

Australian Securities and Investments Commission Regulations 2001 2001 No. 192

EXPLANATORY STATEMENT

Statutory Rules 2001 No. 192

Issued by the Minister for Financial Services and Regulation

Australian Securities and Investments Commission Act 2001

Australian Securities and Investments Commission Regulations 2001

Section 251 of the *Australian Securities and Investments Commission Act 2001* ('the ASIC Act') provides that the Governor-General may make regulations prescribing matters required or permitted by the Act to be prescribed by regulation, or that are necessary or convenient to be prescribed by regulations for carrying out or giving effect to the Act.

The purpose of the Regulations is to:

- * repeal the existing regulations made under the *Australian Securities and Investments Commission Act 1989*, insofar as they are preserved by the transitional provisions of the ASIC Act;
- * re-make the bulk of the repealed regulations as new regulations under the ASIC Act, apart from minor alterations arising from changes to section references, correcting previous typographical errors and updating drafting styles;
- * remove regulations in relation to matters that are no longer covered under the ASIC Act or in relation to sections that have been removed at some time prior to the enactment of the ASIC Act; and
- * make new regulations prescribing matters in cases where the ASIC Act differs from the *Australian Securities and Investments Commission Act 1989*.

The Regulations remain substantially the same as those made under the *Australian Securities and Investments Commission Act 1989*.

The Regulations support the package of new corporations legislation, including the Act, that was enacted in light of recent High Court decisions that cast doubt on the constitutional validity of the existing regulatory regime under the Corporations Law. The decision in *Re Wakim; ex parte McNally* rendered the cross-vesting arrangements under the Corporations Law invalid to the extent that they purported to confer State jurisdiction on federal courts. In *The Queen v Hughes*, the High Court decided that the Commonwealth cannot impose a duty on its officers or authorities to undertake a function under State law in some circumstances, casting doubt on the ability of Commonwealth authorities or officers to exercise certain powers and functions under the corporations legislation.

These decisions resulted in some uncertainty and inefficiency in relation to Australia's system of national corporate regulation. Following an agreement negotiated with the States and Territories, the Commonwealth passed new legislation supported by both its existing legislative power under section 51 of the Constitution and references from the States for the purposes of section 51 (xxvii) of the Constitution.

The Regulations commence on the same day as the ASIC Act.

ATTACHMENT

AUSTRALIAN SECURITIES AND INVESTMENTS COMMISSION REGULATIONS 2001

Background

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

* The decision in *Re Wakim; ex parte McNally* (1999) 198 CLR 511 rendered cross-vesting arrangements invalid to the extent that they purported to confer State jurisdiction on federal courts.

* In *The Queen v Hughes* (2000) 74 ALJR 802; 171 ALR 155, the High Court decided that the Commonwealth cannot authorise its officers or authorities 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 head of Commonwealth legislative power under the Constitution. As the limits of Commonwealth legislative power are uncertain, the decision has cast doubt on the ability of Commonwealth authorities or officers to exercise certain powers and functions under the corporations legislation. This has resulted in uncertainty and inefficiency in relation to Australia's system of national corporate regulation.

2. These problems have been addressed by references from the States for the purposes of section 51 (xxxvii) of the Commonwealth Constitution. That provision enables the Commonwealth Parliament to legislate with respect to matters referred to it by the State parliaments. Suitable references have been enacted by all the States which have, combined with existing legislative power, enabled the Commonwealth Parliament to enact the corporations legislation as a federal law.

3. The *Corporations Act 2001* is to replace the *Corporations Act 1989* and the Corporations Law of the Capital Territory, and the corresponding legislation of the States and the Northern Territory, as the statutory basis for the formation of companies, corporate regulation and the regulation of the securities and futures industries. Similarly, the *Australian Securities and Investments Commission Act 2001* ('the ASIC Act') has been enacted to replace the *Australian Securities and Investments Commission Act 1989*.

The Australian Securities and Investments Commission Regulations 2001

4. The new legislation will for practical purposes restore the regulatory environment that existed before the High Court decisions of *Hughes* and *Wakim*. While the legislation also corrects a number of existing anomalies and updates the drafting style, it does not involve substantive policy changes.

5. The regulations remain substantially unchanged from the regulations made under the *Australian Securities and Investments Commission Act 1989* (the ASIC Regulations 1990). Accordingly, this Explanatory Statement is limited to explaining the changes to the regulations brought about by differences between the ASIC Act and the *Australian Securities and Investments Commission Act 1989*. Explanatory material for the ASIC Regulations 1990 may be found in the Explanatory Statement for the instrument that created or amended those regulations.

Regulations 13, 14 & 16: References to 'relevant national scheme law' replaced by 'Corporations legislation (other than the excluded provisions)'

6. References in regulations 13, 14 and 16 to 'relevant national scheme law' are updated to reflect that the term 'national scheme law' is no longer defined in the ASIC Act. The substantially equivalent term under the new legislative framework is 'corporations legislation', defined in section 5 of the ASIC Act.

7. 'Excluded provisions' (also defined in section 5 of the ASIC Act) are carved out of the references to corporations legislation in regulations 13, 14 and 16 as these provisions are not a national scheme law' for the purposes of the *Australian Securities and Investments Commission Act 1989*.

Regulation 44: Repeal

8. Regulation 44 repeals the previous regulations made under the *Australian Securities and Investments Commission Act 1989* in so far as they are preserved by section 264 of the ASIC Act. As the regulations are being remade with the appropriate updating, it is not necessary to rely on the regulations saved by section 264.

Changes to update drafting style

9. A number of minor changes to various regulations will be made to update the drafting style. For example, 'pursuant to' will be changed to 'in accordance with'; and 'in relation to' will be changed to 'about'.