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THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

HOUSE OF REPRESENTATIVES

**CORPORATIONS BILL 2001**

EXPLANATORY MEMORANDUM

(Circulated by authority of  
the Minister for Financial Services and Regulation, the Honourable J.B. Hockey MP and  
the Attorney-General, the Honourable Daryl Williams AM QC MP)

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# 1

## Abbreviations

ASIC Bill	Australian Securities and Investments Commission Bill 2001
ASIC	Australian Securities and Investments Commission
Federal Court	Federal Court of Australia
<i>Hughes</i>	<i>The Queen v Hughes</i> (2000) 74 ALJR 802; 171 ALR 155
SEGC	Securities Exchanges Guarantee Corporation
the Bill	Corporations Bill 2001
<i>Wakim</i>	<i>Re Wakim; ex parte McNally</i> (1999) 198 CLR 511



# 2

## Outline

2.1. The Bill is one of a package of bills responding to the High Court's decisions in *Wakim* and *Hughes*.

2.2. The other bills are:

- Australian Securities and Investments Commission Bill 2001;
- Corporations (Fees) Bill 2001;
- Corporations (Securities Exchanges Levies) Bill 2001;
- Corporations (Futures Organisations Levies) Bill 2001;
- Corporations (National Guarantee Fund Levies) Bill 2001; and
- Corporations (Consequential Provisions) Bill 2001.

2.3. The Bill is designed to replace the *Corporations Act 1989* and the Corporations Law of the Capital Territory, and the corresponding legislation of the Northern Territory and those States which make suitable references to the Commonwealth Parliament in accordance with subsection 51(xxxvii) of the Constitution, as the statutory basis for the formation of companies, corporate regulation and the regulation of the securities and futures industries.

2.4. The Bill will, in effect, re-enact the Corporations Law as a Commonwealth Act capable of operating throughout Australia. The principal objective of this explanatory memorandum is therefore to explain the differences between the Bill and the Corporations Law. Explanatory material for the provisions of the Corporations Law on which the Bill is based may be found in the explanatory memoranda for the legislation that enacted or amended those provisions.



# 3

## Regulation Impact Statement and Financial Impact Statement

### Regulation impact statement

3.1. The Bill will for practical purposes restore the regulatory environment which existed before the High Court's decisions in *Hughes* and *Wakim*. While the Bill also corrects a number of existing anomalies and updates the drafting style, it does not involve substantive policy changes.

3.2. On that basis, the Office of Regulation Review has advised that a Regulation Impact Statement is not required for the Bill.

### Financial impact statement

3.3. The Bill does not have any financial impact.



# 4

## Background to the Bill

4.1. The current Corporations Law scheme commenced on 1 January 1991. Under that scheme, the Corporations Law is contained in an Act of the Commonwealth Parliament (the *Corporations Act 1989*) and is enacted for the Australian Capital Territory. Laws of each State and the Northern Territory apply the Corporations Law of the Australian Capital Territory as a law of the State or the Northern Territory. The scheme was designed to operate as a single national scheme even though it actually applies in each State and the Northern Territory as a law of the State or Territory.

4.2. The current Corporations Law is administered generally by a Commonwealth body, ASIC, established under the *Australian Securities and Investments Commission Act 1989*. Each State and the Northern Territory has passed legislation applying relevant provisions of that Act, and also conferring functions relating to the administration and enforcement of the Corporations Law on, among others, the Commonwealth Director of Public Prosecutions and the Australian Federal Police.

4.3. The ‘cross-vesting’ provisions of Commonwealth, State and Territory legislation comprising the current Corporations Law scheme were intended to establish a seamless and efficient system of adjudication by, among other things, allowing federal courts to exercise relevant State jurisdiction and State courts to exercise relevant federal jurisdiction.

4.4. The current scheme is also supported by the Corporations Agreement, an inter-governmental agreement to which the Commonwealth, the States and the Northern Territory are parties. The Agreement requires consultation and, in some cases, voting on amendments of the Corporations Law and related scheme legislation.

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

4.6. The decision in *Wakim* rendered the cross-vesting arrangements invalid to the extent that they purported to confer State jurisdiction on federal courts.

4.7. In *Hughes*, the Court decided that the Commonwealth cannot authorise its authorities or officers to undertake a function under State law involving the performance of a duty (particularly a function having the potential to adversely affect the rights of individuals) unless the function has a sufficient nexus with a Commonwealth legislative power. As the limits of Commonwealth legislative power are uncertain, the decision has cast doubt on the ability of Commonwealth officers to exercise certain powers and functions under the Corporations Law. This has resulted in much uncertainty and inefficiency in relation to Australia’s system of national corporate regulation.

4.8. These problems can be avoided by re-enacting the Corporations Law as a single federal law of national application. Under the subsection 51(xxxvii) of the Commonwealth Constitution, the

Commonwealth Parliament may legislate with respect to matters referred to it by the State parliaments. Suitable State references can put beyond doubt the Commonwealth Parliament's power to enact the Corporations Law as a federal law of national application.

4.9. The Bill is designed as a central part of a replacement legislative scheme that would, in effect, re-enact the Corporations Law as a single federal law capable of operating nationally, partly in reliance on referrals by the States under subsection 51(xxxvii) of the Commonwealth Constitution. The Bill is designed so that, once enacted:

- it may be administered and enforced on a national basis by Commonwealth bodies; and
- it will re-instate an integrated system of adjudication by Commonwealth, State and Territory courts.

4.10. The Bill assumes a two-fold reference by States; the first element being a reference of the matters to which the Bill and the ASIC Bill relate, but only to the extent of the enactment of those bills, and the second (the amendment reference) being a reference of 'the matters of the formation of corporations, corporate regulation, and the regulation of financial products and services', but only to the extent of express amendments by Commonwealth legislation of the Bill and the ASIC Bill (once enacted and as in force from time to time). The Bill is introduced on the assumption, in both cases, that the matters referred are limited to those within the legislative powers of the State and not otherwise within the legislative powers of the Commonwealth (see generally clause 4).

4.11. The Bill is introduced on the further assumption that:

- the amendment reference will not restrict the capacity of the Commonwealth Parliament to amend the Bill or the ASIC Bill once enacted (and as in force from time to time) in reliance on the legislative powers that it has apart from the references;
- the State reference legislation will include a general purpose or object provision to the effect that nothing in that legislation is intended to enable the making of a law under the amendment reference with the sole or main underlying purpose or object of regulating industrial relations matters even if, but for the provision, the law would be a law with respect to a matter referred to the Commonwealth Parliament by the amendment reference;
- the State reference legislation will include a 'sunset' provision terminating the references after five years (with provision for extension by proclamation);
- the Corporations Agreement will provide that if four States vote to terminate the amendment reference all referring States will terminate that reference (the Bill itself will provide that if any State individually terminates the amendment reference it will cease to be part of the scheme);
- States will enact further legislation to validate the actions of Commonwealth officers and authorities under the current Corporations Law scheme which may be invalid as a result of *Hughes*; and
- States and the Northern Territory will also enact further legislation to facilitate the transition from the existing legislative scheme, complementing the transitional provisions included in this Bill and the ASIC Bill (and the Commonwealth will enact the necessary provisions for the Australian Capital Territory).

## The Corporations Law as a Commonwealth Act

### Short title and Commencement

5.1. The short title of the Act will be the *Corporations Act 2001* (clause 1).

5.2. The Act will commence on a day to be fixed by Proclamation. Due to the uncertain timing of the passage of State reference legislation, this may not be within six months after the Bill receives Royal Assent. The Bill therefore does not provide for commencement on the earlier of proclamation or six months after Royal Assent (clause 2).

### From eight Corporations Laws to one *Corporations Act 2001*

5.3. The *Corporations Act 2001* will comprise the text of the current Corporations Law amended so that it may operate as an Act of the Commonwealth Parliament throughout Australia. Subject to the changes noted below, provisions in the Bill have the same numbers as the corresponding provisions of the Corporations Law.

#### *The jurisdiction will be different*

5.4. The operation of the new *Corporations Act 2001* in the States will depend on State references, as well as the powers that the Commonwealth Parliament has apart from such references (clause 3).

5.5. Bill clause 5(4) is based on section 110D of the Corporations Law. It provides that Chapters 1 to 6C, and Chapters 9 and 10, of the Bill will apply according to their tenor in relation to all natural persons, bodies corporate, unincorporated bodies, and acts and omissions outside ‘this jurisdiction’ (see below). These chapters largely cover the formation of companies and corporate regulation as well as machinery and transitional matters. Bill clause 5(6) provides that some provisions concerning the securities and futures industries will also apply in relation to all natural persons, bodies corporate, unincorporated bodies, and acts and omissions outside ‘this jurisdiction’. Bill clause 5(8) provides that the Bill will not apply to an act or omission in a State that is not a referring State to the extent that application would be beyond the legislative powers of the Parliament (including powers it has under Constitution, subsections 51(xxxvii) and (xxxix)) (see below in relation to non-referring States).

5.6. The area covered by ‘this jurisdiction’ will include the Australian Capital Territory, the Jervis Bay Territory, the Northern Territory and the referring States (clause 5(1)). Accordingly, ‘this jurisdiction’ will consist of the whole of Australia if all the States are referring States, or Australia (other than any State that is not a referring State) if one or more States are not referring States. The Bill uses the expressions ‘this jurisdiction’ or ‘State or Territory in this jurisdiction’ in

a number of places where the Corporations Law currently refers to Australia. The Bill makes it clear that the expressions:

- ‘outside this jurisdiction’ includes places outside Australia (clause 9 (definition of ‘outside this jurisdiction’) and 102B(2)).
- ‘Australia’ means in Australia, as defined by the Bill (whether in this jurisdiction or not) (Clause 102C). Bill clause 9 provides that ‘Australia’, when used in a geographical sense, does not include an external Territory. This definition will override the *Acts Interpretation Act 1901*, section 17(a), which provides that Australia includes the Territory of Christmas Island and the Territory of Cocos (Keeling) Islands.

### *When will a State be a referring State and therefore in ‘this jurisdiction’?*

5.7. A State will be a referring State (clause 4) if the Parliament of the State has referred to the Parliament of the Commonwealth:

- the matters that are necessary to enable the Parliament of the Commonwealth to enact the Bill and the ASIC Bill; and
- the matters of the formation of corporations, corporate regulation and the regulation of financial products and services, to the extent to making laws with respect to those matters by express amendments of the Bills as enacted and as amended from time to time (clause 4(8)).

5.8. A State can remain part of the scheme if it terminates its amendment reference, but only if it gives at least six months notice of the termination and if every other referring State terminates its amendment reference on the same day (clause 4(7)). As mentioned above, it is assumed that Corporations Agreement will provide that if four States vote to terminate the amendment reference all referring States will terminate that reference.

5.9. A State will therefore cease to be a referring State if the reference by the State Parliament to the Commonwealth Parliament of either of the referred matters is otherwise terminated wholly or in part. However, it will not cease to be a referring State simply because the State reference legislation *provides* that the reference to the Commonwealth Parliament of either or both of the matters referred is to terminate in particular circumstances (see the preceding paragraph); or because the State reference legislation includes a general purpose or object provision of the kind mentioned at paragraph 4.11 above.

5.10. The Bill will generally require things (other than people) to be located or done in the referring States and Territories, and refer to things or people moving to and from the referring States and Territories, where the Corporations Law currently refers to Australia or to a particular State or Territory. In some cases the Bill changes the geographical focus of a provision from a particular State or Territory to the area comprising all of the referring States and Territories (clauses 142(1), 143(2), 156, 172, 186, 206H, 251A(5)(b), 253M(3), 261(1) (definition of ‘property’), 285(2), 289, 291 (Table, Item 4), 348 (table, item 10), 411(3A) and (8), 416 (definition of ‘property’), 420(1), 486A, 486B(1)(b)(i), 487, 581(2), 583, 585, 588(1), 601CA, 601CC(14) and (15), 601CF(3), 601CG(1), 601CL, 601CM, 601CT(1), 601CZC(1), 610ED(5), 668A(2), 766I, 856(14), 881(1), 906, 923, 961D(4), 962(2), 995A, 1091C(1), 1097(1) (definition of ‘eligible body’), 1117(1)(b), 1141(1) and (2), 1209(3), (4) and (4A), 1213(8) and (9), 1238, 1268(1), 1271(1)(b), 1292(1)(ii), 1300(1), 1302(1) and 1304(2)).

5.11. Bill clause 1369A will allow regulations to be made addressing issues that might arise should a State cease to be a referring State. For example, the regulations could allow a period of grace to enable things that are required to be located in a referring State, like a registered office, to be relocated.

*Only one Corporations Act 2001*

5.12. The new *Corporations Act 2001* and regulations made under it will replace the Corporations Law of the Capital Territory, each State and the Northern Territory, and the Corporations Regulations of the Capital Territory, each State and the Northern Territory. After commencement of the Act, it will therefore be necessary to refer to the *Corporations Act 2001* where the current practice would be to refer to the Corporations Law. The Bill uses the term ‘this Act’ (or a similar expression) in places where the Corporations Law refers to ‘this Law’, ‘Corporations Law of this jurisdiction’, ‘Corporations Law of this or any other jurisdiction’ or ‘Corporations Law criminal proceedings’. It also defines the term ‘national corporate law’ to mean the Bill and the ASIC Bill as enacted and amended from time to time (clause 9).

5.13. Section 8 of the Corporations Law ensures that a reference in the Corporations Law to that Law includes a reference to each of the eight existing Corporations Laws. Section 14 of the *Corporations Act 1989* and corresponding provisions in the State Corporations Acts does this for all instruments. As there will only be one *Corporations Act 2001* applying throughout the referring States, the Bill does not include provisions of this kind. Similarly, the following sections found in the Corporations Law are not included in the Bill because they are required solely to address issues arising from the fact that there is more than one Corporations Law:

definitions of:

‘other jurisdictions’

‘regulations’

- 58 defining corresponding laws
- 58A recognition of acts etc. done under corresponding laws
- 102A application not to be granted unless application also made under corresponding laws
- 415A enforcement of orders made in other jurisdiction
- 581(1)(b) courts to act in aid of each other
- Part 5.7A, Division 1  
application of Part 5.3A to matters arising under corresponding laws
- 938(4A) SEGC levies paid in other jurisdictions
- 954(2A) claims to SEGC previously allowed in another jurisdiction
- 954J nexus of participating exchange with this jurisdiction. See also the repeal of sections 954U, 954ZB, 961A and 966A of the Corporations Law.
- 965K preventing double recovery from SEGC in another jurisdiction. See also the repeal of sections 954V, 954ZC, 961B and 961H of the Corporations Law.
- 1108A effect of sections 1105 to 1108 on marketable securities and rights from another jurisdiction
- 1109H effect of sections 1109E, 1109F and 1109G on quoted securities and rights from other jurisdictions
- 1112C(4) civil liability of brokers under more than one Corporations Law
- 1310A offences under two or more Corporations Laws
- 1310B civil liability under two or more Corporations Laws
- 1313B when same offence committed under two or more Corporations Laws.

5.14. The following provisions have been amended or rewritten because there will only be one *Corporations Act 2001* applying as a Commonwealth Act across a single jurisdiction (instead of the existing eight Corporations Laws applying in eight separate jurisdictions):

- 8A Corporations Regulations, and application orders, of a jurisdiction treated as part of that jurisdiction's Corporations Law (Bill clause 9 defines 'this Act' to include a reference to the regulations.)
- 9 paragraph (b) of the following definitions:
  - 'dealers licence'
  - 'futures advisers licence'
  - 'futures brokers licence'
  - 'investment advisers licence'
  - 'law'
  - 'registered Australian body'
  - 'registered body'
  - 'registered company auditor'
  - 'registered foreign company'
  - 'registered liquidator'
- 9 paragraphs (b) and (d) of the definition of 'banning order'
- 601CD when a foreign company carries on business in this jurisdiction
- 601CE(j) application for registration as a foreign company
- 604(1) extension of Chapter 6 to listed managed investment schemes registered in this jurisdiction
- 660B(1) extension of Chapter 6A to listed managed investment schemes registered in this jurisdiction
- 770A(2) omission of a cross-reference to section 102A, which is not included in the Bill (see above)
- 779B(2) omission of a cross-reference to section 102A, which is not included in the Bill (see above)
- 871(2)) trust money held by holder of dealers licence under any Corporations Law is not available in respect of dealer's own debts.
- 874(1) Court may freeze certain bank accounts of dealers and former dealers
- 920 definition of 'fund provisions' no longer refers to the Corporations Law of other jurisdictions.
- 1308(3A) avoidance of double jeopardy for offences against Corporations Regulations and clause 1308(2).

*No more 'recognised companies'*

5.15. All companies will be incorporated (by registration) under a single Commonwealth Act, the *Corporations Act 2001*, instead of under one of the eight existing Corporations Laws. A company that was registered under the Corporations Law will be taken to be registered under the Bill with the same attributes that it had when registered under the Corporations Law (including the date on which it was first registered) (clause 1378). A certificate issued by ASIC (or an earlier company law

regulator) stating that a company was registered under the companies legislation of a referring State or Territory will be conclusive evidence that all the requirements of that legislation for the registration of the company were complied with, and that the company was duly registered as a company under that legislation (clause 1389).

5.16. The Bill does not include the following sections currently included in the Corporations Law solely because companies must be registered under one of a number of different Corporations Law:

- 276AA charges of company transferring jurisdiction
- Part 5.7A Division 2
  - winding up recognised companies
- 606(1) omission of Note 1: ‘company’ means a company incorporated in this jurisdiction
- 1362A recognition of companies from other jurisdictions
- 1362B transfer of registration to another jurisdiction.

5.17. The following provisions of the Bill also differ from the corresponding provisions in the Corporations Law whose drafting currently reflects the fact that a company is registered in any one of eight jurisdictions:

- 9 definitions of ‘administration’, ‘company’ and ‘public company’
- 57A omission of ‘recognised company’ from the definition of ‘corporation’
- 117(2)(a) companies will be registered under the Bill as enacted
- 507 subsections (7) and (7A): law applying to a liquidator’s arbitration
- 300(10) preparing financial reports of subsidiaries of a recognised company
- 977 subsections (2) and (2A): law applying to National Guarantee Fund arbitrations
- 1087(1) share certificate need not state jurisdiction in which company is registered
- 1091(1A) share transfer instrument to show prescribed details – see paragraph 5.25 below
- 1091 subsections (2) to (7) amended to allow shares etc. of dead shareholder to be dealt with in accordance with the law of the State or Territory in which the share is located.

### *Jurisdiction of incorporation and registration*

5.18. A company registered under the Bill will be incorporated ‘in this jurisdiction’ and taken to be registered in a particular referring State or Territory.

5.19. Bill clause 119A(1) provides that companies are incorporated ‘in this jurisdiction’. Accordingly they have the attributes conferred by the Bill throughout ‘this jurisdiction’ even though they are taken to be registered in a particular State or Territory.

5.20. Some State legislation relies on companies being incorporated or registered in a particular State or Territory – for example, stamp duty is imposed on certain share transfers on the basis of the jurisdiction in which the company that issued the shares is incorporated or registered. In order to facilitate the continued operation of the State legislation, or to allow it to operate with only minor amendments, the Bill provides for new companies to be taken to be registered in the referring State or Territory specified in the application lodged with ASIC to incorporate the company (clauses 5H(4)(b), 117(2)(n)), 119A(2) and 601BC(2)(o)). Companies will be able to change the jurisdiction in which they are taken to be registered, with the approval of the relevant State or Territory minister of the State or Territory in which the company is taken to be registered, provided

the procedures specified in the Corporations Regulations have been satisfied (clause 119A(3)). This is equivalent to provisions presently in the Corporations Law enabling companies to transfer their registration from the Law of one jurisdiction to the Law of another.

5.21. An application under sections 117 or 601BC of the Corporations Law for the registration of a company will lapse on the commencement of the Bill. Further, any fee paid towards any such registration must be returned to the applicant unless, with the applicant's permission, it is applied towards an application under the Bill (clause 1387).

5.22. Bill clauses 118(1)(c)(iv) and (v) and 601BD(1)(c)(iv) and (v) provide that ASIC must give new companies a certificate stating:

- that the company is registered under the *Corporations Act 2001*; and
- the State or Territory in 'this jurisdiction' in which the company is taken to be registered.

5.23. Existing companies will be taken to be registered in the State or Territory under whose Corporations Law the company was registered immediately before commencement of the Bill (clause 1378(4)).

5.24. A company will continue to be registered under the *Corporations Act 2001* and incorporated in this jurisdiction (that is, the Territories and the remaining referring States) even if the State in which the company is taken to be registered ceases to be a referring State (clause 119A(4)). If the State in which a company is taken to be registered ceases to be a referring State then the company will be able to nominate a referring State or Territory within this jurisdiction as the State or Territory in which it will be taken to be registered. (Clause 119A(3))

5.25. The requirement in section 1091(1A)(b) of the Corporations Law that a proper instrument of transfer must show the company's jurisdiction of registration will be replaced with a requirement that the instrument show the particulars prescribed in the regulations. This provides the flexibility necessary to ensure that appropriate details are included on those instruments so as to enable the continued collection of stamp duty on off market transfers of securities.

### *Bodies formed under a law of a State or Territory*

5.26. The Corporations Law of each jurisdiction currently includes a number of provisions concerning bodies incorporated or formed in another State or Territory.

5.27. The Bill will extend the definition of the term 'corporation' to include all bodies incorporated or formed under the law of any State or Territory (clause 57A). The following definitions in section 9 of the Corporations Law, which relate to bodies originating in a particular State or Territory, are not included in the Bill:

- 'local corporation'
- 'registrable local body'
- 'local futures association'
- 'local futures exchange'
- 'local securities exchange'
- 'local stock exchange'.

5.28. Compensating amendments have been included in the following clauses of the Bill to substantially preserve the effect of the existing corporations legislation on bodies incorporated or formed under the law of a State or Territory:

- 9 definitions of:
- ‘company’ (omission of reference to ‘registrable local body’ in subclause (b))
  - ‘exchange subsidiary’ (omission of paragraph (c) relating to local securities exchanges)
  - ‘futures association’ (omission of paragraph (b) relating to local futures associations)
  - ‘futures organisation’ (omission of paragraph (c) relating to local futures exchanges)
  - ‘Part 5.1 body’ (omission of reference to ‘registrable local body’ in subclause (b))
  - ‘Part 5.7 body’ (omission of reference to ‘registrable local body’ in paragraph (a))
  - ‘place of origin’ (extended to include unincorporated bodies)
  - ‘securities exchange’ (omission of sub-paragraph (d)(i) relating to local stock exchanges)
  - ‘stock exchange’ (omission of paragraph (d) relating to local stock exchanges)
- 190A for a registrable Australian body, Division 1 of Part 2D.1 concerning the general duties of the directors of a corporation, is confined to matters outside its place of origin
- 197(4) directors of registrable Australian bodies are not be liable under Bill clause 197 for debts incurred by the body as a trustee outside its place of origin
- 206HA for a registrable Australian body, Bill Part 2D.6 concerning disqualification from managing corporations, is confined to matters outside place of origin
- 261 subclause (a) of the definition of ‘property’: in Bill Chapter 2K concerning charges ‘property’ does not include property of a registrable Australian body inside its place of origin
- 416 subclause (c) of the definition of ‘property’: in Bill Part 5.2 concerning receivers etc., ‘property’ does not include property of a registrable Australian body inside its place of origin)
- 433 omission of subsection (1) relating to registrable local bodies: Bill clause 433 applies to all registered Australian bodies, but not to property inside their place of origin
- 583(d) winding up of registrable Australian body to deal only with affairs outside place of origin
- 588(1) vesting of property located outside place of origin of registrable Australian body that is wound up
- 601BC subclause (2)(c): registered Australian body registered under only one Act
- 601CA when a registrable Australian body may carry on business in this jurisdiction outside its State or Territory of origin

- 601 omission of reference to ‘registrable local body’ in paragraph (d): registered Australian body to lodge details of charges over property located outside place of origin
- 601CC subclauses (1) and (1A): registered Australian body must deregister when it ceases to carry on business interstate outside its place of origin
- 601CW subclauses (1) and (1A): registered Australian body does not have to display its name outside places of business in its place of origin
- 708(2) prospectus not required in a referring State or Territory for an offer of securities of an exempt body in that State or Territory
- 984 omission of reference to ‘local Exchange subsidiary’ in the definitions of ‘joining day’ and ‘joining exchange’.

5.29. Section 601DD of the Corporations Law provides that a registered Australian body must not carry on business in a State or Territory under a name unless, among other things, the name is registered for it under the law of the State or Territory. Bill clause 601DD(3) provides instead that the body may use the name in the State or Territory in which it is incorporated or formed if use of that name is authorised by a law of that State or Territory concerning business names.

#### *Application Orders*

5.30. The Bill does not include provisions corresponding to Part 1.3 of the Corporations Law, concerning application orders, which provide a mechanism for permitting differences in how the Corporations Law applies in each State or Territory. The following clauses of the Bill instead contemplate that the Corporations Regulations will deal with the matters currently addressed through the application orders:

- 9 paragraph (c) of the definition of ‘managed investment scheme’
- 115 restriction on size of partnerships
- 273A to 273E (inclusive)  
replacing section 273 of the Corporations Law concerning the registration of charges under the law of a State or Territory.

5.31. The application order made under section 115 of the Corporations Law in relation to the members of partnerships will have effect after commencement of the Bill as a regulation made for the purposes of Bill clause 115 (clause 1388).

#### *ASIC to administer the Act*

5.32. Bill clause 5B is the same as section 2 of the Corporations Law, and provides for ASIC to administer the *Corporations Act 2001*.

### **From *Corporations Act 1989* to *Corporations Act 2001***

#### *Regulations*

5.33. Bill Part 9.12 is based on Part 5 of the *Corporations Act 1989*, and provides for the making of regulations.

#### *Jurisdiction of Courts*

5.34. The Bill includes a new Part 9.6A entitled ‘Jurisdiction and procedure of Courts’. Division 1 of Part 9.6A of the Bill comprises clauses 1337A to 1337V (inclusive) concerning the

vesting and cross-vesting of civil jurisdiction of courts under the Bill. Division 2 of Part 9.6A of the Bill comprises clauses 1338A to 1339B (inclusive) concerning the vesting and cross-vesting of criminal jurisdiction under the Bill. Part 9.6A is intended to produce substantially the same outcomes as Part 9 of the *Corporations Act 1989*, entitled 'Jurisdiction and procedure of Courts' and the corresponding provisions of the State Corporations Acts before the decision in *Wakim*. There are some variations in the way this is achieved as a result of the Bill being federal legislation.

5.35. Bill Part 9.6A will not include provisions corresponding to sections 50, 56 and 63 of the *Corporations Act 1989*. The definitions in section 50(1) that are required for the purposes of Part 9.6A have been moved to Bill clause 9. Sections 50(2) and 63 are no longer required because, unlike the Corporations Law, the Bill will not operate as an applied law in the States and the Northern Territory. The Bill does not include a provision corresponding to section 56 of the *Corporations Act 1989*, because the jurisdiction will be federal jurisdiction and no question arises as to the exercise of State jurisdiction by federal or Territory courts.

5.36. Bill clause 1337A is based on section 49 of the *Corporations Act 1989*. It provides that Division 1 of Part 9.6A operates to the exclusion of *Judiciary Act 1903*, section 39B. Unlike section 49, Bill clauses 1337A(2) and (3) make it clear that the Division does not limit the operation of the *Judiciary Act 1903* (other than section 39B) in relation to criminal matters.

5.37. Bill clause 1338A is based on section 62 of the *Corporations Act 1989*. It notes that Division 2 of Part 9.6A operates to the exclusion of sections 68, 70 and 70A of the *Judiciary Act 1903* in relation to the jurisdiction of courts in respect of criminal matters arising under the Corporations legislation. Unlike section 62, Bill clauses 1338A(2) and (3) make it clear that the Division does not limit the operation of the *Judiciary Act 1903* (other than sections 68, 70 and 70A) in relation to criminal matters. In so doing, it is intended to make it clear that the reasoning of the majority of the court in *ASIC v Vis & ors* [2000] SASC 258 (29 August 2000) concerning the jurisdiction of courts to hear appeals from summary dismissals is not to apply in relation to jurisdiction under the Bill as enacted. Rather, the position in relation to the corporations legislation should be the same as with other offences against other federal laws notwithstanding that some aspects are dealt with in the Bill rather than under the *Judiciary Act 1903* itself.

5.38. Bill clause 1338B is based on section 64 of the *Corporations Act 1989*. Bill clause 1338B(11) makes it clear that the conferral of jurisdiction in relation to appeals includes jurisdiction in relation to an application for a new trial and a proceeding to review or call in question the proceedings, decision or jurisdiction of a court or judge.

5.39. Bill clause 1338C is based on section 65 of the *Corporations Act 1989* and section 56 of the State Corporations Acts. The existing provisions provide that the laws of the State in which the person is charged apply to the arrest, custody and criminal procedure relating to persons charged with offences. Subsections 65(1) and (2), and the corresponding provisions of the State legislation, have been simplified as Bill clause 1338C(1) because the Bill will not form part of an applied law scheme. Bill clause 1338C(1) makes it clear that the court to apply the rules of evidence applied in criminal procedure in the State or Territory in which the person is charged.

5.40. The Bill does not include provision corresponding to:

- Section 59 of the *Corporations Act 1989*, concerning the enforcement of orders of a federal court, because *Federal Court Act 1976* and the *Judiciary Act 1903* set out the necessary machinery for the enforcement of judgments of courts exercising federal jurisdiction; and
- Subsection 61A(3) of the *Corporations Act 1989*, concerning the rules of a State Family Court exercising jurisdiction under the Corporations Law.

### *Application of the Act to the Crown*

5.41. Bill clause 5A will have the same effect as sections 16 to 18 of the *Corporations Act 1989* (clause 5A).

### *Business names*

5.42. Section 70 of the *Corporations Act 1989* has been transferred to Bill clause 147(5), which allows the Minister to identify State and Territory business names registers for inclusion in the national business names register mentioned in clause 147(1)(a). A notice in force under section 70 will have effect as though it were made under clause 147(5) (clause 1391).

### *National Guarantee Fund*

5.43. Bill clauses 925A and 925B will have the same effect as existing sections 67 and 68 of the *Corporations Act 1989* concerning the nomination of a body corporate as the Securities Exchanges Guarantee Corporation, and the powers of the Securities Exchanges Guarantee Corporation respectively.

5.44. Bill clause 928B will continue in existence the National Guarantee Fund established by the SEGC under the Corporations Laws of the States and Territories. The nomination of a body corporate under section 67 of the *Corporations Act 1989*, as the SEGC will have effect as a nomination under clause 925A (clause 1390). A person who has a right immediately before commencement of the Bill to claim against the National Guarantee Fund under the Corporations Law will be able to make that claim under the corresponding provision of the Bill (clause 1400(2)). Those persons will be able to make their claim even if it arises under Part 7.10 of the Corporations Law of a State that is not a referring State (clause 1400(4)).

## **Relationship with other Commonwealth Acts**

5.45. The Commonwealth Parliament will have legislative power with respect to matters that are incidental to the matters referred to the Commonwealth by the States (Constitution, subsection 51(xxxix)). Existing Commonwealth Acts such as the *Crimes Act 1914* and *Evidence Act 1995* (as amended from time to time) will therefore apply to the Bill and the ASIC Bill once enacted.

5.46. References in the Corporations Law to certain Commonwealth Acts ‘applying as a law of this jurisdiction’ have not been included in the Bill as the Bill will operate as a Commonwealth Act (clause 9, paragraph (c) of the definition of ‘ancillary offence’; clause 437E(1)(a) in relation to *Crimes Act 1914*, section 5; and clause 1317J(5) in relation to the *Director of Public Prosecutions Act 1983*).

### *Acts Interpretation Act 1901*

5.47. The scope of what is referred by a State Parliament is determined by that Parliament. As the scope of the matters referred is in part determined by reference to a particular text, Bill clause 5C provides that the text referred is to be interpreted in accordance with the *Acts Interpretation Act 1901* of the Commonwealth as in force on 1 November 2000. This is intended to preclude any argument that the matters referred differ from State to State (as a result of differences in the local interpretation legislation) or that the scope of the reference may change as a result of amendments of the *Acts Interpretation Act 1901*. While the Bill applies the *Acts Interpretation Act 1901* as at 1 November 2000, it is envisaged that changes to that Act could be applied to the interpretation of the legislation by an appropriate amendment of clause 5C in reliance on the amendment reference.

5.48. The Bill does not address a number of matters that are currently addressed in both the Corporations Law and the *Acts Interpretation Act 1901*, on the basis that they will now be covered by the *Acts Interpretation Act 1901*. In particular, sections 109A to 109Z (inclusive, but excluding sections 109Q and 109X) and section 338 of the Corporations Law have not been included in the Bill. In addition, some definitions in section 9 that are no longer required have not been included in the Bill (for example, the definitions of ‘Account’, ‘calendar month’, ‘calendar year’, ‘Consolidated Revenue Fund’, ‘contravene’, ‘Department’, ‘document’, ‘estate’, ‘Executive Council’, ‘foreign companies law’, ‘foreign country’, ‘Gazette’, ‘Government Printer’, ‘individual’, ‘Jervis Bay Territory’, ‘justice of the peace’, ‘land’, ‘magistrate’, ‘month’, ‘office’, ‘originating provision’, ‘Parliament’, ‘Proclamation’, ‘record’, ‘statutory declaration’, ‘swear’ and ‘writing’).

5.49. Bill clause 334(2) provides that the *Acts Interpretation Act 1901*, section 46A (as in force on 1 November 2001), applies to a standard made under clause 334(1) as if it were a disallowable instrument for the purposes of that section. The *Acts Interpretation Act 1901* will therefore apply to accounting standards as though the standards were regulations made under an Act of the Commonwealth Parliament.

### *Crimes Act 1914*

5.50. As the *Crimes Act 1914* will apply of its own force to offences arising under the Bill, the Corporations Law definition of ‘penalty’ has been omitted from the Bill. Instead, the definition in *Crimes Act 1914*, as amended from time to time, will apply. This will effectively change the value of a penalty unit from the \$100 currently specified in Corporation Law, section 9, to the \$110 specified in *Crimes Act 1914*, section 4AA. A criminal liability that exists under the Corporations Law immediately before commencement (other than a liability that arises under a court order) will be taken to exist under the corresponding provision of the Bill (clause 1440(2)). However, the amount of a penalty unit applying under the Bill to those offences will be the amount that applied under the Corporations Law (that is, \$100), despite the effect of *Crimes Act 1914*, section 4AA (clause 1375).

## **Constitutional Matters**

### *Acquisition of property on just terms*

5.51. Bill clause 1350B will preserve the effect of section 1362BA of the Corporations Law requiring just terms to be provided for compulsory acquisitions of property made under the new *Corporations Act 2001* where this is required under subsection 51(xxxi) of the Constitution.

### *Fees and levies*

5.52. In order to comply with section 55 of the Constitution, the Bill does not include a number of provisions that currently relate to the imposition of fees. (Sections 902(3), 904(5), 919, 940(6), 941(6), (8) and (9), 942, 1236(1) and (2), 1351 and 1352). It is expected that these fees will be imposed as taxes by the following Bills (as enacted):

- Corporations (Fees) Bill; and
- Corporations (Securities Exchanges Levies) Bill; and
- Corporations (Futures Organisations Levies) Bill; and
- Corporations (National Guarantee Fund Levies) Bill.

5.53. A fee or deposit paid under the section 1351 of the Corporations Law of a State or Territory in relation to a particular matter will satisfy any liability under clause 1351 arising in relation to the same matter (clause 1393).

5.54. The Bill does not include provisions corresponding to:

- section 1352(1) of the Corporations Law to the effect that the part of any fee exceeding \$25,000 is not payable (however, clause 6(3) of the Corporations (Fees) Bill imposes a \$25,000 limit on the fees that may be imposed under that Bill and will therefore have the same effect as section 1352(1)); and
- sections 1355(b), 1357 and 1358 of the Corporations Law, allowing ASIC to collect a deposit towards a fee in certain circumstances.

5.55. The term ‘chargeable matter’ will have the meaning that it has in the Corporations (Fees) Bill 2001 (clause 9, definition of ‘chargeable matter’). ASIC will be able to recover unpaid fees on behalf of the Commonwealth as a debt (clause 1360).

5.56. Bill clauses 902, 904, 938, 940, 941, 1229(b), 1234 and 1235, concerning contributions to the fidelity fund of a securities or futures exchange, reflect the requirement in section 81 of the Constitution, that all revenues or moneys raised or received by the Executive Government of the Commonwealth shall form one Consolidated Revenue Fund, to be appropriated for the purposes of the Commonwealth in the manner and subject to the charges and liabilities imposed by the Constitution. The Bill provides for the collection of the tax by the exchange as agent for the Commonwealth. The *Financial Management and Accountability Act 1997* will not apply in relation to the payment of an amount of levy under this section to a securities exchange as agent for the Commonwealth. The payment of the tax to the Commonwealth by the exchange will be set off against a corresponding appropriation of the same amount to the exchange for inclusion in its fidelity fund. The Bill does not include provisions corresponding to sections 903(2) and (8) of the Corporations Law as these rules will be in the Corporations (Securities Exchanges Levies) Bill. These provisions concern the suspension of securities exchange fidelity fund levies when fund balance exceeds \$2 million and the resumption of the levy when the balance falls below \$1 million.

5.57. An amount paid before the commencement of the Bill under the Corporations Law of a State or Territory towards the membership of a securities or future exchange, or a contribution towards a fidelity fund of a securities or futures exchange, will be taken to satisfy any liability in relation to that matter arising under the Bill (clauses 1394, 1395 and 1396). The assets comprising the fidelity fund of a securities or futures exchange immediately before the Bill commences will become the assets of the fund immediately after that commencement (clauses 896(aa) and 1229(1)(a)).

### *Judicial power of the Commonwealth*

5.58. As the new *Corporations Act 2001* will be an Act of the Commonwealth Parliament, Chapter III of the Constitution – which provides for the exercise of federal judicial power – will be directly relevant.

5.59. The following changes to provisions of the Corporations Law have been made to ensure conformity with the requirements of Chapter III of the Constitution:

- Bill clause 206F(2)(b)(ii), which expressly enables ASIC to have regard to the public interest in determining whether to disqualify a person from managing a corporation, further distinguishes ASIC’s administrative power from the judicial power to disqualify conferred on the court under clause 206D;

- Bill clauses 422(3), 438D(3) and 533(3) will not allow the Court on its own motion to direct a receiver, administrator or liquidator to lodge a report about offences committed by officers of a company; and
- Bill clause 1322(6)(a)(iii) requires the court to apply a 'just and equitable' test rather than a 'public interest' test in exercising its power under clause 1322 to remedy defects in the holding of meetings.

### *Inconsistent State laws*

5.60. Section 109 of the Constitution provides that when a law of a State is inconsistent with a law of the Commonwealth, the Commonwealth law prevails and the State law, to the extent of the inconsistency, is invalid. The Bill provides for the concurrent operation of State legislation (ie, where there is no indirect inconsistency). It also provides an automatic 'roll-back' to accommodate certain State and Territory legislation, and a regulation-making mechanism to 'roll-back' additional aspects of the new *Corporations Act 2001*. Accordingly, the Bill does not include provisions corresponding to section 1277 of the Corporations Law and sections 9 to 11 (inclusive) of the *Corporations Act 1989* dealing with potential inconsistency between the Bill and a law of a State or Territory.

5.61. The relationship between the Bill and State and Territory legislation is addressed in Part 1.1A, entitled 'Interaction between Corporations legislation and State and Territory laws', comprising clauses 5D to 5H (inclusive). Part 1.1A of the Bill applies only to laws of a Territory or referring State (clause 5D(1)). Further, it will apply only to a potential inconsistency between those laws and the Bill or Part 3 of the ASIC Bill, and regulations made for the purposes of the Bill or Part 3 of the ASIC Bill (clause 5D(2)). However, it will not apply to the provisions of Part 3 of the ASIC Bill, or to regulations made under Part 3, to the extent that they operate in relation to a contravention of Division 2 of Part 2 of that Bill (concerning unconscionable conduct and consumer protection in relation to financial services). The aspects of the ASIC Bill to which Part 1.1A do not apply presently operate as federal law. The provisions of the Bill and the ASIC Bill to which Part 1.1A applies are referred to in the Part as the 'Corporations legislation'.

5.62. The Corporations legislation is not intended to limit the concurrent operation of any law of a referring State (clause 5E). Clause 5E(1) is in terms similar to those of several other Commonwealth provisions, such as section 75 of the *Trade Practices Act 1974*,.

5.63. Bill clause 5G will limit or qualify the operation of the Corporations legislation so that it no longer purports to have an operation that would be directly inconsistent with a relevant State or Territory law. A provision of the Corporations legislation does not prohibit the doing of an act or impose a liability for doing an act if a provision of a relevant State or Territory law specifically authorises or requires the doing of that act (clause 5G(4)).

5.64. It does not apply to a provision of a law of a State or Territory that is capable of concurrent operation with the Corporations legislation (see clause 5E).

5.65. Clause 5G will allow the Corporations legislation to make way for a provision of a State and Territory law, where:

- it is enacted and comes into force before the commencement of the Bill, but is not materially amended after commencement of the Bill (a 'pre-commencement (commenced) provision' (clause 5G(12)); or
- it is enacted before, but comes into force on or after, the commencement of the Bill, and is not materially amended after commencement of the Bill (a 'pre-commencement (enacted) provision' (clause 5G(13)); or

- it is enacted and comes into force on or after the commencement of the Bill, is not materially amended after commencement of the Bill, and is declared by the State or Territory law to be a Corporations legislation displacement provision for the purposes of clause 5G (a ‘post-commencement provision’ (clause 5G(14))); or
- it is materially amended after commencement of the Bill but the amendment was enacted before the Bill commenced; or
- it is materially amended after commencement of the Bill and the amendment is enacted on or after the Bill commenced, and is declared by the State or Territory law to be a Corporations legislation displacement provision for the purposes of clause 5G.

5.66. Clause 5G(15) provides that a provision of a State or Territory law is ‘materially amended after commencement’ if an amendment of the provision commences on or after the commencement of the Bill. However, a provision in a State or Territory law is not materially amended after commencement if it merely:

- changes a reference to the Corporations Law or ASC Law (or a provision) to a reference to the Bill or the ASIC Bill (or a provision), a penalty for a contravention of State or Territory law or a reference to a particular person or body to another person or body;
- adds a condition to rights or powers conferred, or obligations imposed; or
- adds criteria to be taken into account before a power is exercised (clause 5G(16));

or if:

- the amended provision would be inconsistent with a provision of the Corporations legislation in the absence of clause 5G, but would not materially reduce the range of persons, acts or circumstances to which the Corporations legislation applies if clause 5G applied to it as amended (clause 5G(17)).

5.67. The relevant State or Territory laws whose operation is facilitated by clause 5G will be those that:

- expressly authorise or require the doing of an act (clause 5G(4)). For example, a director who is required by a law of a State to exercise their power for an improper purpose will not be liable for any penalty (whether civil or criminal), despite Bill clauses 181(1)(b) and 184(1)(d) concerning the duty of directors to exercise their powers for a proper purpose.
- authorise a person to give instructions to the directors of a company or body, or require the directors to comply with instructions given by a person, or to have regard to matters communicated to the company or body by a person (clause 5G(5)). For example, despite clause (b)(ii) of the definition of ‘director’ at Bill clause 9, a person will not be a director of a company for the purposes of the Bill if they are authorised by a law of a State to give directions to the directors of a company, or the directors are required to comply with, or have regard to, the person’s directions.
- authorise or require a company or other body to use a word, or to use a word as its name (clause 5G(6)). For example, a company will be able to include a word in its name if the inclusion of that word in its name is authorised or required by a law of a State, despite the word not being available to the company under Bill clause 147(1).
- deal with the calling and conduct of a meeting of a company (clause 5G(7)). For example, despite Bill clause 249J(1), a resolution passed at the member’s meeting for which notice had not been given to all members of the company will be valid as if the meeting had been called and conducted in accordance with the Bill, if the failure to give the notice was required or authorised by a law of a State.

- concern a scheme of arrangement, receivership, winding up or other external administration of a company (clause 5G(8)). For example, despite Bill clause 583, Bill Chapter 5 does not apply to the winding up of a Part 5.7 body to the extent that the winding up is carried out in accordance with a provision of a law of a State.
- provides for the inclusion of a provision in a company's constitution (clause 5G(9)). For example, despite Bill clause 648G, the constitution of a company may continue to include proportional takeover approval provisions if a law of a State provides that the provisions are included, or are taken to be included, in the company's constitution.
- provides that additional requirements must be met for an alteration of a company's constitution to take effect (clause 5G(10)). For example, despite Bill clause 246B, the consent of a particular person may be required to alter the constitution of a company if a law of a State provides that the company's constitution may not be altered without the consent of that person.

5.68. Bill clause 5G(11) has the effect that if a provision of a law of a State or Territory would, but for that clause, be inconsistent with a provision of the Corporations legislation, the provision of the Corporations legislation does not operate in the State or Territory to the extent necessary to ensure that no inconsistency arises between the provision of the law of the State or Territory and the provision of the Corporations legislation.

5.69. Regulations made under the Corporations legislation will be able to declare that clause 5G does not apply to particular provisions. The States and Territories will also be able to pass a law declaring that Bill clause 5G does not apply to a specified provision.

5.70. Bill clause 5H will preserve the capacity of a law of a State or Territory to register an entity as a company. The notice lodged with ASIC registering the company will be able to specify the opening hours of the company's registered office (clause 145(2)(a)). The residential addresses specified in the notice must be the person's usual residential address unless they are entitled to have an alternative address substituted for their usual residential address (clauses 109X(2) and 205D(2)).

5.71. The Bill will allow regulations to be made modifying its operation so that the Corporations legislation does not apply to a matter dealt with by a State or Territory law, or is not inconsistent with the operation of a State or Territory law specified in the regulations (clause 5I).

5.72. The regulation making power is intended to apply to laws of a State or Territory in force (or proposed) immediately before the Bill commences, and also to laws of a State or Territory proposed after the Bill commences. The Bill will therefore allow regulations to be made narrowing the operation of the Bill to make way for the existing or proposed State or Territory law to operate, thus avoiding any inconsistency.

5.73. Bill clause 224(9) provides that it applies subject to Bill Part 1.1A. This is not intended to preclude the application of Part 1.1A in relation to other clauses of the Bill that are not expressed to apply subject to Part 1.1A.

5.74. In addition to the issues arising from the potential operation of section 109 of the Constitution, there are also issues arising from the fact that it is not generally within the competence of a Parliament of a State to amend or modify the operation of legislation of the Commonwealth (or vice versa). Over the years, States have from time to time enacted legislation that modifies the operation of the Corporations Law of the State concerned; and there are provisions of the Corporations Law that modify the operation of other legislation of the relevant State. However, provisions of this kind would not generally have effect once the corporations legislation is enacted as federal law.

5.75. In order to ameliorate this outcome in relation to State and Territory laws:

- a provision of a State or Territory law may declare a matter to be an excluded matter, in relation to either the whole of the corporations legislation or a specified provision of the legislation. As a result, the corporations legislation (or the provision specified) will not apply in the State or Territory in relation to the declared matter (clause 5F). It will then be open for the State or Territory to regulate the matter concerned.
- States will be able to pass laws deeming bodies to be registered as companies and those laws will have effect by force of the federal law (clause 5H). State legislation deeming bodies to be registered as companies is not uncommon in connection with the corporatisation or privatisation of government business enterprises.
- companies will be able to transfer their basis of incorporation from the *Corporations Act 2001* to a State/Territory statute of their jurisdiction of registration (Part 5A.2). This will accommodate the continued operation of State and Territory statutes enabling companies to assume another corporate form (eg, by becoming an incorporated association) although minor amendments of those statutes may be required.

5.76. In addition, some provisions of the Corporations Law that in their present form disapply other State and Territory laws in particular circumstances have been recast in order to achieve substantially the same effect in combination with section 109 of the Constitution (clauses 778, 995A and 1141).

5.77. Furthermore, certain provisions of the Corporations Law contemplating the making of regulations modifying the operation of certain State and Territory personal property securities legislation have not to that extent been replicated in the Bill (Corporations Law, paragraphs 273(3)(e) and (4)(b); cf clause 273C). However, it is noted that no modifications have been prescribed for the purposes of the existing provisions.

#### *Jurisdiction of High Court*

5.78. Clause 659B(5) makes it clear that the jurisdiction conferred on courts under clause 659B in relation to takeover matters is not intended to affect the jurisdiction of the High Court. This is presently done by section 59A(4) of the *Corporations Act 1989*.

### **Effect on non-referring States**

5.79. The Bill has been drafted so that it will operate satisfactorily should one or more States not participate in or subsequently withdraw from the new arrangements.

5.80. The principal technique for distinguishing between referring and non-referring States is the use of the term 'this jurisdiction'. Provisions in the Bill that apply only in 'this jurisdiction' will not apply to any State that is not a referring State.

5.81. The following paragraphs outline the more significant consequences should a State not participate in, or withdraw from, the referral of power.

5.82. The Bill would require a body corporate incorporated or formed under a law of the non-referring State, such as the company law of that State, to register with ASIC as a registered Australian body before carrying on business in a referring State or Territory (clause 9, definitions of 'foreign company' and 'registrable Australian body').

5.83. It would no longer be possible to locate or do in a non-referring State things that the Bill will require to be located or done in a referring State or Territory (for example, the keeping of registers

under Bill Chapter 2C) (clauses 172, 856(14) and 881(1)). Nor would a company be able to keep a branch register of members in a non-referring State (clause 178). However, a company would continue to satisfy the directors' residency requirement if at least one of its directors resides in the non-referring State (clause 201A). Similarly, the alternative address specified by a director may be in a non-referring State (clause 205D(2)).

5.84. A disclosing entity formed in a non-referring State would continue to be bound by Chapter 2M concerning financial reports and audit (clause 285(2)). A company would have to keep within the referring States and Territories sufficient records to enable financial statements to be prepared (clause 289).

5.85. The Bill would require the external administrator of a company that carried on business in a non-referring State to publish notices in either a national newspaper or a newspaper that circulates generally in that non-referring State (clauses 436E(3)(b)(ii), 439A(3)(b)(ii), 445F(2)(ii), 446A(5)(b)(ii), 449C(5)(b)(ii), 450A(1)(b)(ii) and 450B(b)(ii)).

5.86. The Court would be able to make an order preventing a person from leaving the referring States and Territories, in addition to retaining its existing power to restrain a person from leaving Australia (clauses 486A, 486B, 487 and 1323(1)(k)).

5.87. The qualified privilege given to an auditor under Bill clause 601HH(4) would not apply to proceedings in a court of a non-referring State.

5.88. A Minister of a non-referring State would not be able to commence court proceedings under the Bill in relation to a takeover bid, or a proposed takeover bid, before the end of the bid period (clause 659B(1)).

5.89. The laws of a non-referring State in relation to gaming and wagering would apply to options contracts to which clause 778 applies and futures contracts to which clause 1141 applies.

5.90. The prohibition on operating an unregistered managed investment scheme would only apply in the referring States and Territories (clause 901ED(5)).

5.91. Bill Chapters 6, 6A and 6C, concerning takeovers, would continue to apply to a body formed under a law of a non-referring State that is included in the official list of a securities exchange in a referring State or Territory (clauses 603, 660A and 671A).

5.92. Bill Chapter 6D, concerning fundraising, would not apply to offers of securities that are received in a non-referring State (clause 700(4)).

5.93. Significant provisions dealing with the securities and futures markets will not apply in a non-referring State. This include provisions concerning access to the National Guarantee Fund and other fidelity funds (although accrued rights to make claims under the Corporations Law of non-referring States will be honoured).

5.94. The Auditor-General of a non-referring State would not be deemed to be registered as an auditor (clause 1281(b)).



# 6

## Correction of Anomalies and Changes in Drafting Style

### Correction of Anomalies

6.1. The Bill will correct a number of anomalies within the existing Corporations Law. These amendments will not make any substantive changes to the law.

6.2. Bill clause 9 amends the definition of ‘Australian bank’ to include an Australian ADI that is permitted under section 66 of the *Banking Act 1959* to assume or use:

- the word bank, banker or banking; or
- any other word (whether or not in English) that is of like import to a word referred to in paragraph (a).

6.3. Bill clause 9, definitions of ‘board or managerial office’ and ‘person’, will be amended to correct cross-references.

6.4. Bill clause 9 will define ‘Panel’ to mean the Corporations and Securities Panel established by section 171 of the ASIC Bill.

6.5. Bill clause 9 defines the term ‘Corporations legislation’ to mean this Bill, the ASIC Bill, and rules of court made by the Federal Court, the Supreme Court of the Capital Territory, or the Family Court, because of a provision of this Bill. It also extends to rules of court applied by the Supreme Court, or a State Family Court, of a State when exercising jurisdiction conferred by Division 1 of Bill Part 9.6A.

6.6. The definition of ‘exempt body’ will be simplified so that a body corporate is an exempt body of a State or Territory if, and only if, it is not a company, and is incorporated by or under a law of the State or Territory (clause 66A).

6.7. The Bill does not include the section 9 definition of ‘public authority of the Commonwealth or a State’.

6.8. Bill clause 91 corrects cross-references, referring to clauses 206B, 206E, 206D and 206F rather than section 229, 230, 599 and 600 respectively.

6.9. Bill clause 109X, concerning the service of documents, includes a cross-reference to clause 205B(1) (section 109X of the Corporations Law incorrectly referred to section 242(1)). The clause also includes a new reference to clause 5H(2), concerning the registration of companies under a law of a referring State or Territory.

6.10. The table of replaceable rules in Bill clause 141 will be amended to correct a number of cross-references.

- 6.11. The note to Bill clause 208(1) will be amended to correct the cross-reference to the definition of ‘control’.
- 6.12. Bill clauses 249CA(2), 249HA(2), 300A(2) and 323DA(2) will be amended to omit a redundant requirement that the companies to which they apply be incorporated in Australia.
- 6.13. Bill clause 251A will be amended so that ASIC may only approve a place for the keeping of minute books if that place is in Australia. This amendment will make clause 251A consistent with Bill clause 172(1A) relating to registers.
- 6.14. Bill clause 252L will be amended to renumber subsection (1A) (second occurring) as paragraph (1B).
- 6.15. Bill clause 261(4) will be amended so that a document will not be taken to have been lodged with ASIC until it has been received by ASIC in a referring State or Territory.
- 6.16. The clauses comprising Bill Chapter 2L, entitled ‘Debentures’, have been renumbered as clauses 283AA to 283I (inclusive) to reflect the appearance of these provisions between clauses 282 and 285. The renumbering of these provisions is also reflected in amendments to Schedule 3, which sets the penalty for provisions that establish offences.
- 6.17. Bill clause 344 will correct the effect of an incorrect section reference in Item 236 of Schedule 3 of the *Corporate Law Economic Reform Program Act 1999*.
- 6.18. The note to Bill clause 348 will be amended to correct the cross-reference to clause 205B as the provision requiring a company to lodge changes in relation to its directors and secretaries.
- 6.19. Bill clause 601ED(5) will be amended to make it clear that the prohibition against operating an unregistered managed investment scheme applies only in ‘this jurisdiction’.
- 6.20. Bill clauses 601FC(3) and 601FE(2) will be amended to provide that the following duties prevail over any duties that an officer of the responsible entity might have under Bill Part 2D.1:
- the duties that the responsible entity has as trustee of the scheme’s assets; and
  - the duties that an officer of a responsible entity has not to use their position improperly.
- 6.21. Bill clause 601HH(4)(a) will be amended to extend the auditor’s qualified privilege to proceedings in a federal court.
- 6.22. Bill clause 659B(1) will allow a Minister of the Commonwealth or a referring State or Territory to commence court proceedings in relation to a takeover bid before the end of the bid period, while section 659B(1) of the Corporations Law conferred that power on a public authority of the Commonwealth or a State.
- 6.23. Bill clause 654B will be amended to make it clear that the usual period of 2 days referred to in that clause is 2 business days.
- 6.24. Bill clause 655B(1) will be will be amended to correctly refer to clause 655B(2).
- 6.25. Bill clause 658D has been amended to refer to a ‘declaration’, consistent with the language used in clause 655A.
- 6.26. Bill Clause 661C(4) will be amended to refer to ‘securities’ instead of ‘shares’ to reflect the broader operation of the balance of the clause.

- 6.27. Bill Clause 670B(3) has been amended by substituting ‘This Chapter’ for ‘This Part’ to reflect the fact that the clause appears in a Chapter and not a Part of the Bill.
- 6.28. Section 708(11)(f) of the Corporations Law has not been included in the Bill because, as a result of amendments made by the *Financial Sector Reform (Amendments and Transitional Provisions) Act (No. 1) 1999*, the definition of terminating building societies was removed from the *Financial Corporations Act 1974*.
- 6.29. Section 708(11)(g) of the Corporations Law has not been included in the Bill because friendly societies that are registered under the Life Insurance Act 1995 will be covered by Bill clause 708(11)(c).
- 6.30. Sections 854(ba) and (b) of the Corporations Law will be renumbered as sections 854(b) and (c) respectively.
- 6.31. The Bill does not include the redundant definition of ‘previous Board’ in section 920 of the Corporations Law.
- 6.32. Bill clause 1274AA(1) has been amended to correct the cross-reference from Part 9.1 to Bill Part 2D.6.
- 6.33. Section 1317S(2)(a) (second occurring), has been renumbered as Bill clause 1317S(2)(b).
- 6.34. Typographical errors are corrected in clauses 200G(1)(c), 299(1)(f), 300A(1)(a), 300(1), 432(4), 562(1), 960(4) and 1087(1)(c).

## Changes in drafting Style

- 6.35. Provisions of the Corporations Law that operate by reference to a particular date, such as the date the provision was amended, have been amended to specify the actual date (clauses 135(1)(a)(i) and (ii), 135(2)(b), 148(5)(a) and (b), 151(1)(b), 169(4)(a) and (b), 169(5)(a), 319(6)(a) and (b), 411(8A), 417, 418A(1)(a) and (b), 459E(5), 565(1), 566, 567(1), (2) and (5), 588F(1), 588FE(1), 588FI(1)(a), 588FJ(1)(b), 588Z(b), 592(1)(a), 664AA(a), 954B(1)(c) and 984 (definition of ‘joining exchange’)).
- 6.36. Unlike the Corporations Law, the Bill does not define the term ‘State’ to include the Northern Territory. The Bill relies on the *Acts Interpretation Act 1901* to define ‘internal Territory’ to mean the Northern Territory, Australian Capital Territory and the Jervis Bay Territory. The Bill therefore does not define the terms ‘internal Territory’, ‘excluded Territory’ and ‘external Territory’. Bill clause 9, definition of ‘incorporated in Australia’, has been amended to take account of the Bill’s reliance on the definition of ‘internal Territory’ in the *Acts Interpretation Act 1901*.
- 6.37. The Bill uses contemporary language such as ‘must’, ‘taken’, ‘given’, ‘ASIC’, ‘employee’, ‘are’, ‘law of’ and ‘chair’ in places where the Corporations Law would use expressions such as ‘shall’, ‘are to be taken’, ‘deemed’, ‘furnished’, ‘the Commission’, ‘servant’, ‘law in force in’ or ‘chairman’. The Bill uses the plural ‘are’ where the Corporations Law currently inappropriately uses the singular ‘is’, and vice versa.
- 6.38. Bill clause 9 modernises the drafting of the definitions of the terms ‘foreign company’ and ‘registrable Australian body’, without any change in effect.
- 6.39. A number of clauses include a semi-colon, or the words ‘and’ or ‘or’, at the end of each item in a list.

- 6.40. Bill clause 9 amalgamates the two definitions of the term ‘entity’ in section 9 of the Corporations Law.
- 6.41. Bill clause 271(1) has been paragraphed without any change in effect.
- 6.42. Bill clauses 273A, 273C and 273D have been amended to omit the definition of the term ‘modification’ that appeared in sections 273A(3A), 273C(3A) and 273D(2) of the Corporations Law, as the definition did not add anything to the ordinary meaning of that word as it is used in those clauses.
- 6.43. Bill clause 327(5) rewrites section 327(5) of the Corporations Law without any change in effect.
- 6.44. Bill clause 659A takes account of the fact that exemptions and modifications may be ‘made’ under clause 655A.
- 6.45. The paragraphs to Bill section 713(6) have been placed in the same order as the provisions to which they refer appear in the Bill.
- 6.46. Sections 896(b) and (ba) of the Corporations Law have been merged into Bill clause 896(b) without any change in effect.
- 6.47. Bill clause 902(1)(b) refers to a person being admitted to membership of a relevant partnership without any change in effect.
- 6.48. Sections 925A and 926 of the Corporations Law have been merged into Bill clause 926 without any change in effect.
- 6.49. The title for Bill clauses 1276 and 1317A have been changed from ‘Interpretation’ to ‘Definition’.
- 6.50. Section 1416 of the Corporations Law provides that a number of provisions of the Corporations Law in force prior to the commencement of the *Company Law Review Act 1998* apply in relation to a company limited by share and by guarantee as if they had not been repealed or amended by that Act. The Bill includes the provisions omitted or repealed by the *Company Law Review Act 1998* (clauses 9 (definition of ‘limited company’), 167AA, 516, 517, 518, 519).

## Transitional Provisions

### Previous amendments to the Corporations Law

7.1. Detailed transitional provisions dealing with previous amendments to the Corporations Law are not necessary. Therefore, all current transitional provisions and current transitional aspects of these provisions have been omitted from the Bill. This includes all references to a ‘corresponding previous law’, ‘corresponding previous provision’ and the definitions of these terms in sections 58(3) and (4) of the Corporations Law. However, the Bill will have the effect that it would have had if those transitional provisions had been part of the Bill and had the effect they had under the Corporations Law. In particular, any right or liability (whether civil or criminal) that existed under the transitional provisions will be continued under the Bill (clause 1408). Clauses that refer to the omitted transitional provisions have been amended to take account of the omission, without any change in effect (clauses 9 (definitions of ‘old Division 11 of Part 11.2 transitionals’ and ‘old Division 12 of Part 11.2 transitionals’), 283G(5)(c), 601QA(5)(c), 655A(6)(c), 669(5)(c), 673(6)(c) and 741(5)(c)).

7.2. The Bill does not include:

- Division 1 of Part 7.1A, of the Corporations Law of the Capital Territory, which enabled the Australian Stock Exchange Limited to change its type from a company limited by guarantee to a company limited by shares, because the conversion has been completed; and
- section 268A of the Corporations Law, concerning the assignment of charges under the *State Bank (Corporatisation) Act 1994* of South Australia.

7.3. Bill clause 1087(2) will provide that a certificate issued in accordance with clause 1087(1) specifying shares held by a member of a company is prima facie evidence of the title of the member to the shares. Bill clause 1087(1) provides that the certificate must state that the company is registered under the Bill. Section 1087(1) of the Corporations Law provides that the certificate must state the company’s jurisdiction of registration. A certificate issued under section 1087(1) will meet the requirements of Bill clause 1087(2) because of clause 1403. Bill clause 1403 will preserve for the purposes of clause 1087(2) the significance (that is, its evidentiary value) that a certificate issued under section 1087(1) had because of section 1087(2).

7.4. Bill Schedule 4 retains the operative provisions in Schedule 4 of the Corporations Law (concerning the transfer to the Corporations Law of entities formerly registered under the Friendly Societies Codes and the Financial Institutions Codes of the States) with the changes required to reflect the constitutional basis of the Bill as a law of the Commonwealth. Bill Schedule 4 does not include a number of spent transitional provisions included in the Corporations Law, and acts done under those spent provisions will be saved by other provisions included in Bill Schedule 4 or by the general transitional provisions (see Bill Chapter 10).

## Transition from the current scheme to the new scheme

### Overview

7.5. It is envisaged that provisions repealing the *Corporations Act 1989* will be included in the Corporations (Consequential Amendments) Bill. On repeal of that Act, the Corporations Law of the ACT will cease to exist.

7.6. Chapter 10 of the Bill deals with the transition to the regime to be established by the Bill. It is expected that complementary provisions will be enacted by the States and the Northern Territory. It is expected that complementary provisions needed for the ACT will be included in the Corporations (Consequential Amendments) Bill of the Commonwealth.

7.7. Broadly, the object of Bill Chapter 10 is to provide for a seamless transition from the Corporations Law to the Bill. Individuals, bodies corporate and other bodies are, to the greatest extent possible, to be put in the position they would have been in if their rights and liabilities under the current Corporations Law had arisen under the Bill (clause 1370). The effect of the transitional provisions will not be affected by a State subsequently ceasing to be a referring State (clause 1376).

7.8. The key elements of the transitional provisions are as follows:

- Clause 1400 will substitute for existing rights and liabilities under the old corporations legislation (not being rights or liabilities arising from a court order) equivalent rights and liabilities under the new corporations legislation.
- Clause 1383 will substitute for non-‘federal’ proceedings on foot under the old corporations legislation (not being proceedings where rights or liabilities have been determined, or proceedings arising from such proceedings) equivalent federal proceedings under the new corporations legislation.
- Clause 1384 will continue ‘federal’ proceedings on foot under the old corporations legislation as federal proceedings under the new corporations legislation.
- The Commonwealth Corporations (Consequential Provisions) Bill 2001 will repeal the Corporations Law, thereby removing the federal basis for new proceedings under the old corporations legislation.
- State and Territory interpretation laws are not expected to save the effect of a court order already made in the exercise of State or Territory jurisdiction with respect to rights or liabilities under the old corporations legislation. State and Territory ‘consequential’ legislation would on that basis need to include savings provisions. The Commonwealth Corporations (Consequential Provisions) Bill will include equivalent savings provisions in relation to orders already made in the exercise of federal jurisdiction.
- State and Territory ‘consequential’ legislation will need to authorise further State and Territory proceedings in relation to such orders (it will also need to provide for Commonwealth officers and agencies to perform functions in relation to those proceedings). Further proceedings within federal jurisdiction will be continued as federal proceedings under 1384 if they are ‘federal corporations proceedings’ (which may involve substituted rights or liabilities under the new corporations legislation).

7.9. Division 1 of Chapter 10 sets out the interpretation provisions for that Chapter. Divisions 2 to 5 (inclusive) of Chapter 10 deal with a range of specific transitional issues. Division 6 deals with transitional issues on a more general level. Division 7, comprising clause 1409, provides for the making of regulations addressing transitional issues (including regulations having a retrospective effect). Division 6 is subject to Divisions 2 to 5 and the regulations made under Division 7

(clause 1397(1)). Divisions 2 to 4 (inclusive) are subject to the regulations made under Division 7 (clauses 1377, 1379, 1381 and 1386). The provisions in Division 6 deal with issues at the broader level necessary to achieve the seamless transition to the Bill mentioned in clause 1370 and are not intended to operate to the exclusion of the provisions of Division 7. In some circumstances more than one provision will apply to a particular issue (clause 1398).

7.10. ASIC will not be required to remove from its database the records it holds under the Corporations Law of a State that becomes a referring State (clause 1392).

#### *Existing companies*

7.11. Bill clause 1378 will expressly carry over the registration of companies from the Corporations Law to the Bill. The effect of existing certificates of registration are preserved by clause 1389.

#### *Payment of fees and levies*

7.12. Liabilities to pay fees or to pay levies for the National Guarantee Fund or a fidelity fund before the commencement of the Bill will be carried forward. Persons with such liabilities are placed in the same position after commencement as they would be before commencement (clauses 1393 to 1396).

#### *Regulations*

7.13. Bill clause 1380 will deem the Corporations Regulations as in force immediately before its commencement to have effect as if they had been made for the purposes of the Bill.

#### *Existing right and liabilities*

7.14. Things done under, or for the purpose of, the Corporations Law that have an ongoing significance immediately before commencement of the Bill will be taken to have been done under, or for the purposes of, the Bill (clause 1399). For example:

- an accounting standard made under section 334(1) of the Corporations Law that is in force immediately before the Bill commences will be taken to have been made under Bill clause 334(1);
- a statutory demand served on a company under section 459E(1) of the Corporations Law that is in effect immediately before the Bill commences will be taken to have been served on the company under Bill clause 459E(1);
- an exemption or declaration made by ASIC under section 655A(1) of the Corporations Law in relation to Chapter 6, concerning takeovers, that operates immediately before the Bill commences will be taken to have been done under Bill clause 655A(1);
- a banning order made by ASIC under section 829(1) of the Corporations Law that is in effect immediately before the Bill commences will be taken to have been made by ASIC under Bill clause 829(1).

7.15. The Bill will create rights and liabilities (civil or criminal) equivalent to those that existed immediately before its commencement under the Corporations Law (clause 1400). For this purpose, a liability includes a duty or obligation (clause 1371, definition of ‘liability’). For example:

- if a corporation has a liability immediately before the Bill commences under section 588W of the Corporations Law it will have an equivalent liability under Bill clause 588W after commencement;
- if a person does an act before commencement that renders them liable to be prosecuted for an offence against a provision of the Corporations Law before commencement, they will have an equivalent liability to be prosecuted after commencement; and
- if a person has an obligation immediately before the Bill commences under Corporations Law, section 1314, to do an act, the person will have an equivalent obligation to do the act under Bill clause 1314 after commencement.

However, the liability to pay a contribution, levy or fee under the sections 902, 904, 938, 940, 941, 1234, 1235 or 1351 of the Corporations Law will be preserved as a tax liability under the tax Bills accompanying the Bill (clause 1397(3)).

7.16. The Bill will also create rights and liabilities equivalent to existing rights and liabilities acquired under provisions of the Corporations Law that are not in force immediately before commencement of the Bill (clause 1401). For example, the Bill will create, despite the repeal of Corporations Law, Chapter 11, rights and liabilities equivalent to existing rights and liabilities established under provisions of the Corporations Law that have been repealed prior to commencement of the Bill.

7.17. The creation of rights and liabilities will extend to right and liabilities that have been ‘validated’ under the State validation legislation (see above) (clause 1372(1)). These rights and liabilities will be taken to have been acquired under the Bill (clause 1372(2)). Bill clause 1373 provides that the transitional provisions are to apply as if the things that have been validated actually occurred. This clause will also have the effect that things that are deemed by a law of a State or Territory to have happened under the Corporations Law of a State, such as the registration of a body corporate as a company, will be treated as though they had actually happened for the purposes of the transitional provisions.

7.18. It is envisaged that there will be State and Territory legislation that has the effect of ensuring the extinguishment of any rights and liabilities that existed under the Corporations Law (including by force of the State validation legislation) where equivalent rights and liabilities are created by the transitional provisions of the Bill.

7.19. Clauses 1400 and 1401 do not apply in relation to rights or obligations arising under or in relation to court orders (see clause 1397). It is envisaged that provisions in complementary State and Territory laws will instead ensure simply that such rights and liabilities are not affected for the purposes of State or Territory law by the repeal of the *Corporations Act 1989*. Provisions in the Corporations (Consequential Provisions) Bill will do the same for the purposes of federal law. This approach avoids any risk these clauses might otherwise infringe the requirements of Chapter III of the Constitution.

7.20. If the Corporations Law has the effect that a thing happened under the Corporations Law of more than one State or Territory, the transitional provisions will apply as though the thing had happened only once for the purposes of the Bill (clause 1374).

7.21. The Bill will preserve any time limits relating to the preserved rights and liabilities (clause 1402). Similarly, a process or status that commenced under the Corporations Law at a particular time before the Bill commenced, and is continued under the Bill, will be taken to have commenced at the time it commenced under the Corporations Law.

7.22. An event or circumstance that occurred before the commencement of the Bill that has a particular significance for the purposes of a provision of the Corporation Law will have the same significance for the purposes of the corresponding provision in the Bill (clause 1403). For example:

- a change before the Bill commences in a director's interests in securities of the company will have the significance for Bill clause 205G(4) that it had for section 205G(4) of the Corporations Law;
- conviction before the Bill commences of an offence of the type mentioned in Bill clause 206B(1)(a) will have the significance for Bill clause 206B(1) that it had for section 206B(1) of the Corporations Law;
- the service of statutory demand on a company under section 459E of the Corporations Law before the Bill commences will have after the Bill commences the significance for Bill clauses 459A and 459C(2)(b) that it had for sections 459A and 459C(2)(b) of the Corporations Law – but note the effect of Bill clause 1397, discussed below;
- if, immediately before the Bill commences, a company's annual return is at least 6 months late, it will have the significance for Bill clause 601AB, concerning the deregistration of companies, that it had for section 601AB of the Corporations Law.

7.23. References in the Bill to the happening of a particular kind of thing will be taken to include a reference to the happening of those things before the Bill commences (clause 1404). For example:

- the reference in Bill clause 170(2) to the grant of an option includes an option granted before the Bill commences;
- the reference in Bill clause 205B(1) to the appointment of a director will be taken to include the appointment of a director before the Bill commences;
- the reference in Bill clause 206B(1)(a) to a person being convicted of certain offences will be taken to include a reference to convictions for those offences that occurred before the Bill commences;
- the reference in Bill clause 249H(2)(b) to members having 95% of the votes agreeing to the calling of a meeting on short notice includes an agreement made before the Bill commences;
- the reference in Bill clause 631(1) to a person having publicly proposed a takeover bid includes a proposal made before the Bill commences.

7.24. References in the Bill to another provision in the Bill will be taken, in relation to events that happened before the Bill commences, to include a reference to the provision of the Corporations Law that corresponds to that other provision (clause 1405). For example:

- the reference in Bill clause 249O(1) to the giving of a notice under Bill clause 249N will be taken to include a notice given under section 259N of the Corporations Law before the Bill commences;
- the reference in Bill clause 256B(1)(c) to shareholders having approved a share buy-back under Bill clause 256C will be taken to include an approval given by shareholders under section 256C of the Corporations Law before the Bill commences;

- the reference in Bill clause 650C(2) to a notice published under Bill clause 630(1) will be taken to include a reference to a notice published under section 630(1) of the Corporations Law before the Bill commences;
- the reference in Bill clause 826(1)(h)(ii) to an order made under Bill clause 830 against a director will be taken to include a reference to an order made against the director under section 830 of the Corporations Law before the Bill commences.

7.25. References in the Corporations Law to a previous corresponding law have not been taken up in the Bill. However, if a provision in the Corporations Law contains a reference to a corresponding previous law, then the corresponding provision in the Bill will be taken to include an equivalent reference (clause 1406). For example:

- the reference in Bill clause 1229(2) to the payment of an amount under Bill clause 1229(1)(b) will be taken to include a reference to an amount paid under a previous corresponding law to section 1229(1)(a) of the Corporations Law (Bill clause 1405 will require the reference to a amount paid under Bill clause 1229(1)(b) to include a reference to an amount paid under section 1229(1)(a) of the Corporations Law);
- the reference in Bill clause 1285(1)(e) to particulars of the suspension of a person's registration as an auditor under Division 2 of Part 9.2 of the Corporations Law will be taken to include a reference to the particulars of the suspension of the person's registration as an auditor under a previous corresponding law to Division 2 of Part 9.2 of the Corporations Law.

### *Court proceedings*

7.26. Federal corporations proceedings as defined in clause 1382(1) will continue after the Bill commences in the same court as if the previous proceedings (including any orders) under the Corporations Law had been proceedings under the corresponding provision of the Bill (clause 1384). These proceedings may relate to the rights and liabilities created under clause 1400. Equally they may relate to rights or liabilities under or in relation to court orders.

7.27. In relation to other proceedings on foot under the Corporations Law immediately before the commencement of the Bill, the Bill creates a new proceeding in the same court, exercising federal jurisdiction, under the corresponding provision of the Bill (clause 1383(3)). These new proceedings relate to the new rights and liabilities created by clause 1400. The court will be obliged to treat the steps taken before the Bill commences as though they were taken for the new proceedings (clause 1383(4)). Further, if the earlier steps included an interlocutory order, the rights and liabilities of all persons will be those that they would have had if the order been had been made by the same court, in the exercise of federal jurisdiction, as part of the new proceedings (clause 1383(5)). These arrangements apply to both civil and criminal proceedings. It is expected that State and Territory law will make it clear that the existing non-federal proceedings do not continue.

7.28. Consideration is currently being given to the decision of the High Court in *ASIC v Edensor Nominees Pty Ltd* [2001] HCA 1, any implications it may have for the operation of the transitional provisions and any consequential changes that may be desirable.

7.29. Clause 1383 does not apply to certain proceedings relating to court orders, or where there has been a final determination (see paragraph 7.19 above). It is envisaged that complementary provisions in State and Territory legislation will authorise State and Territory proceedings in these circumstances. State and Territory provisions will also make provision for ASIC, the

Commonwealth DPP and the AFP, where appropriate, to continue to perform functions in relation to those proceedings.

7.30. The following table illustrates how the transitional provisions apply to court proceedings:

BEFORE COMMENCEMENT	AFTER COMMENCEMENT
A shareholder starts an action under section 1005 of the Corporations Law to recover loss alleged to have been suffered due to conduct of a listed company that was in contravention of the continuous disclosure provisions in section 1001A.	As no final order has been made in the proceeding, and it is not a federal corporations proceeding, clause 1383 applies. A new proceeding is created by that provision, relating to rights and liabilities of both parties created by clause 1400.
A shareholder obtains an order under section 1005 of the Corporations Law, requiring a listed company to compensate the shareholder for loss which they suffered as a result of the company's contravention of the continuous disclosure provisions in section 1001A. The shareholder seeks a sequestration order against the company.	The proceeding is an enforcement proceeding that is not a federal corporations proceeding. Accordingly, neither clause 1383 nor clause 1384 apply. The proceeding continues under the law of the relevant State or Territory, facilitated by the complementary provisions of that jurisdiction preserving the effect of the order being enforced, and the enforcement proceedings themselves.
A company seeks compensation from one of its former directors for breaching duties under former section 232 of the Corporations Law. The director unsuccessfully applies to the trial judge to strike out the claim on the basis that former section 232 is not a valid law of the relevant State. This decision is unsuccessfully appealed to the Court of Appeal and the High Court.	As no order has been made in the continuing trial proceeding, and the proceeding is not a federal corporations proceeding, the proceeding is one to which clause 1383 applies. A new proceeding is therefore created by that provision, relating to rights and liabilities created by clause 1401.
ASIC refuses an application by a company limited by guarantee to convert into company limited by shares under Part 2B.7. The decision is set aside by the Federal Court in an action by the company under the <i>Administrative Decisions (Judicial Review) Act 1987</i> (applying of its own force). ASIC is ordered to determine the application in accordance with law. ASIC appeals to the Full Court of the Federal Court.	The appeal proceedings are federal corporations proceedings. They continue under clause 1384. The effect of the order of the Federal Court at first instance (to which the appeal relates) is preserved by provisions to be included in the Corporations (Consequential Provisions) Bill. If ASIC is unsuccessful in having the orders set aside, ASIC will be under an obligation under corresponding provisions of the new corporations legislation to determine the application.
ASIC investigates the conduct of a person that appears to constitute a breach of the insider trading provisions in section 1002G. A brief of evidence is sent to Commonwealth Director of Public Prosecutions.	As court proceedings have not commenced, Part 10.1 Division 4 is not applicable. If the person was liable to be prosecuted before commencement, they have an equivalent liability to be prosecuted after commencement. The DPP may bring a charge for an offence against the corresponding provisions of the new corporations legislation.

### Other transitional measures

7.31. A reference in an instrument to a provision of the Corporations Law will be taken to include a reference to the corresponding provision in the Bill (clause 1407). Bill clause 9 defines 'provision of a law' to include a subsection, section, Subdivision, Division, Part or Chapter of the law; and a Schedule, or an item in a Schedule, to the law. Similarly, a reference in the Bill to the taking of a proceeding in a court under the Bill will be taken to include a reference to proceedings taken before the Bill commences under the corresponding provision of the Corporations Law (clause 1385).

7.32. For the purposes of Bill clause 1407, an instrument is an instrument of a legislative or administrative character, and includes any other document (clause 1371, definition of 'instrument'). The provision therefore extends to Acts of the Commonwealth Parliament, and regulations and

## **Transitional Provisions**

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other instruments made under Commonwealth Acts. The provision does not extend to Acts of the States or Territories (or an instrument made under such an Act) (clause 1407(1)(a) and (b)). It is expected that each of the States and Territories will enact a similar provision in relation to their Acts, and instruments made under those Acts.

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