

First print



New South Wales

# Corporations (Administrative Actions) Bill 2001

## Explanatory note

This explanatory note relates to this Bill as introduced into Parliament.

This Bill is cognate with the *Corporations (Ancillary Provisions) Bill 2001*.

## Overview of Bill

The object of this Bill is to give validity to certain potentially invalid administrative actions taken before the commencement of the proposed Act by Commonwealth authorities or officers acting under powers or functions conferred on them by laws of the State relating to corporations.

## Background

The Commonwealth Constitution gives the Commonwealth Parliament limited powers to regulate corporations under section 51 (xx) of the Commonwealth Constitution. That provision allows the Commonwealth Parliament to legislate with respect to “foreign corporations, and trading or financial corporations formed within the limits of the Commonwealth”. The Commonwealth Parliament also has other

legislative powers under the Commonwealth Constitution that assist it to regulate corporate activities, such as the interstate trade and commerce power (section 51 (i)), and the postal, telegraphic, telephonic, and other like services power (section 51 (v)).

However, the High Court has held that the Commonwealth's constitutional powers do not extend to regulating aspects of a number of important commercial areas 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.

In contrast, the States have broad powers to regulate corporations and corporate activities (subject to the Commonwealth Constitution).

As a result of the restrictions on the powers of the Commonwealth Parliament, a national scheme of corporate regulation requires co-operation among the Commonwealth and the States and Territories. Several different schemes of co-operation have been implemented at different times since 1961.

The current scheme commenced on 1 January 1991. Under that scheme, the substantive law of corporate regulation (known as the *Corporations Law*) is contained in an Act of the Commonwealth enacted for the Australian Capital Territory and the Jervis Bay Territory (the *Capital Territory*). Laws of each State and the Northern Territory apply the Corporations Law of the Capital Territory (as in force for the time being) as a law of the State or Northern Territory. The effect of this arrangement is that, although the Corporations Law operates as a single national law, it actually applies in each State and the Northern Territory as a law of that State or Territory, not as a law of the Commonwealth.

The Corporations Law is administered by a Commonwealth body, the Australian Securities and Investments Commission (*ASIC*) established by the *Australian Securities and Investments Commission Act 1989* of the Commonwealth (*ASIC Act*). Each State and the Northern Territory have passed legislation applying relevant provisions of the ASIC Act as a law of that jurisdiction (known as the *ASC Law* or *ASIC Law*).

Legislation of each State and the Northern Territory confers functions relating to the administration and enforcement of the Corporations Law on ASIC, the Commonwealth Director of Public Prosecutions and the Australian Federal Police. These bodies are responsible for the investigation and prosecution of offences under the Corporations Law.

### **The High Court decision in Hughes**

In *The Queen v Hughes* (2000) 171 ALR 155, the High Court indicated that, where a State gave a Commonwealth authority or officer a power to undertake a function under State law together with a duty to exercise the function, there must be a clear nexus between the exercise of the function and one or more of the legislative powers of the Commonwealth set out in the Commonwealth Constitution.

If this view prevails, the Commonwealth would not be able to authorise its authorities or officers to undertake a function under State law involving the performance of a duty (particularly a function having potential to adversely affect the rights of individuals) unless the function could be supported by a head of Commonwealth legislative power.

Although the Court found that the particular exercise of the prosecution function by the Commonwealth Director of Public Prosecutions in question in *Hughes* was valid, it made no finding about the validity of the conferral of the prosecution function generally, or of other functions under the Corporations Law scheme.

The decision in *Hughes* may have implications for the validity of a range of administrative actions taken by Commonwealth authorities and officers under the Corporations Law scheme (the *current scheme*) and the previous co-operative scheme (the *previous scheme*). A number of Commonwealth authorities have functions and powers under the current scheme, including ASIC and the Commonwealth Director of Public Prosecutions. Commonwealth authorities, most notably the National Companies and Securities Commission (NCSC), had functions and powers under the previous scheme. Much of the work of the NCSC was carried out by State and Territory authorities as delegates of the NCSC, and the Bill applies to actions of those delegates on the basis that the actions of a delegate are treated as actions of the principal. Since the commencement of the Corporations Law, Commonwealth authorities have continued to carry out functions under the previous scheme, including ASIC and the Commonwealth Director of Public Prosecutions.

Many or all actions by these Commonwealth authorities are likely to be valid, because they could be supported by the Commonwealth's legislative powers. However, the validity of each action can only be determined on a case by case basis, having regard to the particular circumstances of each action.

### **Giving validity to Commonwealth administrative actions**

The Bill provides that every invalid administrative action taken under the current or previous scheme has (and is deemed always to have had) the same force and effect as it would have had if it had been taken by a State authority or officer of the State on which or whom the relevant function or power had been conferred.

This provision overcomes any doubts about the validity of administrative actions by Commonwealth authorities or officers under the current and previous schemes. Other jurisdictions propose to introduce similar legislation to achieve a uniform effect.

The Bill preserves rights and liabilities potentially affected by invalid administrative actions, and specifically confirms the validity of the registration or incorporation of companies under the current and previous schemes.

The Bill applies to administrative actions taken before the commencement of the proposed Corporations legislation. The validity of future actions by Commonwealth authorities and officers will be assured by the reference of matters to the Commonwealth Parliament by the *Corporations (Commonwealth Powers) Bill* proposed to be enacted by each State. The NSW *Corporations (Commonwealth Powers) Bill* has been enacted and commenced on 4 April 2001 and the new Corporations legislation of the Commonwealth has been introduced into the Commonwealth Parliament in reliance on that reference of powers.

## Outline of provisions

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

**Clause 2** provides for the commencement of the proposed Act immediately before the proposed new Corporations legislation of the Commonwealth comes into operation.

**Clause 3** defines certain words and expressions used in the proposed Act. The expression *invalid administrative action* is defined as an administrative action that was taken before the commencement of the proposed Act by a Commonwealth authority or officer pursuant to a function or power conferred under the current or previous scheme (the *relevant function* or *power*), and that is invalid because its conferral on the Commonwealth authority or officer is not supported by a head of power in the Commonwealth Constitution.

**Clause 4** deals with the application and operation of the proposed Act. Clause 4 (1) provides that the proposed Act binds the Crown. Clause 4 (2) provides that the proposed Act has effect despite any provision of the *Corporations (New South Wales) 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. Clause 4 (3) provides that the proposed Act extends to affect

rights and liabilities that are or have been the subject of legal proceedings. Clause 4 (4) provides that the proposed Act does not affect rights and liabilities arising between parties to legal proceedings heard and finally determined before the commencement of the proposed Act to the extent to which they arise from, or are affected by, an invalid administrative action.

**Clause 5** provides that every invalid administrative action has (and is deemed always to have had) the same force and effect as it would have had if it had been taken by a duly authorised State authority or officer of the State. The clause does not in terms validate administrative actions taken by Commonwealth authorities and officers, but rather attaches to the actions retrospectively the same force and effect as would have ensued had the actions been taken by State authorities and officers (a similar distinction was drawn in *The Queen v Humby, Ex parte Rooney* (1973) 129 CLR 231).

**Clause 6** complements clause 5 and does not affect the generality of clause 5. The clause declares that the rights and liabilities of all persons are (and always have been) for all purposes the same as if every invalid administrative action had been taken by a duly authorised State authority or officer of the State.

**Clause 7** complements clauses 5 and 6 and does not affect the generality of those clauses. The clause specifically declares that clauses 5 and 6 extend to the registration or incorporation of companies. The formation of corporations was held by the High Court in *The State of New South Wales v The Commonwealth of Australia* (1990) 169 CLR 482 to lie outside the legislative competence of the Commonwealth Parliament.

**Clause 8** ensures that the proposed Act does not reinstate administrative actions that, since the action was taken, have been affected by another action or process. For example, if a decision has been altered on review, the proposed Act does not reinstate the decision in its original form. The Bill applies to the decision as it is affected by later actions from time to time.

**Clause 9** provides that it is immaterial for the purposes of the proposed Act that a Commonwealth authority or officer does not have a counterpart in the State, or that the powers and functions of State authorities or officers do not correspond to the powers and functions of Commonwealth authorities or officers.

**Clause 10** provides that the proposed Act does not give rise to any liability against the State.



New South Wales

# Corporations (Administrative Actions) Bill 2001

## Contents

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	Page
1 Name of Act	2
2 Commencement	2
3 Definitions	2
4 Application and operation of Act	3
5 Legal effect of invalid administrative actions	4
6 Rights and liabilities declared in certain cases	4
7 Registration or incorporation of companies	5
8 This Act to apply to administrative actions as purportedly in force from time to time	5
9 Corresponding authorities or officers	6
10 Act not to give rise to liability against the State	6



New South Wales

# **Corporations (Administrative Actions) Bill 2001**

No. , 2001

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## **A Bill for**

An Act relating to administrative actions taken by Commonwealth authorities or officers of the Commonwealth under certain State laws relating to corporations.

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<b>The Legislature of New South Wales enacts:</b>	1
<b>1 Name of Act</b>	2
This Act is the <i>Corporations (Administrative Actions) Act 2001</i> .	3
<b>2 Commencement</b>	4
This Act commences immediately before the <i>Corporations Act 2001</i> of the Commonwealth, as originally enacted, comes into operation.	5 6
<b>3 Definitions</b>	7
In this Act:	8
<b><i>administrative action</i></b> means an act or omission of an administrative or legislative nature, and includes any act or omission of an administrative nature that is done or omitted in the course of or ancillary to or preliminary to or subsequent to judicial proceedings (civil or criminal).	9 10 11 12 13
<b><i>commencement time</i></b> means the time when this Act commences under section 2.	14 15
<b><i>Commonwealth authority</i></b> means an authority or body (whether incorporated or not) that is established or continued in existence by or under an Act of the Commonwealth, but does not include the Federal Court of Australia, the Family Court of Australia or the Federal Magistrates Court.	16 17 18 19 20
<b><i>confer</i></b> includes impose.	21
<b><i>function</i></b> includes a duty.	22
<b><i>invalid administrative action</i></b> means an administrative action of a Commonwealth authority or an officer of the Commonwealth taken, or purportedly taken, at or before the commencement time:	23 24 25
(a) pursuant to a function or power conferred, or purportedly conferred, by or under a relevant State Act (the <b><i>relevant function or power</i></b> ), and	26 27 28
(b) in circumstances where the relevant function or power could not have been conferred on the authority or officer by a law of the Commonwealth the operation of which in the relevant respect was based on the legislative powers of the Parliament	29 30 31 32



of the Commonwealth (including, for example, circumstances where the authority or officer was, or purportedly was, under an express or implied duty to perform the function or exercise the power),	1 2 3 4
that was invalid because of the circumstances referred to in paragraphs (a) and (b), whether or not it was also invalid on any other ground.	5 6
<b>liability</b> includes a duty or obligation.	7
<b>officer of the Commonwealth</b> has the same meaning as in section 75 (v) of the Constitution of the Commonwealth.	8 9
<b>relevant function</b> or <b>power</b> means a function or power referred to in paragraph (a) of the definition of <b>invalid administrative action</b> .	10 11
<b>relevant State Act</b> means:	12
(a) the <i>Corporations (New South Wales) Act 1990</i> , or	13
(b) the <i>Companies (Application of Laws) Act 1981</i> , or	14
(c) the <i>Companies (Acquisition of Shares) (Application of Laws) Act 1981</i> , or	15 16
(d) the <i>Securities Industry (Application of Laws) Act 1981</i> , or	17
(e) the <i>Futures Industry (Application of Laws) Act 1986</i> , or	18
(f) the <i>Companies and Securities (Interpretation and Miscellaneous Provisions) (Application of Laws) Act 1981</i> ,	19 20
and includes any law applying as a law of the State by force of any such Act.	21 22
<b>right</b> includes an interest or status.	23
<b>4 Application and operation of Act</b>	24
(1) This Act binds the Crown in right of New South Wales and, in so far as the legislative power of the Parliament of New South Wales permits, the Crown in all its other capacities.	25 26 27
(2) This Act has effect despite any provision of the <i>Corporations (New South Wales) Act 1990</i> or of the applicable provisions (as defined in that Act) of the State.	28 29 30
(3) Subject to subsection (4), this Act extends to rights or liabilities arising between parties to proceedings initiated at or before the commencement time where an allegedly invalid administrative action is or was the subject of or relevant to the proceedings.	31 32 33 34

- (4) This Act does not affect rights or liabilities arising between parties to proceedings heard and finally determined at or before the commencement time to the extent to which those rights or liabilities arise from, or are affected by, an invalid administrative action. 1  
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**5 Legal effect of invalid administrative actions** 5

Every invalid administrative action has, and is deemed always to have had, the same force and effect for all purposes as it would have had if: 6  
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- (a) it had been taken, or purportedly taken, by a State authority or officer of the State, and 8  
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- (b) the relevant function or power had been duly conferred on that authority or officer. 10  
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**6 Rights and liabilities declared in certain cases** 12

- (1) Without affecting the generality of section 5, the rights and liabilities of all persons are, by force of this Act, declared to be, and always to have been, for all purposes the same as if: 13  
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- (a) every invalid administrative action had been taken, or purportedly taken, by a State authority or officer of the State, and 16  
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- (b) the relevant function or power had been duly conferred on that authority or officer. 19  
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- (2) A right or liability conferred or affected by subsection (1): 21
  - (a) is exercisable or enforceable, and 22
  - (b) is to be regarded as always having been exercisable or enforceable, 23  
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as if it were a right or liability conferred or affected by (or arising from) an administrative action of a State authority or officer of the State on which or whom the relevant function or power had been duly conferred. 25  
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- (3) Any act or thing done or omitted to be done at or before the commencement time under or in relation to a right or liability conferred or affected by subsection (1): 29  
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  - (a) has the same effect, and gives rise to the same consequences, for the purposes of any written or other law, and 32  
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(b) is to be regarded as always having had the same effect, and given rise to the same consequences, for the purposes of any written or other law,

as if it were done, or omitted to be done, to give effect to, or under the authority of, or in reliance on, an administrative action of a State authority or officer of the State on which or whom the relevant function or power had been duly conferred.

**7 Registration or incorporation of companies**

Without affecting the generality of sections 5 and 6, it is declared that those sections extend to the registration or incorporation, or purported registration or incorporation, of companies by, or consequent on administrative action taken or purportedly taken by, Commonwealth authorities or officers of the Commonwealth at or before the commencement time.

**8 This Act to apply to administrative actions as purportedly in force from time to time**

- (1) The purpose of this section is to ensure that this Act operates to give to an invalid administrative action that has subsequently been affected by another action or process no greater effect than it would have had if the administrative action, or any other relevant administrative action, had not been invalid on constitutional grounds (arising from the circumstances referred to in paragraphs (a) and (b) of the definition of *invalid administrative action* in section 3).
- (2) If administrative action taken by a Commonwealth authority or an officer of the Commonwealth was affected (whether by way of revocation, modification or otherwise) at or before the commencement time by any later administrative action or by any judicial process or by any administrative review process, this Act applies to the administrative action as so affected from time to time.
- (3) In this section, a reference to administrative action taken includes a reference to administrative action purportedly taken, and a reference to administrative action affected in any way includes a reference to administrative action purportedly affected in that way.

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<b>9</b>	<b>Corresponding authorities or officers</b>	1
	It is immaterial, for the purposes of this Act, that a Commonwealth authority or an officer of the Commonwealth does not have a counterpart in the State, or that the powers and functions of a counterpart State authority or a counterpart officer of the State do not correspond exactly or substantially with those of the Commonwealth authority or the officer of the Commonwealth.	2 3 4 5 6 7
<b>10</b>	<b>Act not to give rise to liability against the State</b>	8
(1)	The State is not liable to any action, liability, claim or demand arising from the enactment, commencement or operation of this Act.	9 10
(2)	Without limiting subsection (1), no proceedings lie against the State in respect of an administrative action affected by this Act, except to the extent that the proceedings would lie had this Act not been enacted.	11 12 13
(3)	In this section:	14
	<i>proceedings</i> includes proceedings for an order in the nature of prohibition, certiorari or mandamus or for a declaration or injunction or for any other relief.	15 16 17
	<i>the State</i> includes any State authority or officer of the State, and also includes:	18 19
(a)	the Crown in right of the State, and	20
(b)	the Government of the State, and	21
(c)	a Minister of the Crown in right of the State, and	22
(d)	a statutory corporation, or other body, representing the Crown in right of the State.	23 24