth law and invalid under section 109 of the Constitution. There is also a risk that it would violate a constitutional immunity from State laws enjoyed by the Commonwealth.

If a State law confers functions on a Commonwealth entity then a Commonwealth law may *permit* it to exercise those functions, by relying on what is called the 'incidental power'.[25] However in the *Hughes* case the Court held that the Commonwealth law effectively imposes a *duty* on the Commonwealth DPP to exercise States functions and powers under the corporations scheme.[26] In such circumstances the Court emphasised that a Commonwealth law which accepts the conferral of functions by a State must be based on a head of power under the Constitution. In this case the Court found that the trade and commerce power (section 51(i)) and the external affairs power (section 51(xxix)) supported Commonwealth legislation accepting these functions. This was because the offences with which Mr Hughes was charged related to the making of investments in the United States.[27]

Without deciding the issue, the joint judgement also stated that there were a number of other possible constitutional bases for the Commonwealth legislation in this case, including the incidental power and executive power (section 51(xxxix) and section 61)), the corporations

power (section 51(xx)) and the banking power in (section 51(xiii)). The Court held that the corporations power would support Commonwealth enforcement of 'perhaps the very great majority of offences created by the State legislation which adopts the (Corporations) Law.[28]

It would seem from the comments of the joint judgment that the corporations power will provide the necessary nexus to a source of Commonwealth power for most Corporations Law offences. Academic commentary has noted however that the corporations power would probably not sustain Commonwealth prosecution of offences involving incorporation of companies or managed investments.[29]

The Court's discussion on the scope the executive power and incidental power is significant because in some schemes this may be the best hope of securing validity.

The incidental power enables the Commonwealth, amongst other things, to legislate in aid of the executive power in section 61. The joint judgement cited with approval the comments of Mason J in *R v Duncan*[30] that the executive power in section 61 includes the 'entry into governmental agreements between Commonwealth and State on matters of joint interest, including matters which require for their implementation joint legislative action'. The Court noted (without deciding) that the incidental power *may* facilitate the implementation of the Alice Springs Agreement that the Commonwealth should be responsible for the enforcement of the Corporations Law.

Their Honours made clear however that the scope of this power is limited:

> It is plain enough that s 51(xxxix) empowers the Parliament to legislate in aid of an exercise of the executive power. However, it would be another matter to conclude that this means that the Parliament may legislate in aid of any subject which the Executive Government regards as of national interest and concern, … the scope of the executive power, and of s 51(xxxix) in aid of it, remains open to some debate and this is not a suitable occasion to continue it.[31]

*Hughes* stands for the proposition that in enacting legislation accepting the conferral of powers by State law on a Commonwealth Officer or agency, the Commonwealth law must be supported by an appropriate head of power at least where, as in this case, the Commonwealth law goes as far as imposing a duty on the Commonwealth officer to exercise the power.[32]

### Implications of *Hughes* for the Corporations Law

As previously stated, the incorporations case established that the Commonwealth's corporations power does not extend to allow it to make laws with respect to the incorporation of companies. A case is now before the High Court which challenges the capacity of ASIC to incorporate companies arguing on *Hughes* grounds[33] that such activity by ASIC cannot be supported by a head of Commonwealth power.

In Queensland, GPS First Mortgage Securities Pty Ltd brought a bankruptcy petition against a Mr Damian Michael Lynch. Mr Lynch has challenged the petition on a number of grounds including that GPS was not properly incorporated. An application to have the matter

removed to the High Court to deal with the constitutional issue was heard in June 2000. The matter has been removed and is due to be heard this year.[34] The implications of a successful claim by Mr Lynch are substantial. A senior official in the Attorney-General's Department has noted that 'if the High Court finds ASIC's function of incorporations under the Corporations Law scheme to be unconstitutional, approximately 660,000 companies incorporated by ASIC under the State Corporations law since 1991 would essentially not exist'.[35]

Prospectuses are already referring to uncertainty caused by the High Court decisions. The recently privatised Western Australian company AlintaGas was forced to add a disclaimer stating:

> 'There is a risk that if the High Court (were) to hold that the incorporation of a company by the Australian Securities and Investments Commission was invalid then AlintaGas and each of its subsidiaries would not have been validly incorporated. This would mean that they lacked the legal capacity to enter into any transactions.'[36]

The uncertainty surrounding the viability of the Corporations Law also delayed the introduction of the proposed Financial Services Reform Bill 2000.[37]

### Implications for other Co-operative Schemes

The decision in Hughes has implications for other co-operative schemes where the power to enforce a uniform State law is vested in a Commonwealth regulatory agency. Most commentators have focused on the implications of the decision for the corporations law however there are many examples of arrangements where the Federal Parliament has purported to consent to Commonwealth officers exercising functions and powers conferred by the States. In *Hughes,* Justice Kirby provides a long list of such legislation in a footnote to his judgement.[38]

## Options for dealing with the Problem

### Unilateral Commonwealth legislation

The High Court ruled in the incorporations case that the corporations power does not extend so far as to allow the Commonwealth to legislate in relation to the incorporation of companies. It has been observed that the commonwealth's capacity in a number of areas of corporations and securities regulation remains untested. These areas include the regulation of: futures contracts with respect to commodities and currencies; investment advisers; and managed investments.[39]

A corporations law based solely on the Commonwealth power would therefore not be as comprehensive as the current legislation. It is also likely that the legislation would be subject to challenges as litigants explored the scope of section 51(xx).

The Government has pointed out that the States would also lose out under a unilateral Commonwealth law. States are currently consulted on all corporations law changes and have voting rights in relation to certain proposed amendments. In addition, the States receive payment under the Corporations Agreement. Last year these payments amounted to $135 million.[40]

### Await the outcome of future cases

Given the comments of the joint judgement in *Hughes* that there are various heads of power which *may* support the enforcement of State Corporations Law by a Commonwealth agency, one option open to the Government was to wait for further High Court decisions to clarify whether remedial measures are required.

This 'wait and see' approach found some support following the High Court's decision in *ASIC v Edensor Nominees*[41]. The case followed from a decision of the Full Federal Court that it had no power to grant the declarations and injunctions sought by ASIC under the Victorian Corporations Law because of the *Wakim* decision. The Court held that the Federal Court had jurisdiction because ASIC was the moving party. The High Court stated that ASIC was 'the Commonwealth' for the purposes of the Constitution and the *Judiciary Act 1903* and that because the Commonwealth was a party the Federal Court was exercising federal jurisdiction when ASIC sought relief. In addition, section 79 of the Judiciary Act operated to apply the Corporations Law of a State in proceedings brought by ASIC.in the Federal Court.[42]

ASIC welcomed the decision as it confirmed the Commission's capacity to seek remedial orders such as injunctions and declarations in the Federal Court. The Commission acknowledged however that there were still gaps in the jurisdiction of the Federal Court. For example, it seems that the Federal Court would not have jurisdiction to deal with an application by ASIC to wind up an insolvent company.[43]

In the view of the Government and most commentators, acceptance of this option would result in a lengthy period of uncertainty which could be damaging for business and investment.

### A referendum

The inconvenience and anomalies caused by the High Court's *Wakim* decision invalidating the vesting of State jurisdiction in federal courts could be overcome by a constitutional referendum. In 1988, the Constitutional Commission acknowledged the risk that cross-vesting legislation could be found to be invalid. To deal with this possibility, in its Final Report the Constitutional Commission advocated the insertion of the following amendment:

> 77A The Parliament of a State or the legislature of a Territory may, with the consent of the Parliament of the Commonwealth, make laws conferring jurisdiction on a

> federal court in respect of matters arising under the law of a State or Territory, including common law in force in that State or Territory.[44]

The nature of a referendum to fix the problems caused by *Hughes* is not so clear. A referendum to strengthen the Commonwealth's corporations powers (for example by including the power to legislate in relation to incorporation) would address the Corporations Law problem but not the implications of the decision for other co-operative schemes. An alternative may be an amendment to section 51 of the Constitution allowing the Commonwealth to legislate to consent to its officers or authorities exercising functions or powers conferred by State Parliaments.[45]

Although the Commonwealth has not ruled out the option of a referendum at some stage, it is not the preferred option at present principally because of considerations of cost and pessimism about the prospects of Constitutional amendment. The Australian Electoral Commission has estimated that the cost of holding a referendum at the same time as a House of Representatives and half Senate election would be $20.5 million. The Attorney-General has also expressed doubts about the prospects for a successful referendum given that only 8 out of 44 proposals have achieved the requisite majority in a majority of States.[46] Misgivings about the likelihood of constitutional reforms that would have the effect of increasing the powers of the Commonwealth would seem to be well based. History shows that referenda that would have expanded the Commonwealth's power over corporations have failed in 1911, 1913, 1919, 1926, 1944 and 1946.[47]

One commentator however has expressed the view that a referendum is the only long term solution to the problems identified by the High Court in *Wakim* and *Hughes*.[48] This argument is principally based on the fact that the decisions put at risk a wide range of Commonwealth-State co-operative schemes not just the Corporations Law.[49] According to Dr Williams:

> 'The High Court's approach suggests that the Constitution no longer provides an appropriate platform for co-operative federalism in Australia…[t]he referral package is only a short term solution to this structural problem and only in the field of Corporations Law.'

### A Referral

The Commonwealth's preferred option to address the Corporations Law implications of *Wakim* and *Hughes* is to secure a referral of powers from the States under section 51(xxxvii) of the Constitution. The Government argues that this option has several advantages, namely that it:

- can be achieved relatively quickly
- will provide certainty and restore confidence
- will avoid the complexity of the current scheme

- will enable the continued involvement of the States under a new Corporations Agreement, and
- will enable all the corporate law jurisdiction of the Federal Court to be restored.[50]

### The Nature of the Referral Power

Section 51(xxxvii) of the Constitution provides that the Commonwealth Parliament may make laws with respect to:-

> Matters referred to the Parliament of the Commonwealth by the Parliament or Parliaments of any State or States, but so that the law shall extend only to States by whose Parliaments the matter is referred, or which afterwards adopt the law.

The clause was held up by delegates to the Constitutional Conventions of the late 1890s as a mechanism to bring some flexibility to the Constitution.[51] This paragraph provides that State Parliaments can refer 'matters' to the Commonwealth Parliament and gives the Commonwealth power to pass laws about them. At least in theory, it makes the division of powers between the Commonwealth and the States quite flexible, by enabling them to change it by agreement between themselves. It is not necessary for all States to refer a matter to the Commonwealth. If only some States make a reference, the Commonwealth law can apply only in those States. Once the law is passed, it may be 'adopted' by the Parliaments of other States and so come into effect there as well.[52]

Over the course of last century, relatively little use has been made of the power. The States collectively passed 38 referral acts of which only 17 remain in force.[53] The most significant referrals currently in operation relate to the establishment of the Mutual Recognition Regime[54] where legislation was passed by all States and the referral by all States except Western Australia of their powers over guardianship, custody and access to and maintenance of ex-nuptial children to the Commonwealth. A complete list of the referral legislation is contained in the notes to the Australian Constitution. The proposed referral of power to restore uniform corporate regulation represents perhaps the most significant use of the reference power.

The Constitutional Commission of the 1980s concluded that uncertainty about the scope of the power had contributed to the unwillingness of the States to refer matters to the Commonwealth. Three key issues were identified namely:

- whether a State retains power to legislate on a matter which it has referred to the Commonwealth[55]
- whether a reference may be made subject to conditions as to its exercise or duration, and
- whether the referral can be revoked.

While the Commission concluded that 'judicial decisions seem fairly clearly to indicate that the answer to each of these questions is in the affirmative'[56] it supported a proposal to amend the Constitution to put the question beyond doubt.[57]

## The Road to Referral

On 25 August 2000 the Joint Standing Committee of Attorneys-General and the Ministerial Council for Corporations reached an agreement to refer the substance of the corporations law scheme and the powers to enable ASIC to administer and enforce the scheme. It was also agreed that the referral would include a power to amend the scheme. The process of amending the law was left to be fleshed out in a new corporations agreement. The Ministers agreed that the referral would terminate after 5 years, however it could be extended by proclamation. It was intended that the new framework for corporate regulation would be in place by January 2001.

Following that time two major obstacles arose that prevented the implementation of the agreement namely: a concern by the States that the referral would increase the Commonwealth's capacity to remodel its workplace relations legislation based on the corporations power; and State objections to the proposed amendment provisions.

### Industrial Relations

In an address to the National Press Club in March 1999, the Workplace Relations Minister first raised the prospect of basing workplace relations legislation primarily on the corporations power section 51(xx) of the Constitution rather than the arbitration power in section 51(xxxv).[58] The Minister argued that the proposal would simplify the system of workplace relations in Australia.[59]

The Government has made no policy decision to adopt the proposal but in October and November 2000 released public discussion papers which present the case for change. Both Labor and Coalition State governments have expressed concern that the workplace relations laws based on the corporations power would override State industrial relations laws.

One of the disadvantages of the proposal to switch the basis of workplace relations legislation to the corporations power is that a number of workers would drop out of the federal system because of limitations in the scope of that power, for example they may work in non-corporate organisations or in corporations that are not trading, financial or foreign corporations.[60] During negotiations for the referral of the corporations power, the States raised concern that the referral would allow the Commonwealth to plug some of the gaps in the scope of the corporations power thus making it more attractive for the Commonwealth to pursue a path that could eliminate or reduce the role of State industrial relations systems.

To address this concern the States insisted that the legislation contain provisions restricting the capacity of the Commonwealth to use the referred power to legislate on a range of workplace relations matters. The Commonwealth was prepared to give an undertaking that

the referred powers would not be used as the basis for workplace relations laws, in the Corporations Agreement but not in the referral legislation. The States were not satisfied that this represented a sufficient safeguard because undertakings between governments which are of a political nature are not justiciable.[61] In defending the Commonwealth's position the Attorney-General argued that:

> The States do not need a three page long section inserted in the Bill at the 11th hour in order to guarantee that the Commonwealth cannot use their referred power to regulate industrial relations.
>
> (Such a provision could) create great uncertainty and vastly increase the potential for legal challenges to the Bill by those who would thwart its operation or seek to challenge the actions of the Australian Securities and Investment Commission and the Director of Public Prosecutions. [62]

### Agreement on Referral

On 21 December 2000 the Commonwealth, NSW and Victoria reached an agreement to resolve the Corporations Law impasse.[63]

Under the deal the NSW and Victoria agreed to drop their demand that the referral Bill contain safeguards against the referred corporations powers being used as the basis for remodelled workplace relations legislation that may override state industrial relations systems. The Corporations Agreement will contain a provision stating that the referred powers are not to be used for the purposes of workplace relations laws. Such provisions are not enforceable. The objects clause of the referral legislation will also state that the referred powers are not to be used for this purpose. Objects clauses may be used by the courts as an aid to interpretation but are also not enforceable. The parties also agreed that no State will be able to unilaterally terminate the reference of power to amend the corporations legislation *and* remain in the scheme.[64]

### The Referral Act[65]

The NSW Parliament passed referral legislation in the form of the *Corporations (Commonwealth Powers) Act 2001* (the Referral Act) in March. The Victorian Parliament passed its referral legislation in May.

Section 1 of the Referral Act states that the purpose of the Act 'is to refer certain matters relating to corporations and financial products and services to the Parliament of the Commonwealth for the purposes of section 51(xxxvii) of the Constitution of the Commonwealth.' Reflecting State concerns that the reference could be used to allow the Commonwealth to expand the scope of its industrial relations legislation, subsection 1(3) provides that 'Nothing in this Act is 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 legislation actually makes two references. Firstly, the State refers to the Commonwealth the power to enact the 'tabled text' – that is the Corporations Bill 2001 (Cth) and the Australian Securities and Investments Commission Bill 2001 (Cth). In recognition of the fact that it is not within the legislative competence of the State to refer all the matters contained in those Bills the reference is limited to those matters that are included in the legislative competence of the State.[66]

The second reference is the amendment reference. Paragraph 4(1)(b) gives the Commonwealth Parliament the power to make express amendments to the Corporations Act or the ASIC Act in relation the formation of corporations, corporate regulation and the regulation of financial products and services.

The amendment procedure will be governed by the Corporations Agreement. The terms of this agreement are not yet available. Subsection 4(4) makes clear that the Commonwealth may amend the Corporations Legislation in reliance on its other powers under the Constitution. The explanatory memorandum to the Referral Act notes however that this issue may be dealt with in the Corporations Agreement [67]

The references last for five years but may be terminated earlier or may be extended by proclamation. The Governor of a State may fix an earlier day to terminate the references or the amendment reference only but that date must be at least six months after the proclamation. The amendment reference may be terminated before the initial reference. Subsection 5(4) states the termination of the amendment reference does not affect:

- laws that were made under the amendment reference before that termination but have not come into operation before the termination, or
- the continued operation in the State of the Corporations legislation as in operation immediately before that termination.

The NSW Premier noted that a critical feature of the Bill is that it allows the amendment reference to be terminated without terminating the initial reference of power to enact the tabled text. A State will remain a referring state if a State terminates the amendment reference and the amendment references of all the States terminate on the same day. This matter is not covered in the reference legislation but rather is to be included in the new Corporations Agreement. According to the Premier:

> 'The ability to terminate the amendment reference without terminating the initial reference or ceasing to be a referring State, including New South Wales with the means to ensure that the Commonwealth abides by both the spirit and the letter of the corporations agreement.'[68]

## The Corporations Agreement

The 1997 Corporations Agreement provides that the Commonwealth may not introduce a Bill repealing or amending a national scheme law or make a regulation without *consulting* the Ministerial Council on Corporations. However the Agreement also lists a range of matters where the Commonwealth may legislate *without the approval* of the Ministerial Council. Prominent amongst these matters are provisions relating to national markets (takeovers, securities, fundraising and futures). In relation to matters which are not specified, the *approval* of the Ministerial Council is required for amendments. Where the Ministerial Council votes on such provisions the Commonwealth has 4 votes and each of the States has one vote as does the Northern Territory. Thus the Commonwealth may amend the law with the support of just two other jurisdictions. Furthermore, the agreement provides that if a Bill amending the Corporations Law is itself amended in the Commonwealth Parliament, the Commonwealth must use its best endeavours to consult with the Ministerial Council however the approval of the Council is not required regardless of the subject matter of the amendment.

The new Corporations Agreement is an essential element to the package negotiated between the Commonwealth and the States. At the time of writing, the agreement had not yet been concluded and copies of the draft were not publicly available. It has been revealed however that:

- the Corporations Agreement will specifically prohibit the use of the referred powers for the purposes of regulating industrial relations, the environment or any other matter unanimously agreed on by the parties to the agreement as a prohibited matter
- three jurisdictions will be required to vote to approve amendments to the Corporations Law in areas where approval of the Ministerial Council is currently required (jurisdictions means States and the Northern Territory). At present the Commonwealth needs only the support of two other jurisdictions. The current voting arrangements are otherwise unchanged[69]
- the Corporations Agreement will provide that if four States vote to terminate the amendment reference (that is reference of the matter of amending the corporations legislation) all States will terminate the amendment reference,[70] and
- the new arrangements will be reviewed within three years.

## Other Bills

In order to implement the agreed solution to the corporations law, the Government has announced that 7 Bills will be required. The Australian Securities and Investments Commission Bill was introduced on 4 April 2001. The following Bills were introduced on the 24 May 2001.

- Corporations (Fees) Bill 2001
- Corporations (Securities Exchanges Levies) Bill 2001
- Corporations (Futures Organisations Levies) Bill 2001
- Corporations (National Guarantee Fund Levies) Bill 2001
- Corporations (Repeals, Consequentials and Transitionals) Bill 2001.

State legislation will also be enacted seeking to validate past actions which may be invalid as a result of the *Hughes* decision.[71]

## Main Provisions

The Bill aims to restore the regulatory regime for corporations to its pre-*Wakim* and *Hughes* status. The Explanatory Memorandum states that 'while the Bill corrects a number of anomalies and updates the drafting style, it does not involve substantive policy changes'.[72] Therefore this digest will not attempt to digest the substantive corporations law, rather the focus will be on the provisions of the Bill which establish the constitutional basis for the Act and affect its scope.

The constitutional basis for the legislation is set out in **clause 3**. That basis varies depending on location. The principal powers relied on are as follows:

- in the referring States the Act is based on the powers of the Commonwealth under section 51 of the Constitution and powers as a result of the referral legislation.
- in the ACT and the Northern Territory the Act is based on the territories power as well as the powers under section 51
- outside Australia, reliance is additionally made on the external affairs power (section 51(xxix), and
- where a State is not a referring State, the Act will still apply to the extent allowed by the Constitution.[73]

### What is a referring State?

**Clause 4** provides that a State is a referring State if the Parliament of the State has referred:

- the capacity to enact the 'initial' Corporations Act and the 'initial' ASIC Act[74] (this legislation is known as the 'tabled text' in the State Referral Acts), and

- the capacity to amend the Corporations Act and the ASIC Act in relation to the matters of the formation of corporations, corporate regulation and the regulation of financial products and services.

**Subclauses 4(6),(7),(8)** detail situations where a State ceases to be a referring State. A State ceases to be a referring State if it terminates the initial reference. States can remain referring states after terminating the amendment reference provided that:

- the termination is effected by the Governor of that State by fixing a termination date by proclamation
- the termination date is at least 6 months after the proclamation date, and
- the State's amendment reference and that of every other State terminates on the same day.

The operation of this clause will in effect be aided by the Corporations Agreement. As mentioned above, the Corporations Agreement will provide that if four States vote to terminate the amendment reference all States will terminate that reference.

This provision is important because if a State could easily opt out of the amendments to the Corporations Act, the law would quickly lose its uniformity. While States can still withdraw the amendment reference unilaterally if they do so they will cease to be a referring State meaning that the application of the Corporations Act will be limited to the extent permitted by the Commonwealth's other constitutional powers. Such States will need to enact their own legislation to plug the gaps in Commonwealth power.

## Concurrent operation of State and Territory laws.

Section 109 of the Constitution provides that 'when a law of a State is inconsistent with a law of the Commonwealth the latter shall prevail and the former shall, to the extent of inconsistency, be invalid'. A State law may be held to be directly inconsistent with a Commonwealth law if the legislation in question makes a contradictory provision in relation to the same topic. Where there is no textual conflict between a State law and a Commonwealth law there will nevertheless be an inconsistency if the State law purports to regulate an activity which the Commonwealth law purports to regulate exclusively and exhaustively.[75] **Proposed Part 1.1A** makes clear that the Commonwealth does not intend to cover the field in relation to certain aspects of the corporations legislation and attempts to ensure the validity of State and Territory law.

**Clause 5E** provides that the 'Corporations legislation'[76] is not intended to exclude or limit the concurrent operation of any law of a State or Territory that does things such as

- impose additional obligations or liabilities on directors or companies
- confers additional powers on directors or companies

- provides for the formation of a body corporate
- imposes limits on the interests a person may hold in a company, or
- prevents a person from being a director of or managing a company

unless there is a direct inconsistency between the Corporations legislation and the State or Territory law. **Clause 5G** operates to limit the application of the Corporations legislation in certain circumstances so as to prevent direct inconsistency.

**Clause 5F** allows a State or Territory law to declare a matter to be an 'excluded matter'. The effect of such a declaration is that specified provisions of the Corporations legislation do not apply in relation to the matter. Under **subclause 5F(3)**, the Commonwealth retains the power to limit the application of State and Territory declarations by regulation.

**Clause 5I** states that regulations may be made to modify the operation of the Corporations Law to ensure that no inconsistency arises with a provision of State or Territory law. This power to amend Acts by regulation is known as a 'Henry VIII' clause. Pearce and Argument note that 'such clauses vest an enormous amount of power in the executive government'[77]. The Senate Standing Committee for the Scrutiny of Bills however has accepted the argument in the explanatory memorandum that the provision is necessary to ensure the constitutional validity of the legislation.[78]

The protection against a finding of inconsistency provided by **proposed Part 1.1A** only applies to laws of States and Territories in 'this jurisdiction'.[79] This term is defined in clause 9 as each referring State the ACT and the Northern Territory (including coastal seas adjacent to these areas). The effect of this provision therefore is that the laws of non-referring states are more likely to be found to be invalid for inconsistency with Commonwealth law.

### Incentives to Join the Scheme

In addition to the inconsistency clauses discussed above there are a number of provisions in the Bill that are limited in their operation to 'this jurisdiction'. For example, companies from States which are not referring States will not be able to conduct business in referring States unless they apply to be registered by ASIC (**clause 601CA**). The intent seems to be to provide some inconvenience in non-referring States and thereby create an incentive to join the scheme. [80]

## Concluding Comments

The Bill has the strong support of the business community as an immediate solution to the uncertainty that has surrounded corporate law for the last two years. There has been little support for a return to State based company law.[81] While only New South Wales and Victoria have passed their referral legislation at the time of writing, the Attorney-General and the Minister for Financial Services and Regulation recently announced that 'all other States have agreed in principle to the referral and have indicated that their referral legislation is imminent'.[82] It is not clear whether the Government has had to amend the Corporations Agreement to secure the approval of the other States.[83]

The main concern expressed by the business community[84] has been in relation to the sunset clause in the State referral legislation[85]. States may try to secure improved conditions from the Commonwealth in return for extending the reference after 5 years. The expiry of the reference was considered necessary by the States to ensure that the Commonwealth does not use the referred powers for other than the agreed purposes. While the referral can be extended by proclamation, there is likely to be some uncertainty in the lead up to the expiry of the references.

The expiry of the reference does provide the Commonwealth with an incentive to explore and pursue permanent solutions to the problems raised by *Wakim* and *Hughes* through a constitutional amendment.

### Is this the right referral?

It has been suggested by constitutional lawyers that the referral proposed is too broad and that the concerns about the scope of the reference and the capacity of the Commonwealth to use the reference to support legislation beyond what was intended can be dealt with by a narrower reference.

Rose and Lindell have suggested two references to deal with the implications of *Hughes.* They argue that the States should refer the following matters:

- the matter of the imposition of duties with respect to the exercise by any Commonwealth body of State powers and functions conferred by the State on the body with Commonwealth consent, and
- the matter of consent to the exercise of State powers and functions by any Commonwealth body.[86]

A full examination of this proposal is beyond the scope of this digest however it is worth noting that an advantage of this proposal over the present referral is that it provides the opportunity to address the implications of *Hughes* for other co-operative schemes.

## Can the Parliament amend this Bill?

The Attorney-General's Department has taken the view that any amendment would jeopardise the constitutionality of the new scheme. In evidence before the Joint Standing Committee on Corporations and Securities, an officer of the Attorney-General's Department stated 'there would be a very big problem with [the Commonwealth amending the Bill]…each State reference bill says…the Commonwealth parliament may enact these two bills –(the Corporations Bill and the ASIC Bill)-and it must be in this exact form'.[87]

However there does appear to be some scope for the Commonwealth Parliament to vary the Corporations Bill 2001 and the Australian Securities and Investments Commission Bill 2001 from the version tabled in the State Parliament so long as the provisions are 'substantially in the terms of the tabled text'.[88]

Despite this technical capacity to amend, the prudent course of action would be to enact the Bills in their existing form, given that the intent of the new scheme is to bring certainty to the corporate regulation. It would be unwise to open up another avenue of constitutional challenge about whether an amendment to the tabled text represented a 'substantial' change and therefore was not supported by section 51(xxxvii). The Joint Committee on Corporations and Securities has recommended that the Bill be passed without amendment.[89]

## What about other national schemes?

This Bill deals with the corporate law implications of *Hughes* but does not address the potential problems for other co-operative schemes. At present the Commonwealth is engaged in the task of determining how many schemes are affected by the *Hughes* problem and what needs to be done to put the schemes on a secure basis.[90] There is a possibility that further referrals or constitutional referenda will be required.

Legislation is also being introduced at State level to deal with the effects of *Hughe*s. In May, the Victorian Government introduced the Co-operative Schemes (Administrative Actions) Bill 2001. The Bill seeks to validate past actions of Commonwealth authorities and officers that were not linked to a Commonwealth head of power. The Bill also ensures that no duty, function or power is conferred on a Commonwealth authority or officer which is beyond the legislative power of the State. According to the explanatory memorandum the Bill will apply to:

- the co-operative scheme for agricultural and veterinary chemicals[91], or
- any other co-operative scheme to which the proposed Act is applied by proclamation.

Victoria has also introduced the Corporations (Administrative Actions) Bill 2001. The Bill seeks to validate 'certain potentially invalid administrative actions taken by

Commonwealth authorities and officers acting under powers or functions conferred on them by laws of the State relating to corporations'.

## Endnotes

1 (1999) 198 CLR 511

2 (2000) 171 ALR 155.

3 (1990) 169 CLR 482

4 The Commonwealth may, of course, legislate to establish statutory corporations under other heads of power.

5 Mason J in *R v Federal Court of Australia; Ex parte Western Australian National Football League* (1979) 143 CLR 190 at 234.

6 This test is not the sole criterion for determining whether an entity is a trading corporation. Its character may also be found in its constitution. Therefore a corporation which has not begun to trade may still be a trading corporation. See *Fencott v Muller* (1983) 152 CLR 570 at 602

7 *R v Federal Court of Australia; Ex parte Western Australian National Football League* (1979) 143 CLR 190 per Barwick CJ at 208.

8 *State Superannuation Board of Victoria v Trade Practices Commission* (1982) 150 CLR 282 at 304 per Mason, Murphy and Deane JJ

9 *R v Federal Court of Australia; Ex parte Western Australian National Football League* (1979) 143 CLR 190 at 239 per Murphy J.

10 (1971) 124 CLR 468.

11 *Actors & Announcers Equity Association v Fontana Films Pty Ltd* (1982) 150 CLR 169 at 212 per Murphy J.

12 See Dawson J in *Re Dingjan; Ex parte Wagner* (1995) 183 CLR 323 at 346.

13 *Re Dingjan*; Ex parte Wagner (1995) 183 CLR 323 at 364 per Gaudron J (Deane J agreeing). See also Mason CJ at 333-34.

14 It should be noted that section 51(xx) also has a protective scope. That is, it extends to allow the Commonwealth to legislate in relation to things which affect corporations. See *Actors & Announcers Equity Association v Fontana Films Pty Ltd* (1982) 150 CLR 169 where a provision prohibiting secondary boycotts was held to be a law with respect to corporations.

15 This background draws on material contained in a Report by the Senate Standing Committee on Constitutional and Legal Affairs, *The Role of Parliament in Relation to the National Companies Scheme*, 1987.

16 House of Representatives, *Hansard*, 22 October 1986, p. 2555.

17 Criminal matters were not covered by the scheme.

18 Justice Kirby dissented.

19 In proceedings before the High Court counsel for the Commonwealth and the States cited the scheme as a successful example of cooperative federalism. The Court dismissed this notion. Justice McHugh remarked that 'co-operative federalism is not a constitutional term. It is a political slogan, not a criterion of constitutional validity or power.' (1999) 198 CLR 511 at 556.

20 Under the doctrine of 'accrued jurisdiction', a federal court can resolve issues arising under State law if they form part of a controversy arising under a federal cause of action. According to the High Court 'it is a matter of impression and of practical judgement whether a non-federal claim and a federal claim joined in a proceeding are within the scope of one controversy and thus within the ambit of a matter.' *Fencott v Muller* (1983) 152 CLR 570 at 608.

21 This data was prepared specifically to answer a question on notice and to the writer's knowledge it has not been updated.

22 [2000] HCA 62

23 For more information on this Bill see Sean Brennan, Jurisdiction of Courts Legislation Amendment Bill 2000, *Bills Digest* No. 149, 1999-2000. http://www.aph.gov.au/library/pubs/bd/1999-2000/2000BD149.htm

24 A joint judgement was delivered by Gleeson, CJ, Gaudron, McHugh, Gummow, Hayne, and Callinan JJ. Justice Kirby delivered a separate judgement which also dismissed the application.

25 171 ALR 155 at 163

26 This was principally because State law provided that State prosecution authorities could not enforce the Corporations Law of Western Australia but rather the only prosecution authority under the co-operative scheme was the Commonwealth DPP. See 171 ALR 155 at 164.

27 For a more detailed examination of the *Hughes* decision see Sean Brennan, Agricultural and Veterinary Chemicals Legislation Amendment Bill 2001, *Bills Digest* No. 133 2000–01. http://www.aph.gov.au/library/pubs/bd/2000-01/01BD133.htm

28 *R v Hughes* (2000) 171 ALR 155 at 166.

29 See comments of Dr Williams and Professor Ramsey in Chris Merritt, 'ASIC Jurisdiction in jeopardy', *Australian Financial Review*, 4 May 2000 and Dennis Rose, 'The Hughes Case: The Reasoning, Uncertainties and Solutions', *Western Australian Law Review*, Vol 29, 2000, p. 187.

30 (1983) 158 CLR 535 at 560

31 *R v Hughes* (2000) 171 ALR 155 at 165

32 *R v Hughes* (2000) 171 ALR 155 at 167-168.

33 The incorporation occurs under State law, the function is conferred on the ASIC by State law, the Commonwealth law purports to consent to the conferral and the absence of alternatives under the scheme means that the Commonwealth law effectively confers a duty on ASIC to carry out incorporation under the corporations law.

34 *In the matter of Damian Michael Lynch; GPS First Mortgage Securities Pty Ltd v Lynch* (B51/2000).

35 'Companies law deal hailed as workable', *Australian Financial Review*, 20 October 2000.

36 Kirsty Simpson and Michael Madden, 'Canberra threatens States on law reform', *The Age*, 30 November 2000

37 The Hon. Joe Hockey MP and the Hon. Daryl Williams, 'States Cause Uncertainty for Business', *Joint News Release*, 17 November 2000. This Bill aims to provide comparable regulation of all financial products, including securities, derivatives, superannuation, life and general insurance and bank-deposit products; and ensure that 'promoters' or issuers of financial products provide comprehensible disclosure documents that assist investors to compare different investment products and to make informed decisions. It was introduced on 5 April 2001 following the enactment of the NSW referral legislation.

38 Justice Kirby, in *R v Hughes* [171 ALR 155 at 185/86, listed a variety of situations in which State laws had conferred functions on Commonwealth authorities: 'See eg Aboriginal and Torres Strait Islander Commission Act 1989 (Cth), s 9; Air Navigation Act 1920 (Cth), s 30; Australian Federal Police Act 1979 (Cth), s 8(1)(bc); Australian National Railways Commission Act 1983 (Cth), s 11; Australian National Training Authority Act 1992 (Cth), s 6; Australian Prudential Regulation Authority Act 1998 (Cth), s 9A; Australian Sports Drug Agency Act 1990 (Cth), s 9A; Child Support (Assessment) Act 1989 (Cth), s 15; Civil Aviation Act 1988 (Cth), s 9; Classification (Publications, Films and Computer Games) Act 1995 (Cth), s 4; Gas Pipelines Access (Commonwealth) Act 1998 (Cth), s 13; Human Rights and Equal Opportunity Commission Act 1986 (Cth), ss 11(1)(c), 16; National Crime Authority Act 1984 (Cth), s 11; National Road Transport Commission Act 1991 (Cth), s 8(1)(d); Public Service Act 1999 (Cth), s 71; Taxation Administration Act 1953 (Cth), s 13L; Therapeutic Goods Act 1989 (Cth), s 6A; Trade Practices Act 1974 (Cth), ss 44ZZM, 150F; Workplace Relations Act 1996 (Cth), s 5(6).'

39 Constitutional Commission: Committee on Trade and National Economic Management, *Background Paper No.3: National Companies and Securities Regulation*, 1986, p. 5.

40 Ian Govey and Hilary Manson (Attorney-General's Department), *Measures to address Wakim and Hughes: How the referral of powers will work*, Paper presented at Corporate Law Teachers Association Conference, Sydney, 3 November 2000.

41 (2001) 19 ACLC 427.

42 Section 79 states: 'The laws of each State or Territory, including the laws relating to procedure, evidence, and the competency of witnesses, shall, except as otherwise provided by

the Constitution or the laws of the Commonwealth, be binding on all Courts exercising federal jurisdiction in that State or Territory in all cases to which they are applicable.'

43 Bill Pheasant, 'Federal Court's Doors Open Again', *Australian Financial Review*, 16 February 2001

44 Constitutional Commission, *Final Report of the Constitutional Commission*, Vol. 1 1988, p. 371-373.

45 A submission along these lines was made to the Joint Committee on Corporations and Securities http://www.aph.gov.au/senate/committee/corp_sec_ctte/comm_powersbills/3%20Dominic%20Villa.pdf

46 The Hon. Daryl Williams, Attorney-General, Reply to Question on Notice, House of Representatives, *Hansard*, 30 May 2000, p. 15619.

47 See House of Representatives Standing Committee on Legal and Constitutional Affairs, *Constitutional Change: Select sources on Constitutional change in Australia 1901-1997*, February 1997.

48 Dr George Williams, 'The Real Answer is Constitutional Reform', *Australian Financial Review*, 1 December 2000.

49 In *Hughes*, Justice Kirby provides a long list of such legislation in a footnote to his judgement, 171 ALR 155 at 185/86 see endnote 38.

50 Ian Govey and Hilary Manson (Attorney-General's Deparment*), Measures to address Wakim and Hughes: How the referral of powers will work*, Paper presented at Corporate Law Teachers Association Conference, Sydney, 3 November 2000.

51 Sir John Downer in commenting on the necessity of the clause remarked 'This, of course is to be an inelastic constitution, which can only be amended after great thought and with much trouble.' *Official Record of the Debates of the Australasian Federal Convention*, 3rd Session, Melbourne, 1898, Vol IV, p. 220.

52 Western Australia chose this course of action in relation to the Mutual Recognition legislation which is discussed below.

53 This will rise to 18 if the Western Australian Parliament enacts the Mutual Recognition (Western Australia) Bill 2001. This Bill re-adopts the Commonwealth Mutual Recognition Act 1992. The *Mutual Recognition (Western Australia) Act 1995*, which previously adopted the Commonwealth Act, expired on 28 February 2001.

54 In 1992 the Commonwealth, States and Territories signed a formal agreement to introduce a mutual recognition scheme aimed at removing barriers to the free flow of goods and services within Australia. Pursuant to that agreement, the Commonwealth passed the *Mutual Recognition Act 1992* based primarily on a referral power from the States. Section 9 of the MRA states the 'mutual recognition principle'. In general terms, it provides that a good that may legally be sold in one State or Territory may be legally sold in another State or Territory

without the necessity for compliance with further requirements in that jurisdiction. The legislation does provide for a range of exceptions from this principle.

55 During the Constitutional Convention Debates Alfred Deakin expressed the view that the referred power could not be reclaimed: 'having appealed to Caesar, it (the State) must be bound by the judgement of Caesar, and that it would not be possible for it afterwards to revoke its reference.' *Official Record of the Debates of the Australasian Federal Convention*, 3rd Session, Melbourne ,1898, Vol IV, p.217.

56 Constitutional Commission, Interchange of Powers between the Commonwealth and the States', *Background Paper No.5*, 1986, p. .5.

57 The Constitution Alteration (Interchange of Powers ) Bill 1984 sought to clarify the basis on which States may refer legislative powers to the Commonwealth. The proposal was defeated at the referendum in 1984, securing only a 47 per cent Yes vote and failing to achieve a majority in any state.

58 Section 51(xxxv) permits the Parliament to legislate 'with respect to …conciliation and arbitration for the prevention and settlement of industrial disputes extending beyond the limits of any one State.'

59 The Hon. Peter Reith, 'Getting the Outsiders Inside – Towards a Rational Workplace Relations System in Australia', Address to the National Press Club, 24 March 1999.

60 For a discussion of the merits of the proposal see Andrew Stewart, 'Federal Labour Law and New Uses for the Corporations Power", Paper presented at the ACCIRT 8th Annual Labour Law Conference, Sydney, 16 June 2000.

61 *South Australia v The Commonwealth* (1962) 108 CLR 130 at 149 per McTiernan J.

62 The Hon. Daryl Williams, 'States Derail Certainty of Corporate Regulation', *Media Release*, 29 Nov 2000.

63 The Hon. Daryl Williams and the Hon. Joe Hockey, 'Corporations Law Agreement', *Joint Media Release*, 21 December 2000

64 The States cannot be bound to remain in the scheme. A State Parliament cannot bind its successors see S*outh Australia v The Commonwealth (*1942) 65 CLR 373 (the First Uniform Tax Case) at 416 per Latham CJ.

65 The NSW referral bill is available at the following link: http://www.parliament.nsw.gov.au/prod/web/PHWeb.nsf/Bills?OpenFrameSet

66 See subsection 4(2).

67 See p. 7.

68 The Hon. Bob Carr, Legislative Assembly, *Hansard*, 7 March 2001, p. 12350.

69 In evidence before the Joint Standing Committee on Corporations and Securities, the Attorney General's Department suggested that 'it has not been the experience of the Commonwealth that the jump from two to three states will be significant in terms of what the Commonwealth

will be able to pass in terms of amendments 'on most occasions, as I understand it, there is never a problem in getting unanimity, if not something just short of unanimity.' Mr Faulkner, Joint Committee on Corporations and Securities, *Evidence*, 27 April 2001, p 10.

70 The Hon. John Howard, the Hon. Bob Carr and the Hon. Steve Bracks, 'Joint Statement by the Prime Minister and the Premiers of New South Wales and Victoria', *Media Release*, 21 December 2000.

71 See for example Victoria's Corporations (Administrative Actions) Bill 2001 which is discussed below.

72 p. 5

73 It will not be possible for States to rely on the existing scheme. The Corporations (Repeals, Consequentials and Transitionals) Bill 2001 repeals the Commonwealth elements of the existing regulatory framework namely, the *Corporations Act 1989* and the *Australian Securities and Investments Commission Act 1989*.

74 Defined in subclause 4(9) as the Acts as originally enacted.

75 *Ex parte McLean* (1930) 43 CLR 472. See discussion in *Halsbury's Laws of Australia*, p. 165,222.

76 This term includes the Corporations Act, Part 3 of the ASIC Act and regulations made under that Part. Part 3 deals with ASIC's powers in relation to investigations and information gathering. See clause 5D.

77 Dennis Pearce and Stephen Argument, *Delegated Legislation in Australia* (2nd ed), Butterworths, Sydney, 1999, p. 15.

78 Senate Standing Committee for the Scrutiny of Bills, *Alert Digest*, No.6 2001, p.16.

79 Subclause 5D(1).

80 The Explanatory Memorandum documents a number of these provisions see p. 24.

81 For arguments in favour of State based company law see Michael J. Whincop, 'Phoenix or Souffle? The Economisc of the Rise, Fall and Second Rise of the National Scheme', Paper presented at Corporate Law Teachers Association Conference, Sydney, 3 November 2000

82 The Hon.Daryl Williams and the Hon. Joe Hockey MP, 'New Corporations Scheme on Track for July 1 Target.' *Joint News Release*, 24 May 2001.

83 During the Joint Committee on Corporations and Securities inquiry into the Bill, it was revealed that South Australia was particularly concerned about how the Commonwealth's expanded capacity to legislate in relation to corporations may give it an expanded power to require that certain activities may only be conducted by corporations. The Corporations Law already contains provision which state that particular conduct or business may only be engaged in by a corporation. For example section 601FA of the Corporations Law provides that the responsible entity for a register managed investments scheme must be a responsible entity.

South Australia was reported to be seeking further protections against the extreme use of this power. Mr Yen, Joint Committee on Corporations and Securities, *Evidence*, 27 April 2000, p.6.

84 See submission of the Coalition for Corporate Certainty. This Group includes the Australian Institute of Company Directors, the Business Council of Australia, Institute of Chartered Accountants in Australia, Investment and Financial services Association, Law Council of Australia, Securities Institute of Australia.

85 Section 5 of the State *Corporations (Commonwealth Powers) Acts 2001*.

86 Dennis Rose and Geoffrey Lindell, 'A constitutional perspective on Hughes and the referral of powers', *Constitutional Law and Policy Review*, Vol 3, No.2, August 2000.

87 Mr Faulkner, Joint Committee on Corporations and Securities, *Evidence*, 27 April 2001, p.8.

88 See paragraph 4(1)(a) of the referral legislation.

89 The Committee's Report can be found at the following link:

http://www.aph.gov.au/senate/committee/corp_sec_ctte/comm_powersbills/comm_powersbillsreport.pdf

90 Mr Faulkner, Joint Committee on Corporations and Securities, *Evidence*, 27 April 2001, p.18.

91 For a more detailed examination of the *Hughes* decision see Sean Brennan, Agricultural and Veterinary Chemicals Legislation Amendment Bill 2001, *Bills Digest* No. 133 2000–01. http://www.aph.gov.au/library/pubs/bd/2000-01/01BD133.htm