

Proclamation—Corporations (Commonwealth Powers) Act 2001

Human Rights Certificate

Prepared in accordance with Part 3 of the *Human Rights Act 2019*

In accordance with section 41 of the *Human Rights Act 2019* (HR Act), I, the Honourable Shannon Fentiman MP, Attorney-General and Minister for Justice, Minister for Women and Minister for the Prevention of Domestic and Family Violence, provide this human rights certificate with respect to the proclamation made under the *Corporations (Commonwealth Powers) Act 2001* (the Act).

In my opinion, the proclamation, as tabled in the Legislative Assembly, is compatible with the human rights protected by the HR Act. I base my opinion on the reasons outlined in this statement.

Overview of the Subordinate Legislation

The Australian Constitution gives the Commonwealth Parliament powers to regulate corporations. These powers do not extend to regulating aspects of a number of important matters such as the incorporation of companies, certain activities of non-financial and non-trading corporations, and certain activities of unincorporated bodies that engage in commerce. These matters are within the legislative powers of the State Parliaments.

The existing national system of corporations law exists through formal cooperation between the Commonwealth and the States and through the States referring to the Commonwealth their powers with respect to corporations.

Under the *Corporations (Commonwealth Powers) Act 2001* (the Act), the Parliament of Queensland referred to the Commonwealth Parliament the powers:

- to enact the *Corporations Act 2001* (Corporations Act) and the *Australian Securities and Investments Commission Act 2001* (ASIC Act) as Commonwealth legislation (the initial reference); and
- to enact laws in relation to the formation of corporations, corporate regulation and the regulation of financial products and services by express amendment to the corporations legislation.

The history of events leading to the passage of the Act and the current national scheme for corporate regulation are set out in the Explanatory Notes to the *Corporations (Commonwealth Powers) Bill 2001*.

Section 5 of the Act provides for the references to terminate on the day that is the fifth anniversary of the day of commencement of the Commonwealth corporations legislation under the initial reference or on a later day fixed by the Governor by proclamation under section 6. By proclamation dated 27 May 2016, the Governor fixed 15 July 2021 as the new date for the references to terminate.

The proclamation fixes 15 July 2031 as the new termination date for the references. This has the effect of Queensland continuing to refer to the Commonwealth its powers with respect to corporations.

The purpose of the proclamation is to enable Queensland's continued participation in the national corporations scheme and to allow Queensland companies to operate and conduct their business with certainty under the scheme's regulatory framework.

Human Rights Issues

In extending the termination date for the referral of powers to the Commonwealth, it is acknowledged that the operation of the corporations legislation that relies on the referral of powers does engage human rights. This includes engaging at least the following rights under the HR Act:

- property rights (section 24 of the HR Act);
- right to privacy and reputation (section 25 of the HR Act);
- right to a fair hearing (section 31 of the HR Act); and
- rights in criminal proceedings (section 32 of the HR Act)

Consideration of reasonable limitations on human rights (section 13 *Human Rights Act 2019*)

(a) the nature of the right

Property rights (section 24 of the HR Act)

The right to property protects the right of all persons to own property and provides the people have a right to not be arbitrarily deprived of their property (including money). In a human rights context, 'arbitrary' means capricious, unpredictable, unjust or unreasonable in the sense of not being proportionate to a legitimate aim sought.

The proclamation will have the effect of continuing existing limits on the right to property in corporations legislation, including by providing:

- for the creation and enforcement of financial penalties payable by individuals, resulting in a deprivation of property in the form of money; and
- courts with the power to freeze accounts, as well as the power to prohibit the payment or transfer of money, financial products or other property in specific situations, resulting in a deprivation of property by placing limits on its transfer and disposal.

Right to privacy (section 25(a) of the HR Act)

The right to privacy protects persons from arbitrary and unlawful interference with their privacy, family, home or correspondence. The underlying value of the right to privacy is to 'protect and enhance the liberty of the person – the existence, autonomy, security and well-being of every individual in their own private sphere.'¹ The right protects the individual from all interferences and attacks upon their privacy, family, home, correspondence (written and verbal). The scope of the right to privacy is very broad, but at a fundamental level it is concerned with notions of personal autonomy and dignity.

¹ Director of Housing v Sudi (2010) 33 VAR 139, 29 (Bell J).

The proclamation will have the effect of continuing existing limits on the right to privacy in corporations legislation, including by providing for the:

- collection of information about entities that are registered with the Australian Securities and Investments Commission (ASIC), which may include personal information and is publicly accessible;
- collection and use of information obtained by ASIC in its compliance and investigation activities; and
- disclosure of information by individuals about investments, financial interests and other relevant matters in specific situations.

Right to a fair hearing (section 31 of the HR Act); and rights in criminal proceedings (section 32 of the HR Act)

The right to a fair hearing affirms the right of all individuals to procedural fairness and natural justice when coming before a court or tribunal. It applies to both criminal and civil proceedings. The right requires that relevant proceedings and matters be heard and decided by a competent, impartial, and independent court or tribunal. The facts of the case, and the weighing of public interest factors, will determine what constitutes a ‘fair’ hearing in the circumstances of each relevant matter.

Generally, this right embraces principles of unimpeded access to courts, an appropriately expeditious hearing, rights to legal advice and representation, and the privilege against self-incrimination.

In addition to the right to a fair hearing, in the context of criminal proceedings, the HR Act also protects the right to be presumed innocent until proven guilty according to law (under HR Act section 32(1)) and the right of any individual not to be compelled to testify against themselves or to confess guilt.

The proclamation will have the effect of continuing existing limits on the right to a fair hearing and rights in criminal proceedings in corporations legislation, including by providing for strict liability offences and situations of reversal of onus of proof, which encroach on the right to be presumed innocent.

(b) the nature of the purpose of the limitation, including whether it is consistent with a free and democratic society based on human dignity, equality and freedom

The purpose of the limitations on the rights identified above is to provide for the appropriate regulation (including enforcement) of corporate and commercial activity in Australia. This regulation is necessary for the ongoing operation of the Australian economy.

The purpose of the proclamation is to ensure the continued operation of a national scheme of corporations law (including regulatory enforcement) by the ongoing referral of powers to the Commonwealth.

The operation of appropriate corporate regulation consistently across Australia is critical to Australia’s and Queensland’s economic wellbeing. This includes providing for consistent law across Australia regarding: the formation of corporations; corporate regulation and the regulation of financial products and services; and the enforcement of these regulatory schemes.

The High Court has held that the Commonwealth's constitutional powers do not extend to regulating aspects of several areas relevant to regulating corporation and commercial activities. By contrast, States have broad powers to regulate corporations and corporate activities. As a result, a national scheme requires cooperation between the Commonwealth, States and Territories.

The referral of powers provides certainty for individuals and corporate entities about the legislative and regulatory scheme under which companies, securities and financial services and markets are regulated in Australia.

(c) the relationship between the limitation and its purpose, including whether the limitation helps to achieve the purpose

The limitation on rights achieves the purpose of creating an appropriate scheme for corporate regulation by identifying regulated activities and behaviours, and relevant enforcement powers and penalties for failing to meet regulatory requirements.

The nationally consistent operation of the scheme will be achieved by the ongoing referral of powers regarding the formation and regulation of corporations, and financial products and services.

(d) whether there are any less restrictive and reasonably available ways to achieve the purpose

There are no less restrictive and reasonably available ways to achieve the operation of a nationally consistent scheme of corporate regulation in Australia.

The current national system of corporations' law commenced on 15 July 2001 and exists through formal cooperation between the Commonwealth and the States and through the States referring to the Commonwealth their powers with respect to corporations. The scheme was necessary following the High Court in the decisions of *Re Wakim; Ex parte McNally* (1999) 163 ALR 270 and *R v Hughes* (2000) 171 ALR 155 which undermined the constitutional certainty of the previous national scheme. In light of this case law, it is not feasible to consider a different form of national scheme.

The power of the Commonwealth to amend existing legislative arrangements (where those amendments rely on the referral of powers) is subject to the cooperative arrangements detailed in the Corporations Agreement 2002 (as amended). This Agreement provides for consultation, voting and other arrangements for proposed corporations legislation. When considering future legislative proposals, the relevant Queensland Minister will be subject to the obligation under section 58(1) of the HR Act to act and make decisions compatibly with human rights, and to give proper consideration to human rights when making a decision. Any future legislative proposals that fall within the operation of the provisions of the Corporation Agreement that require consultation with referring states will therefore remain subject to consideration as to whether any limits on protected human rights are reasonable and justified, as required under the HR Act.

- (e) the balance between the importance of the purpose of the limitation and the importance of preserving the human right, taking into account the nature and extent of the limitation

Queensland's participation in the national corporations scheme is fundamental to its economic well-being. This is because the scheme provides a modern regulatory framework under which companies in Queensland can operate nationally and internationally. The extension of the termination date for referral of powers is the only way to provide for Queensland's continued participation in the national corporations scheme and for Queensland companies to operate and conduct their business with certainty.

While corporations legislation (and future amendments to it) engage human rights, the reference of powers to the Commonwealth only has effect to the extent that the matter is not already a subject of Commonwealth power.

In light of this, the importance of ensuring the ongoing operation of nationally consistent corporate regulation, and Queensland's participation in it, outweighs the limits on rights that are the result of creating and enforcing the legislative scheme.

- (f) any other relevant factors

Not applicable.

Conclusion

I consider that the proclamation under the *Corporations (Commonwealth Powers) Act 2001* is compatible with the *Human Rights Act 2019* because it limits human rights only to the extent that is reasonable and demonstrably justified in a free and democratic society based on human dignity, equality and freedom.

SHANNON FENTIMAN MP
Attorney-General and Minister for Justice
Minister for Women and Minister for the
Prevention of Domestic and Family Violence