

CHAPTER 3

STRUCTURE OF THE LEGISLATION

The Corporations Bill 2001

3.1 As noted in the previous chapter, the Bill is one of a package of measures intended to respond to the decisions of the High Court in *Wakim* and *Hughes*. It will replace the present *Corporations Act 1989* and the Corporations Law of the ACT, and the corresponding legislation of the Northern Territory and those States which have referred appropriate powers to the Commonwealth, as the statutory basis for the formation of companies, corporate regulation and the regulation of the securities and futures industries. The Bill will, in effect, re-enact the existing Corporations Law as a Commonwealth Act in operation throughout Australia. It will, therefore, restore the regulatory framework which existed before *Wakim* and *Hughes*. The Bill does not involve substantial policy changes so this description of the structure of the Bill will, like the Explanatory Memorandum, concentrate on the differences between the Bill and the Corporations Law and on transitional provisions.

From eight Corporations Laws to one *Corporations Act 2001*

3.2 The Bill includes the text of the present Corporations Law amended so that it may operate throughout Australia as a Commonwealth Act. Individual provisions of the Bill generally have the same numbers as the corresponding provisions of the Corporations Law. After enactment of the Act it will therefore be necessary to refer to the *Corporations Act 2001* instead of the Corporations Law. A company registered under the Bill will be incorporated in the jurisdiction of the Bill (all mainland Territories and all referring States) and taken to be registered in a particular referring State or Territory. Existing companies will be taken to be registered in the current State or Territory of registration.

From the *Corporations Act 1989* to the *Corporations Act 2001*

3.3 The provisions of the Bill dealing with the jurisdiction and procedure of Courts are intended to produce the same outcomes as the corresponding provisions of the *Corporations Act 1989* and the State Corporations Acts before the *Wakim* decision.

Effect on non-referring States

3.4 The Bill has been drafted to operate effectively even if one or more States do not participate in the new arrangements or subsequently withdraw from them. However, there will be some significant consequences for non-referring States. For instance, the Bill provides that any company formed under a law of a non-referring

State must register with ASIC before carrying on business in a referring State or Territory. Also, significant provisions relating to securities and futures (such as access to the National Guarantee Fund and other fidelity funds) will not apply to non-referring States.

Transition from the present scheme to the new scheme

3.5 The object of the transitional provisions in the Bill is to provide a seamless transition from the existing Corporations Law scheme to the new scheme based on the Bill. Individuals, bodies corporate and other bodies are, as far as possible, to be put in the same position as if their rights and liabilities under the present Corporations Law had arisen under the Bill.

The Australian Securities and Investments Commission Bill 2001

3.6 Like the Corporations Bill 2001, this Bill is a core element in the Commonwealth package of bills responding to the High Court decisions in *Wakim* and *Hughes*. It will, in effect, re-enact the *Australian Securities and Investments Commission Act 1989* as a Commonwealth Act capable of operating throughout Australia, following suitable referral of State powers. The Bill will, for all practical purposes, restore the regulatory framework which existed before the High Court decisions. The Bill does not make any substantive policy changes.

3.7 The Bill expressly continues in existence the following bodies established under the 1989 Act:

- Australian Securities and Investments Commission
- Companies and Securities Advisory Committee
- Companies Auditors and Liquidators Disciplinary Board
- Financial Reporting Council
- Australian Accounting Standards Board
- Parliamentary Joint Committee on Corporations and Securities

3.8 The Bill provides a service obligation for ASIC, obliging it to establish an office, with its own Regional Commissioner, in every referring State and Territory, and to serve adequately the needs of business communities in those States and Territories.

3.9 The transitional provisions of the Bill, like those of the Corporations Bill 2001, are intended to ensure that individuals, bodies corporate and other bodies are, as far as possible, put in the same position that they would have been if their rights and liabilities under the present ASIC legislation had arisen under the new ASIC legislation.

The Corporations (Commonwealth Powers) Act 2001 (NSW)

3.10 The *Corporations (Commonwealth Powers) Act 2001* (NSW), which commenced on 4 April 2001, is the first State Act to refer powers relating to corporations and financial products and services to the Commonwealth, to enable the Commonwealth to make laws which apply in the State of their own force, instead of through the Corporations Law and other applied laws. The Act includes an objects clause excluding reliance on the reference by the Commonwealth to regulate industrial relations. The reference is in two parts, the first enabling the Commonwealth to enact the text of the Corporations Bill and the ASIC Bill and the second to ensure that those new Acts may be amended by the Commonwealth, as long as the amendments relate to the formation of corporations, corporate regulation, or the regulation of financial products and services. The reference is for five years, although this period may be extended by proclamation.

