

CORPORATIONS (ANCILLARY PROVISIONS) BILL 2001

EXPLANATORY NOTES

GENERAL OUTLINE

OBJECTIVES OF THE LEGISLATION

The purpose of this Bill is to enact ancillary provisions, including transitional provisions and consequential amendments, relating to the proposed new corporations legislation to be enacted by the Commonwealth Parliament following references of matters relating to corporations made by the States under section 51(xxxvii) of the Commonwealth Constitution.

The Queensland reference will be made under the Corporations (Commonwealth Powers) Bill 2001. That Bill refers to the Commonwealth Parliament certain matters relating to corporations, corporate regulation and financial products and services. New South Wales and Victoria has enacted a similar Act and the other States are to introduce corresponding legislation. The Commonwealth proposes to enact, under the powers conferred by these references and other powers available to it, a Corporations Act 2001 and an Australian Securities and Investments Commission Act 2001.

REASONS FOR THE OBJECTIVES AND HOW THEY WILL BE ACHIEVED

This Bill, together with the Corporations (Commonwealth Powers) Bill 2001 and the Corporations (Administrative Actions) Bill 2001, make up the legislative package needed in Queensland for the new corporations arrangements.

ADMINISTRATIVE COST TO GOVERNMENT OF IMPLEMENTATION

The Bill will not impose any additional financial burdens on the Government. The current arrangements for the sharing of revenue received from the Corporations Law scheme (primarily from the collection of registration and related fees by the Australian and Securities Commission) as prescribed under the current Corporations Agreement will be maintained.

FUNDAMENTAL LEGISLATIVE PRINCIPLES

The Bill raises an issue regarding consistency with the fundamental legislative principles contained in section 4 of the *Legislative Standards Act 1992* (“the LSA”). Specifically, clauses 5(5), 9(3), 12(2),(4) and (6), 13(4), 17(1)(f) and (2) and 26 may be in conflict with section 4(2)(b) of the LSA, namely that legislation ‘has sufficient regard to the institution of Parliament’.

These clauses may be seen as Henry VIII clauses, but they are designed to operate in line with the purpose of the Bill, which is to enact ancillary and transitional provisions, relating to the enactment by the Parliament of the Commonwealth of new corporations legislation.

Generally, the effect of these clauses is to allow regulations to be made providing for the application or non-application of certain provisions of the Bill to certain references in State legislation or to specified circumstances.

The aim of these clauses is to facilitate the application of the new Commonwealth corporations legislation in a manner which protects provisions in Queensland legislation which may be inconsistent with the new Commonwealth legislation and therefore invalid. The clauses will facilitate immediate executive action where a potential inconsistency arises.

As the primary aim of the clauses is to ensure a smooth transition from the current Corporations Law to the new Commonwealth corporations legislation, each of the Henry VIII clauses is to be subject to a 2-year sunset clause.

The Parliament, in its scrutiny of the Bill, is fully apprised of the parameters of its operation.

CONSULTATION

The Bill was prepared through the Standing Committee of Attorneys-General and the Ministerial Council for Corporations, in conjunction with the Special Committee of Solicitors-General and the Parliamentary Counsel's Committee.

All Government Departments were consulted during the preparation of the Bill.

NOTES ON PROVISIONS

PART 1—PRELIMINARY

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

Clause 2 provides for commencement of the proposed Act.

Sub-clause (1) provides for the proposed Act, other than Schedule (3) to come into operation immediately before the new Commonwealth Corporations Act. Commencement at this time is necessary to ensure an effective transition to the new corporations arrangements.

Sub-clause (2) provides for Schedule (3) to come into operation immediately after the new Commonwealth Corporations Act comes into operation.

Clause 3 sets out the purpose of the proposed Act.

Clause 4 sets out definitions of terms used in the proposed Act.

Clause 5 sets out rules for determining whether provisions of old and new legislation are corresponding provisions for the purposes of the proposed Act.

Clause 6 provides that the proposed Act has effect despite any provision of the *Corporations (Queensland) Act 1990* or of the laws applied by that Act, and avoids a possible argument that section 5 of that Act would otherwise prevent the Bill from affecting the operation of that Act.

PART 2—TRANSITIONAL PROVISIONS

Clause 7 limits the application of the national scheme laws (the *Corporations (Queensland) Act 1990*, the Corporations Law of Queensland and the ASIC Law of Queensland) to matters arising before the beginning of the new corporations arrangements or matters arising out of such matters to the extent that those matters are not dealt with by the new Commonwealth legislation or the laws that pre-dated the national scheme laws in Queensland (the co-operative scheme laws).

Clause 8 contains provisions dealing with the effect of clause 7.

Sub-clause (1) applies to the limitation of operation of the national scheme laws effected by clause 7, the provisions of the *Acts Interpretation Act 1901* of the Commonwealth that apply on a repeal. Thus all accrued rights and liabilities under the national scheme laws are protected and legal proceedings in respect of those rights and liabilities may be commenced or continued. The Commonwealth provisions have been chosen so that a similar result is achieved in all jurisdictions moving to the new arrangements.

Sub-clause (2) cancels certain accrued rights and liabilities under the national scheme laws where substituted rights and liabilities are being provided under the new Commonwealth legislation.

Sub-clause (3) terminates certain legal proceedings commenced under the national scheme laws where the new Commonwealth legislation has the effect of deeming equivalent proceedings to have been brought under the new legislation in the same court.

Sub-clause (4) ensures that a person does not have to pay in respect of the same matter a fee or levy already paid under the national scheme laws.

Sub-clause (5) defines "pre-commencement right or liability" for the purposes of sub-clause (2).

Sub-clause (6) ensures that the limitation of operation of the national scheme laws effected by clause 7 does not lead to the revival of operation of laws previously superseded by the national scheme laws.

Clause 9 contains provisions designed to complement, and ensure the widest possible operation of, certain provisions of the new Corporations legislation.

Sub-clause (1) clarifies the continuing operation of existing State laws that are inconsistent with the new Commonwealth legislation by overcoming any argument against the effective operation of those laws based on non-compliance with section 5 of the *Corporations (Queensland) Act 1990*.

Sub-clause (2) ensures the non-application of the new Commonwealth legislation to a matter if a previous State corporation's law did not apply to the matter.

Sub-clause (3) allows regulations to be made disapplying sub-clause (1) or (2) in specified circumstances.

Sub-clause (4) provides a test of inconsistency for the purposes of sub-clause (1).

Sub-clause (5) preserves the operation of section 6 of the *Corporations (Queensland) Act 1990*.

Sub-clause (6) defines "matter" and "relevant law of the State" for the purposes of the clause.

Clause 10 provides for the continuance of certain proceedings despite the cessation of operation of the national scheme laws and for certain court orders to cease to have effect.

Clause 11 saves existing court rules made under the national scheme laws.

Clause 12 deals with the construction of references to corporation's legislation.

Sub-clause (1), in conjunction with the Table in Schedule 3, construes references in Acts, instruments made under Acts and laws applying as State laws to the national scheme laws as including references to the new Commonwealth legislation.

Sub-clause (2) enables regulations to be made providing for the non-application of sub-clause (1) in certain cases or for sub-clause (1) to operate in certain cases on an exclusive, rather than an inclusive, basis.

Sub-clause (3) excepts certain laws from the operation of sub-clause (1).

Sub-clause (4) enables regulations to be made construing references in Acts, instruments made under Acts and laws applying as State laws.

Sub-clause (5) provides that express references to the new Commonwealth legislation include, in connection with past events, circumstances or things, references to the corresponding old corporations legislation of this and other jurisdictions that participated in the national scheme.

Sub-clause (6) enables regulations to be made providing for the non-application of sub-clause (5) in certain cases or for sub-clause (5) to operate in certain cases to construe a reference as a reference to the old corporations legislation of a specified jurisdiction only.

Clause 13 deals with the construction of references to certain companies in Acts, instruments made under Acts and laws applying as State laws.

Sub-clause (1) construes references to companies incorporated or registered under the national scheme laws as references to companies taken to be registered under the new Commonwealth legislation in Queensland or other relevant jurisdiction.

Sub-clause (2) construes references to foreign companies.

Sub-clause (3) construes references to the jurisdiction of incorporation of a company as references to the State or Territory in which the company is taken to be registered under the new Commonwealth legislation.

Sub-clause (4) enables regulations to be made providing for the non-application of sub-clause (1), (2) or (3) in certain cases or for sub-clause (1), (2) or (3) to operate in certain cases on an inclusive, rather than an exclusive, basis.

PART 3—APPLICATION OF COMMONWEALTH CORPORATIONS LEGISLATION TO STATE MATTERS

Clause 14 defines certain terms used in the Part.

Clause 15 facilitates the application of the new Commonwealth legislation for the purposes of State laws in circumstances where it has no

application of its own force. The effect is not to extend the operation of the Commonwealth legislation but to enable it to be applied as State law. The clause enables the use of a legislative device (a declaratory provision) which will result in either the whole, or a specified portion, of the new Commonwealth legislation being applied for the purposes of State law.

Clause 16 sets out the effect of particular declaratory provisions.

Clause 17 makes certain modifications of the new Commonwealth legislation for the purposes of its application under this Part and enables further modifications to be made under the proposed Act or the Act containing the declaratory provision.

Clause 18 limits the circumstances in which a function may be conferred on the Australian Securities and Investments Commission (ASIC) by means of a declaratory provision and ensures that, even where a function is conferred on it, ASIC is not under a duty to perform the function.

Clause 19 translates references in applied laws to courts as references to the Supreme Court or other specified State court.

Clause 20 applies automatically certain other provisions of the new Commonwealth legislation where a declaratory provision is used but enables the application of these additional provisions to be modified by regulations under this Act.

Clause 21 deals with prosecutions under applied laws, including the procedure to be followed and the maximum penalties available.

Clause 22 makes it clear that this Part does not provide an exhaustive code of how the new Commonwealth legislation might be applied as State laws.

PART 4—GENERAL

Clause 23 enables regulations to be made under this Act consequentially amending certain other statutory rules without complying with Part 5 of the *Statutory Instruments Act 1992*.

Clause 24 provides a rule-making power for the Supreme Court.

Clause 25 enables the Minister, or a person authorised by the Minister, to enter into an agreement or arrangement with ASIC for functions to be performed or powers to be exercised by it as an agent of the State.

Clause 26 provides that a note in the text of the proposed Act is part of the Act.

Clause 27 enables regulations to be made for the purposes of the proposed Act. The regulations may modify the operation of the transitional provisions contained in Part 2 and may facilitate the operation of State laws under the regime provided by the new Commonwealth legislation.

Clause 28 provides that certain regulation-making powers and any regulations made under those provisions will expire at the end of 30 June 2003.

Schedule 1 contains a table of reference translations for the purposes of clause 12.

Schedule 2 and **3** set out the consequential amendments necessary to various Queensland Acts.

The Schedules:—

- amend provisions referring to the Corporations Law, or any part of it, so that they refer in future to the Corporations Act of the Commonwealth, or the relevant part of it;
- correct references to particular provisions of the Corporations Law so that they are read in future as references to the correct provisions of the Corporations Act (this includes amendments consequential on the *Corporate Law Economic Reform Program Act 1999* of the Commonwealth (CLERP));
- make similar amendments and corrections in relation to existing references to the Companies (Queensland) Code and other Code Acts;
- in accordance with Part 1.1A of the proposed Corporations Act of the Commonwealth, continue certain existing exemptions, exceptions and exclusions from the operation of the Corporations Law;
- re-enact provisions in Acts that apply particular provisions of the Corporations Law as if they were part of those Acts, so that the provisions continue to apply as State law; and
- make other miscellaneous adjustments necessary for the new corporations scheme.

Where a reference to the Corporations Law is not amended by the Schedule and it is intended that the reference not be changed, whether because it is purely historical or for any other reason, the existing reference will be preserved by regulations made under clause 12. It is necessary to do so because clause 12 of the Bill contains a general translation provision which changes all references unless the regulations otherwise provide.