

Corporations Regulations 2001 2001 No. 193

EXPLANATORY STATEMENT

Statutory Rules 2001 No. 193

Issued by the Minister for Financial Services and Regulation

Corporations Act 2001

Corporations Regulations 2001

Section 1364 of the Corporations Act 2001 ('the Corporations 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 Corporations Act 1989, insofar as they are preserved by the transitional provisions of the Corporations;
- * re-make the bulk of the repealed regulations as new regulations under the Corporations Act, apart from minor alterations arising from changes to section references, correcting previous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 Corporations Act or in relation to sections that have been removed at some time prior to the enactment of the Corporations Act; and
- * make new regulations prescribing matters in cases where the Corporations Act differs from the Corporations Law.

Whilst the majority of the Regulations will remain substantially the same, the new regulations cover additional matters dealt with under the Corporations Act. These additional matters arise from changes resulting from the conversion of the substance of the existing State and Territory corporations legislation into a federal law capable of national application. In particular, the new regulations will:

- * provide a procedure for corporations that wish to change their jurisdiction of registration, as permitted under section 119A of the Corporations Act;
- * outline the information to be provided by bodies collecting levy payments as an agent for the Commonwealth, in relation to levies mentioned in sections 902, 904, 938, 940, 941, 1234 and 1235 of the Corporations Act;
- * prescribe details that must be included in instruments of transfer of shares, debentures or interests in managed investment schemes under paragraph 1091(1A)(b) of the Corporations Act; and
- * prescribe for the purposes of section 15 of the Corporations Act the maximum sizes of certain kind of partnerships and associations.

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 (xxxvii) of the Constitution.

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

CORPORATIONS 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 ('the Corporations Act') 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.

The Corporations 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 remains substantially unchanged from the regulations made under the *Corporations Act 1989* (the Corporations Regulations 1990). Accordingly, this Explanatory Statement is limited to explaining changes to the regulations brought about by differences between the Corporations Act and the Corporations Law. Explanatory material for the Corporations Regulations 1990 is to be found in the Explanatory Statement for the instrument that created or amended those regulations.

Regulation 2A.1.01 Size of partnerships and associations

6. Regulation 2A.1.01 prescribes for the purposes of section 115 of the Corporations Act the maximum sizes of certain kind of partnerships and associations. These maximum numbers are currently found in the *Partnerships and Associations Application Order 1999 (No. 1)*, made for the purposes of section 115 of the Corporations Law. The mechanism for making application orders has not been carried over into the Corporations Act. Rather, where appropriate, matters

dealt with by application order under the Corporations Law are to be dealt with by regulation under the Corporations Act (see also Regulation 10.1.02 below).

Regulations 2A.2.01 - 2A.2.04: Change of place of registration of company

7. Part 2A.2 of the Regulations provides for a procedure for the transfer of registration of a company under subsection 119A(3) of the Corporations Act.

8. ASIC will be able to process an application for change in the jurisdiction in which a company is registered where the application has been approved by a special resolution of the company (regulation 2A.2.01). A copy of the special resolution will need to be provided to ASIC within 14 days after it is passed.

9. Regulation 2A.2.02 provides that the special resolution may be set aside by Court order, on application to the Court by at least 10% of votes capable of being cast on the special resolution. The application must be made within 28 days of the passing of the special resolution.

10. Under regulation 2A.2.02, the Court is able to order that the special resolution be set aside if it would unfairly prejudice the applications were the jurisdiction of registration to be changed in accordance with the resolution. Where such a Court order is obtained, the company must give ASIC a copy of the order within 14 days after the order is made.

11. Regulation 2A.2.03 provides that the company may apply to ASIC, in the approved form, for a change in its jurisdiction of registration in accordance with the special resolution. Regulation 2A.2.04 provides that ASIC must record the change of the company's jurisdiction of registration where:

- * the company has passed a special resolution approving the application for the change;
- * the Court has not made an order setting aside the special resolution;
- * the relevant Minister of the State or Territory in which the company is registered has approved the proposed change of jurisdiction of registration; and
- * ASIC is not aware of any other reason why the company's jurisdiction of registration should not be changed.

12. Under subregulation 2A.2.03(2), ASIC must not alter the details of the company's registration until 28 days after the application was made. This will provide applicants with time to apply to the Court for an order under regulation 2A.2.02.

13. Subregulation 2A.2.03(3) provides that ASIC must issue a new certificate of registration after it alter the details of a company's registration.

Regulation 7.13.01: Details to be included in instruments of transfer

14. Paragraph 1091(1A)(b) of the Corporations Act provides that a proper instrument of transfer in relation to the transfer of shares, debentures or interests must show the prescribed details in relation to the company concerned. Regulation 7.13.01 provides that the company's jurisdiction of registration is prescribed for the purposes of paragraph 1091(1A)(b).

15. This regulation will ensure that information relevant to the collection of stamp duty will be shown on the instrument of transfer, to facilitate the continued collection of stamp duty in relation to off-market transfer of securities.

Regulation 7.15.01: Notification about payment of levies

16. The Corporations Act provides for the payment of certain levies into the Consolidated Revenue Fund and then into the relevant industry fund. To comply with constitutional requirements, the levies are imposed as a tax, and are payable to the relevant exchange/organisation as agent for the Commonwealth.

17. The relevant levies are:

- * initial membership and annual contributions to the fidelity fund of a securities exchange (section 902 of the Corporations Act), and top-up levies for such amounts, if required (section 904);

- * initial membership and annual contributions to the fidelity fund of a futures organisation (section 1234 of the Corporations Act), and top-up levies for such amounts, if required (section 1235); and

- * levies paid to the Securities Exchange Guarantee Corporations (SEGC) by dealers on a "per transaction" basis (section 938 of the Corporations Act), an additional levy payable by exchanges where the amount in the SEGC's fund is low (section 940), and a levy on exchange-members in contribution towards to levy under section 940 (section 941).

18. In each case, the Corporations Act disapplies the provisions of the *Financial Management and Accountability Act 1997* in relation to the levy. However, in each case the Corporations Act provides that the exchange/organisation must, in accordance with the regulations, notify the Commonwealth of payments of levy it receives as agent for the Commonwealth.

19. Regulation 7.15.01 prescribes a half-yearly requirement that the relevant body notify the Commonwealth of levies it has collected or that are payable, for each period of 6 months ending on 31 December and 30 June. Under the regulation, the notification must:

- * be given in writing to the Secretary of the Department of Finance and Administration, or another nominated office of that Department;

- * set out the total levies received or payable in the period; and

- * be given no later than 2 weeks after the end of the period.

Regulation 10.1.01: Repeal of Corporations Regulations 1990

20. Regulation 10.1.01 repeals the previous regulations made for the purposes of the Corporations Law in so far as they are preserved by section 1380 of the Corporations Act. As the regulations are being remade with the appropriate updating, it is not necessary to rely on the regulations saved by section 1380.

Regulation 10.1.02: Repeal of *Partnerships and Associations Application Order 1999 (No. 1)*

21. Section 1388 of the Corporations Act would, but for regulation 10.1.02, carry over the *Partnerships and Associations Application Order 1999 (No. 1)* as if it were a regulation made under the Corporations Act. However, the substance of the order is dealt with in regulation 2A.1.01. Accordingly, the order as carried forward by section 1388 of the Corporations Act is not required and regulation 10.1.02 effects its repeal.