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Bills Digest

No. 144 2000–01

Australian Securities and Investments
Commission Bill 2001

ISSN 1328-8091

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Published by the Department of the Parliamentary Library, 2001

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Australian Securities and Investments Commission Bill
2001

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4 June 2001

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Australian Securities and Investments Commission Bill 2001

Date Introduced: 4 April 2001

House: House of Representatives

Portfolio: Treasury

Commencement: At the same time as the proposed *Corporations Act 2001*. It is intended that Act will commence on July 1 2001.

Purpose

To remove constitutional doubts about the framework for corporate regulation by substantially re-enacting the *Australian Securities and Investments Commission Act 1989* based on powers referred by the States.

Background

This Bill is one of 7 pieces of legislation introduced by the Commonwealth to deal with the implications for corporate regulation arising out of the High Court decisions in *Re Wakim; ex parte McNally*¹ and *The Queen v Hughes*². It is based in part on a referral of powers to the Commonwealth under section 51(xxxvii) of the Constitution. What follows is a brief background only. For a detailed discussion of the issues that have resulted in this legislation see the Bills Digest for the Corporations Bill 2001.

The Current Corporations Law Scheme

The current framework for corporate regulation is a co-operative national scheme involving interlocking Commonwealth, State and Territory legislation. It was developed following a ill fated attempt by the Commonwealth in 1989 to enact comprehensive legislation³ based principally on the corporations power in section 51(xx) of the Commonwealth Constitution. In *New South Wales v. The Commonwealth*⁴ (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

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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 (including the Australian Securities Commission Act⁵) 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.⁶ State Corporations Acts⁷ also empower the Australian Securities and Investments Commission (ASIC), a Commonwealth statutory body, to enforce the State Corporations Law. Section 58 of the State Acts provides that the ASIC Act⁸ applies as the law of the relevant State.

Hughes

The framework for co-operative schemes was thrown into doubt by the decision of the High Court in *Hughes*. Hughes was charged with offering prescribed interests contrary to the Corporations Law of Western Australia. The principal issue in the *Hughes* case concerned whether the Commonwealth *Corporations Act 1989* and regulations made under it which consented to the Commonwealth Director of Public Prosecutions (CDPP) prosecuting offences against State corporations law was constitutional.

The High Court rejected the accused's contention that the CDPP had no authority under either Commonwealth or State law to prosecute in relation to the alleged offences. It did so, however, in a fashion that was narrowly based and fuelled concerns about the continued viability of the Corporations Law scheme.

The Court held that the *Corporations Act 1989* effectively imposes a *duty* on the CDPP to exercise States functions and powers under the corporations scheme.⁹ In such circumstances the Court held that a Commonwealth law which accepts the conferral of powers by a State must be based on a head of power under the Constitution. The Court found in *Hughes* that the trade and commerce power (section 51(i)) and the external affairs power (section 51(xxix)) supported Commonwealth legislation accepting these powers. This was because the offences with which Mr Hughes was charged related to the making of investments in the United States.

While the Court held that the corporations power would support Commonwealth enforcement of 'perhaps the very great majority of offences created by State legislation which adopts the (Corporations) Law',¹⁰ there are clearly limits. Academic commentary has noted

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that the corporations power would probably not sustain Commonwealth prosecution of offences involving incorporation of companies or managed investments.¹¹

The decision has grave implications for ASIC's ability to enforce the law. Section 66 of the State Acts confers powers and functions on the Commission. This conferral of powers is accepted by the Commonwealth in subsection 11(3) of the ASIC Act which states that ASIC has such functions and powers as are conferred on it by a national scheme law of another jurisdiction.¹² A case¹³ is now before the High Court which challenges the capacity of ASIC to incorporate companies, arguing on *Hughes* grounds¹⁴ that such activity by ASIC cannot be supported by a head of Commonwealth power. 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'.¹⁵

The Referral

The Commonwealth decided that the best solution to the uncertainties created by the *Hughes* decision was to secure a referral of powers from the States under section 51(xxxvii) of the Constitution in relation to corporate regulation. New South Wales and Victoria have now passed legislation¹⁶ which enables the Commonwealth to enact the Corporations Bill 2001 and this Bill as well as legislation which amends these Bills in relation to the formation of corporations, corporate regulation and the regulation of financial products and services. It is reported that all other States have agreed to the referral and will soon introduce the necessary legislation.¹⁷

Main Provisions

This Bill substantially re-enacts the provisions of *ASIC Act 1989* as an Act which may apply throughout Australia based on Commonwealth power. The Bill does not make any substantive policy changes.¹⁸ Some changes have been made however to reflect the new constitutional basis for corporate regulation. The Bill also corrects anomalies and updates the drafting style as well as providing for transitional provisions.

ASIC's Functions

The referral of powers to enact the Corporations Bill and the ASIC Bill addresses the main problem raised in *Hughes*, namely finding a head of power to support ASIC's functions in administering and enforcing the corporations legislation. Section 51(xxxvii) will augment the Commonwealth's existing powers.

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In **clause 11** however, the Bill envisages that the Commission may also be given functions and powers that are not related to its role under the new framework for corporate regulation based on the referral of powers. This provision could have practical relevance in a situation where, for example, a State declines to participate in the new scheme based on the referral of power or subsequently drops out of the scheme but enters into an arrangement, or passes legislation, whereby its company law is enforced by ASIC.

The Bill contains several provisions that are designed to confine ASIC's 'duty' to perform functions and exercise powers. **Clause 1(2)(g)** states that in performing its functions and exercising its powers ASIC must take whatever action it can take, and is necessary, in order to enforce and give effect to the *laws of the Commonwealth* that confer functions on it.¹⁹

In contrast, under **subclauses 11(8)-(9A)**, where the Commission is given functions and powers under State or Territory law or as a result of an agreement or arrangement between ASIC and a State or Territory, the Bill provides that in neither circumstance will ASIC be under a *duty* to perform such powers. The Bill attempts to reinforce the absence of duty by providing the Minister may not direct ASIC in relation to the exercise of powers conferred by the States (**subclause 11(9B)**).

These attempts to confine ASIC's duties flow from the Court's reasoning in *Hughes*. The Court stated that 'permissive provisions', that is, Commonwealth legislation that permits officers of the Commonwealth to perform functions in addition to those imposed by a law of the Commonwealth, may be supported by the incidental power in section 51(xxxix) of the Constitution.²⁰

Yet where the Commonwealth law effectively imposes a *duty* on the Commonwealth officers or authorities to exercise powers and functions and powers conferred by a State law then the constitutional basis of the provision will be subject to greater examination.²¹

Clause 11 represents an attempt by the Commonwealth to draft 'permissive provisions' and thus remove the need for an intensive search for constitutional power to support ASIC performing functions and powers conferred by State law. Depending on the nature of arrangements however, there may be some doubt as to whether this drafting technique would allow a future scheme to survive judicial scrutiny.

The Court implied a duty in *Hughes* because prosecutions under the national scheme for corporations were the exclusive province of Commonwealth entities.²² It was also significant that the powers of the Commonwealth Director of Public Prosecutions were coercive, that is, it had duties adversely to affect the rights of individuals.²³ It is easy to envisage that a future co-operative scheme could have these features. To ensure that the Court does not find that a duty has been imposed it may be necessary for a State to provide for a co-regulatory process where its agencies also have a role in administering the scheme.

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If this approach is not taken, the express denial by the Commonwealth that it is imposing a duty may lead the Court to conclude that State law has imposed a duty. Such a conclusion would force the Court to address an issue left open in *Hughes*; namely, whether State law can impose duties on Commonwealth entities. The Court speculated in *Hughes* that it may well be a 'constitutional imperative' for such duties to be conferred by Commonwealth law.²⁴

It must be stressed that these issues do not go to the viability of ASIC's enforcement of the new Corporations Bill 2001 under the scheme based on the referral of powers.

Transitional Provisions

Part 16 of the Bill provides for transitional provisions. **Clause 253** states that the object of the Part is to provide that individuals, bodies corporate and other bodies are, to the greatest extent possible, put in the same position under the Bill as they would have been under the current ASIC law.²⁵

Clause 261 continues the existence of bodies established under the *ASIC Act 1989*. These bodies include: ASIC itself; the Companies and Securities Advisory Committee; the Companies Auditors and Liquidators Disciplinary Board; the Financial Reporting Council; the Australian Accounting Standards Board; and the Parliamentary Joint Committee on Corporations and Securities.

Regulations that were made under the *ASIC Act 1989* and were in force prior to commencement of this Bill are continued by **clause 264**.

Court Proceedings

The treatment of continuing Court proceedings is dependent upon whether the matter in question is a 'federal ASIC proceeding'. This term is defined in **clause 266** and includes proceedings:

- involving a matter under the *Administrative Decisions (Judicial Review) Act 1977* concerning a decision made under the current ASIC legislation of the Commonwealth, a referring State or the Northern Territory (the ASIC laws)
- in relation to the unconscionable conduct and consumer protection in financial services provisions of the *ASIC Act 1989*;
- for a writ of mandamus or prohibition or injunction against an officer of the Commonwealth in relation to the ASIC laws, and
- in the court's accrued jurisdiction involving the ASIC laws.

Clause 267 provides that in certain circumstances involving non-federal proceedings, a new proceeding will be taken to have commenced in the same court, exercising federal

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jurisdiction. Importantly this will not apply if the proceeding is an enforcement provision or an appeal or review proceeding (**subclause 267(1)(c)**). In addition, it will not apply to proceedings brought under the ASIC law of a non-referring State (**subclause 267(1)(b)**). The Bill does not deal with the status of these non-federal proceedings.

If the proceeding is a federal proceeding that had not been terminated before the commencement of this Bill the proceeding continues in the same court as if it had always been a proceeding under a corresponding provision of the new ASIC Act (**clause 268**).

Concluding Comments

This Bill will be complemented by State legislation, which purports to validate past actions by ASIC and its officers under the national scheme. Victoria is the only State that has introduced such legislation at the time of writing in the form of the *Corporations (Administrative Actions) Bill 2000*.

Endnotes

- 1 (1999) 198 CLR 511
- 2 (2000) 171 ALR 155.
- 3 This legislation involved a package of 16 Bills including the Corporations Bill 1988 and the Australian Companies and Securities Bill 1988.
- 4 (1990) 169 CLR 482
- 5 The *Australian Securities and Investments Commission Act 1989* was originally known as the *Australian Securities Commission Act 1989*. The name of the Act was changed in 1998 following the implementation of the recommendations of the Wallis Inquiry into the Financial System where the Commission was given additional responsibilities for consumer protection in the financial services sector.
- 6 For example section 7 of the *Corporations (New South Wales) Act 1990*.
- 7 In this context, the term 'State' includes the Northern Territory.
- 8 There are some exclusions from this application provision.
- 9 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 and section 33 of the *State Corporations Acts*
- 10 *R v Hughes* (2000) 171 ALR 155 at 166.

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- 11 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.
- 12 The definition of national scheme law in section 5 of the *ASIC Act* includes State laws that correspond to the *Corporations Act 1989* (Cth), the *Corporations Law of the Capital Territory of the ASIC Act 1989* (Cth).
- 13 *In the matter of Damian Michael Lynch; GPS First Mortgage Securities Pty Ltd v Lynch* (B51/2000).
- 14 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.
- 15 Cherelle Murphy, 'Companies law deal hailed as workable', *Australian Financial Review*, 20 October 2000.
- 16 *The Corporations (Commonwealth Powers) Act 2001*.
- 17 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.
- 18 *Explanatory Memorandum* p. 5.
- 19 Writer's emphasis.
- 20 *R v Hughes* (2000) 171 ALR 155 at 163–164.
- 21 *R v Hughes* (2000) 171 ALR 155 at 164.
- 22 *ibid.*
- 23 *R v Hughes* (2000) 171 ALR 155 at 168.
- 24 *R v Hughes* (2000) 171 ALR 155 at 164.
- 25 Assuming that the current ASIC Law is valid.

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