

2001

THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

HOUSE OF REPRESENTATIVES

AUSTRALIAN SECURITIES AND INVESTMENTS COMMISSION BILL 2001

EXPLANATORY MEMORANDUM

(Circulated by authority of
the Minister for Financial Services and Regulation, the Honourable J.B. Hockey MP and
the Attorney-General, the Honourable Daryl Williams AM QC MP)

ISBN: 0642 466688

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Abbreviations

1989 Act	<i>Australian Securities and Investments Commission Act 1989</i>
ASIC Bill	Australian Securities and Investments Commission Bill 2001
ASIC	Australian Securities and Investments Commission
CASAC	Companies and Securities Advisory Committee
Federal Court	Federal Court of Australia
<i>Hughes</i>	<i>The Queen v Hughes</i> (2000) 74 ALJR 802; 171 ALR 155
NCSC	National Companies and Securities Commission
State Corporations Acts	<i>Corporations ([Name of State]) Act 1990</i>
<i>Wakim</i>	<i>Re Wakim; ex parte McNally</i> (1999) 198 CLR 511

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Outline

2.1. The Bill is one of a package of bills responding to the High Court's decisions in *Wakim* and *Hughes*.

2.2. The other bills are:

- Corporations Bill 2001;
- Corporations (Fees) Bill 2001;
- Corporations (Securities Exchanges Levies) Bill 2001;
- Corporations (Futures Organisations Levies) Bill 2001;
- Corporations (National Guarantee Fund Levies) Bill 2001; and
- Corporations (Consequential Provisions) Bill 2001.

2.3. The Bill is designed to replace the *Australian Securities and Investments Commission Act 1989* and associated provisions of the State Corporations Acts of the Northern Territory and those States which make suitable references to the Commonwealth Parliament in accordance with section 51(xxxvii) of the Constitution.

2.4. The Bill will, in effect, re-enact the 1989 Act as a Commonwealth Act capable of operating throughout Australia. The principal objective of this explanatory memorandum is therefore to explain the differences between the Bill and the 1989 Act. Explanatory material for the provisions of the 1989 Act on which the Bill is based may be found in the explanatory memoranda for the legislation that enacted or amended the provisions.

2.5. This explanatory memorandum is intended to be read with the explanatory memorandum for the Corporations Bill 2001.

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Regulation Impact Statement and Financial Impact Statement

Regulation Impact Statement

3.1. The Bill will for practical purposes restore the regulatory environment which existed before the High Court's decision in *Hughes* and *Wakim*. While the Bill also corrects a number of existing anomalies and updates the drafting style, it does not involve substantive policy changes.

3.2. On that basis, the Office of Regulation Review has advised that a Regulation Impact Statement is not required for the Bill.

Financial Impact Statement

3.3. The Bill does not have any financial impact.

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Differences between the Bill and the 1989 Act

Continued existence of bodies

4.1. Bill clause 261 will continue in existence the following bodies established under the 1989 Act:

- Australian Securities and Investments Commission;
- Companies and Securities Advisory Committee;
- Companies Auditors and Liquidators Disciplinary Board;
- Financial Reporting Council;
- Australian Accounting Standards Board; and
- Parliamentary Joint Committee on Corporations and Securities.

ASIC's service obligation

4.2. The new scheme is to be established under federal law capable of operating nationally, rather than under an aggregation of State, Territory and federal laws (as at present). The new scheme will apply to all States that make suitable references in accordance with section 51(xxxvii) of the Constitution, but not to any State which is not or ceases to be, a referring State. Bill clause 1(2) therefore does not include the requirement in section 1(2)(c) of the 1989 Act, that ASIC, in performing its functions and exercising its powers, must strive to achieve uniformity throughout Australia in how ASIC and its delegates perform their functions and exercise their powers. ASIC is expected to continue to have functions under legislation based on existing legislative powers of the Commonwealth throughout Australia.

4.3. ASIC will be obliged to establish an office, with its own Regional Commissioner, in each referring State and Territory. For the purposes of the Corporations Bill 2001 and the Bill, ASIC will be obliged to ensure that:

- in deciding on the number and location of its offices, it serves adequately the needs of business communities in the referring States and Territories; and
- it provides prompt and convenient access to decision-making and its facilities in every referring State and Territory (clauses 95 and 96).

4.4. ASIC will also be able to establish offices, and engage Regional Commissioners, in any non-referring State. This may be desirable for the administration of legislation other than the Corporations Bill (as enacted).

4.5. Bill clause 1(2)(g) will confine to the laws of the Commonwealth ASIC's obligation to strive to enforce and give effect to the laws that confer functions on it. Bill clauses 11(9) and (9A) provide that ASIC may have functions and powers under other laws, but provide also that ASIC will not be under a duty to perform those functions or exercise those powers. Nor will ASIC be subject to any direction by the Minister in relation to such functions and powers (clause 11(9B)). These refinements are designed to avoid the imposition of duties under State law of the kind ruled invalid in *Hughes*.

Geographic focus of the Bill

4.6. Bill clause 4 provides that the Bill will apply in both the referring States and Territories (referred to collectively as 'this jurisdiction', relying on the definition of 'this jurisdiction' in the Corporations Bill 2001) and States that are not referring States. The Bill will therefore not apply in the external Territories such as the Territory of Christmas Island and the Territory of Cocos (Keeling) Islands, which are included in the definition of 'Australia' in the *Acts Interpretation Act 1901*, section 17(a).

4.7. Bill clause 5(2) provides that an expression has the same meaning in the Bill that it has in the Corporations Bill 2001. Bill clause 9, provides that 'Australia', when used in a geographical sense, does not include an external Territory. However, Bill clause 5 provides that, for the purposes of the Bill, 'Australia', includes an external Territory that is prescribed for the purpose of the provision in which the reference to 'Australia' appears.

4.8. The geographical focus of a number of clauses is on the referring States and Territories whereas the focus of the corresponding provision in the 1989 Act is on the whole of Australia or every State and Territory (clauses 16(1)(a), 18(2), 28(c)(ii), 37(10), 40(c)(ii), 43(1)(d), 46(1)(b)(ii), 91(1)(a), 93(2), 95(1), 102(4)(b), 127(2), 127(4B)(a)(iaa), 127(4F)(b)(iaa), 147(5), 172(4A), 213(2)(a) and 237(2)(a)).

4.9. Bill clause 12A, Division 2 of Part 2 and Part 3 will apply throughout Australia, as the Commonwealth has sufficient constitutional power to enact these provisions without relying on a State reference (clause 4). These provisions are concerned with:

- the conferral of functions and powers on ASIC in relation to a number of matters within Commonwealth power, such as insurance (clause 12A);
- unconscionable conduct and consumer protection in relation to financial services (Division 2 of Part 2); and
- investigations and information gathering in relation to unconscionable conduct and consumer protection (Part 3).

The Bill is not an applied law

ASIC Act to replace ASC Law

4.10. The State Corporations Acts applied the 1989 Act (with certain specified exceptions) and the regulations made under the 1989 Act as a law of the relevant State or Territory. The applied law mechanism was necessary because the Commonwealth did not have sufficient constitutional power to enact all the applied provisions as a law that applied throughout Australia. The 1989 Act and each of the State Corporations Acts also provided that a reference in any Act or instrument to the ASC Law or the ASC Regulations included a reference to the applied provisions of that State or Territory, every other State or Territory and the 1989 Act.

1989 Act provisions that are not in the Bill

4.11. The Bill does not include the following provisions that were included in the 1989 Act to accommodate the applied law regime:

- 1B alternative citations of this Act and regulations under section 251
- 1C citation of provisions of this Act, and regulations under section 251, applying as law of another jurisdiction
- 1D references to ASC Law and ASC Regulations
- 1E saving of citation provisions of other jurisdictions
- 5(1) the following definitions:
 - ‘national scheme law’
 - ‘national scheme law of this jurisdiction’
 - ‘non-applied provisions’
 - ‘this Law’
- 11(7) ASIC has functions conferred on it by a national scheme law
- Part 2, Division 2, Subdivision J
 - sections 12JA to 12JE (inclusive): certain provisions of the Corporations Law about dealings in securities to apply as a law of the Commonwealth
- 12B application of Part 3
- 83A exercise of powers etc. for purposes of investigations under corresponding laws
- 88(1A) application of Part III of the *Crimes Act 1914* to ASIC hearings under ASC law of another jurisdiction
- 91(1A) preventing double recovery of expenses of investigations
- 102(8) application of ASIC’s power to delegate in relation to the law of another jurisdiction
- 127(8) application of secrecy provisions to functions discharged and powers exercised under an applied law
- 148 subsection (2) and (3): CASAC to have regard to laws of other jurisdictions
- 174(2) Corporations and Securities Panel may exercise powers conferred on it by the law of another jurisdiction
- 204(2) Companies Auditors and Liquidator Disciplinary Board may exercise powers conferred in it by the law of another jurisdiction
- 243A offences under 2 or more ASC Laws
- 243C reciprocity in relation to offences in more than one jurisdiction
- 243CA recognition of certain acts done for the purposes of another ASC Law
- 252 Regulations may be made for the purpose of the non-applied provisions

Provisions that differ from those in the 1989 Act

4.12. The following clauses in the Bill differ from the corresponding provision in the 1989 Act because the Bill will not be part of an applied law regime:

- 5(1) definition of:
 - ‘examination’
 - ‘regulations’
- 43 exercise of certain powers by ASIC under a law of this jurisdiction in relation to securities
- 49(5) clause not to affect *Director of Public Prosecutions Act 1983*
- 50 ASIC may cause civil proceedings to be begun
- 251(1) Omission of reference to applied laws in the regulation-making power.

4.13. As the Corporations Bill 2001 will replace the Corporations Law, the Bill refers to the *Corporations Act 2001* in places where the 1989 Act refers to the Corporations Law. Bill clause 5(1) defines the term ‘corporations legislation’ to mean the Corporations Act 2001 and the Bill. The Bill uses the terms ‘corporations legislation’ in places where the 1989 Act uses the expression ‘national scheme law’ or refers to the Corporations Law and the ASC Law (clauses 1(1)(c), 5(1) (definition of ‘eligible person’), 11(1) and (2)(b), 12(1), 13(1), 14(2)(a), 15, 16(1)(c), 28, 29(1), 40, 49(1)(c), 51, 53(1)(a), 54, 56(2)(a), 57(1), 59(1), 67(2), 93A(1)(b), 95(1) and (2)(a), 102(4)(b), 127(1)(a), 135(4), 148, 174, 184(5), 185(3), 204, 213(1), 218(1)(a), 227(1)(b), 237(2)(d), 243(a)(ii) and 246). The expression ‘national scheme law’ used in the 1989 Act does not include section 12A and Division 2 of Part 2 of the 1989 Act, while the expression ‘corporations legislation’ will include the corresponding provisions in the Bill. Accordingly, in places where the 1989 Act refers to the ‘national scheme law’ and the Bill refers to the ‘corporations legislation’, the Bill will specifically exclude these provisions.

The Bill will be a law of the Commonwealth

4.14. The Bill does not include the following provisions included in the 1989 Act because, as a law of the Commonwealth, other Commonwealth Acts containing equivalent provisions will apply:

- 5 definition of ‘penalty unit’ (see *Crimes Act 1914*, section 4AA)
- 6A acting appointments (see *Acts Interpretation Act 1901*, section 33A)
- 6B alteration of names and constitution (see *Acts Interpretation Act 1901*, section 25B)
- 6C presentation of papers to the Parliament (see *Acts Interpretation Act 1901*, section 34B)
- 6D periodic reports (see *Acts Interpretation Act 1901*, section 34C)
- 102(7) exercise of powers and functions by a delegate (see *Acts Interpretation Act 1901*, section 34A)
- 243D subsection (1) to (5C): cash dealers to report certain transactions (see *Financial Transactions Reporting Act 1988*, section 16(1)(b)(ii))

5

Correction of Anomalies and Changes in Drafting Style

Correction of Anomalies

5.1. Bill clause 32A will make it clear that the power to require the production of books and records under that section may only be exercised by ASIC for the purposes of Division 2 of Part 2 concerning unconscionable conduct and consumer protection in relation to financial services.

Changes in Drafting Style

5.2. Bill clause 1(1)(a) refers to ‘a Territory’ instead of the Capital Territory and other Territories, and in so doing relies on the definition of ‘Territory’ at *Acts Interpretation Act 1901*, section 17(p): ‘a Territory referred to in section 122 of the Constitution, and includes a Territory administered by the Commonwealth under a Trusteeship Agreement’.

5.3. The Bill uses the words ‘must’, ‘chair’, ‘employee’ and ‘Secretary of the Department’ where the 1989 Act used ‘shall’, ‘chairman’, ‘servant’ and ‘Secretary to the Department’ respectively.

6

Transitional Provisions

Previous amendments to the 1989 Act

6.1. Detailed transitional provisions dealing with previous amendments to the 1989 Act are not necessary. Therefore, all current transitional provisions and current transitional aspects of provisions have been omitted from the Bill (in particular, section 12AB, and Part 17 (comprising sections 263 to 267 (inclusive) of the 1989 Act) entitled ‘Commencement and application of certain amendments of the ASC Law’). This includes all references to terms such as ‘corresponding previous law’ and ‘corresponding previous provision’. However, the Bill will have the effect that it would have as if those transitional provisions had been part of the Bill and had the effect they had under the 1989 Act (clause 284).

6.2. The Bill does not include the following provisions included in the 1989 Act in order to facilitate the transition to the 1989 Act from the previous co-operative scheme:

6E	liabilities etc. imposed on Commonwealth by other ASC Laws
11	subsection (1A) and (1B); powers conferred on the NCSC
13	subsection (3) to (6) (inclusive): power of ASIC to continue NCSC investigations
14A	directions under previous laws
51(2)	power of ASIC to continue NCSC hearings
122A	transfer of certain NCSC staff to the Australian Public Service
127(7)	NCSC officers to preserve secrecy of information
127A	NCSC officers to preserve secrecy of information
251	subsections (3) and (4): Regulations may facilitate transfer of functions to ASIC
Part 16	entitled ‘Transitional’, comprising sections 253 to 268 (inclusive), transferring assets, etc from the NCSC to ASIC.

6.3. Nor does it include provisions dealing with the transition relating to the assumption of financial protection consumer protection functions (Clause 5I).

6.4. The Bill does not include section 148A of the 1989 Act which obliged CASAC to report to the Minister on certain matters. This provision is not required in the Bill because CASAC has reported on those matters.

Transition to the Bill

Application of the transitional provisions

6.5. Part 16 of the Bill provides for the transition from the ‘old ASIC legislation’ to the ‘new ASIC legislation’. These terms are defined under clause 254 and include the relevant laws and regulations, instruments made under them, and applicable pieces of State legislation. It is expected that complementary provisions will be enacted by the States and the Northern Territory. It is also expected that complementary provisions needed for the ACT will be included in Corporations (Consequential Provisions) Bill of the Commonwealth.

6.6. The object of Part 16 is to ensure that individuals, bodies corporate and other bodies are, to the greatest extent possible, put in the position immediately after commencement of the Bill that they would have been in if their existing rights and liabilities under the current ASIC legislation had arisen under the new ASIC legislation (clause 253).

6.7. Clause 255 of the Bill provides in effect that the transitional provisions apply to an invalid administrative action of a Commonwealth authority or officer that has been validated by State ‘validation’ legislation.

6.8. The Bill further provides that the transitional provisions apply to things that are deemed to have happened or to have been the case under the law of a State or the Northern Territory (clause 256).

6.9. Clause 257 prevents the need to duplicate things that must be done, created or produced following the commencement of the Bill, where the effect of the transitional provisions on old ASIC legislation and the concurrent operation of the Bill would otherwise have the effect that a thing must be done, created or produced more than once.

6.10. Despite the application of the *Crimes Act 1914*, offences that can be prosecuted as a result of the operation of Part 16 in respect of conduct that occurred before its commencement attract a penalty of \$100 per penalty unit (clause 258).

6.11. If a State ceases to be a referring State, Bill clause 259 preserves the operation and ongoing effect that the transitional provisions have already had in relation to matters connected with that State after commencement of the Bill and prior to it ceasing to be a referring State.

Bodies established under old ASIC legislation

6.12. Division 2 of Part 16 continues the existence of bodies established under the 1989 Act (clause 261). These bodies include ASIC, CASAC, the Companies Auditors and Liquidators Disciplinary Board, the Financial Reporting Council and the Australian Accounting Standards Board. Division 2 also continues the appointments of the Chair and Deputy Chair of the Financial Reporting Council, taking account of a change in name of the positions (clause 262). Appointments to other bodies are continued by clause 275.

Old ASIC regulations

6.13. Division 3 of Part 16 preserves the operation of regulations made under the old ASIC legislation. Regulations in force immediately before the commencement of the Bill that were made for the purposes of the 1989 Act and which correspond to the provisions of the Bill, will continue to have effect as if they were regulations under the Bill (clause 264).

Court proceedings and orders

6.14. Division 4 of Part 16 deals with continuing court proceedings following the commencement of the Bill (clauses 267 and 268). Where the proceeding is not a federal ASIC proceeding (as defined under clause 266) or an enforcement, appeal or review proceeding relating to a court order, an equivalent new proceeding is taken to be on foot in the same court exercising federal jurisdiction (clause 267). The new proceeding relates to the rights and liabilities created by clause 271 and 272 (in substitution for existing rights under the State and Territory ASIC Laws).

6.15. Federal ASIC proceedings include matters arising under the *Administrative Decisions (Judicial Review) Act 1977* related to a decision made under the old ASIC legislation, proceedings concerning consumer protection in relation to financial services under Division 2 of Part 2 of the 1989 Act, and writs of mandamus, prohibition or injunction against Commonwealth officers arising under old ASIC legislation. Those proceedings continue subject to the ability of the Court to make contrary orders (clause 268). Where relevant they may relate to rights and liabilities created by clauses 271 and 272 in substitution for existing rights under the State and Territory ASIC Laws, or rights and liabilities saved under provisions of the Corporations (Consequential Provisions) Bill 2001.

6.16. Consideration is currently being given to the decision of the High Court in *ASIC v Edensor Nominees Pty Ltd* [2001] HCA 1, any implications it may have for the operation of the transitional provisions and any consequential changes to those provisions that might be desirable.

6.17. Division 4 of Part 16 also preserves the effect of interlocutory orders (clause 267), steps taken in proceedings, and orders made (clause 269) under prior legislation.

6.18. Division 4 of Part 16 does not seek to deal with enforcement, appeal or review proceedings relating to a court order where those proceedings are not federal ASIC proceedings. It is expected that these proceedings and the rights and liabilities to which the proceedings relate will be saved by State and Territory legislation. This approach is designed to ensure that the provisions of the Bill comply with the requirements of Chapter III of the Constitution.

Continuation of ASIC's functions and powers

6.19. Division 5 of Part 16 provides that ASIC has the functions and powers conferred on it (clause 271) or the NCSC (clause 272) by or under a law of the Commonwealth, State or the Northern Territory in relation to a non federal proceeding that is not affected by clauses 267 or 268. However, ASIC is not subject to direction in respect of, or under a duty to perform or exercise, the functions or powers. These refinements are designed to avoid the imposition of duties under State law of the kind ruled invalid in *Hughes*.

General transitional provisions

6.20. Transitional provisions of a more general nature are included in Division 6 of Part 16, and they operate subject to (clause 273) and in support of (clause 274) the other transitional provisions in Part 16 and regulations made under Division 7 of Part 16. They are intended to operate in a way that achieves the object of Part 16 (clause 274). However, the provisions in Division 4 of Part 6 do not apply to court orders, appeals or proceedings made or taken before the commencement of the Bill (see Division 4 of Part 16).

6.21. Things done under, or for the purpose of, the old ASIC legislation that have an ongoing significance immediately before commencement of the Bill will be taken to have been done under, or for the purposes of, the new ASIC legislation (clause 275). Examples of such things under the 1989 Act would include:

- the commencement of a prosecution for an offence under the Corporations Law (section 49);
- written notice requiring the production of books for inspection by ASIC (Division 3 of Part 3); and
- notice to an individual to produce documents (section 33).

The Bill sets out the circumstances in which a thing has ongoing significance, and also allows for regulations to be made to provide a specified thing does, or does not, have ongoing significance.

6.22. Similarly, where rights and liabilities were acquired, accrued or incurred under the old ASIC legislation or its transitional provisions (other than a right or liability arising under an order made by a court), an equivalent right or liability is taken to have been acquired, accrued or incurred under the new legislation on commencement (clauses 276 and 277). For example, the liability under section 129 to compensate a person for loss sustained as a result of breaching section 128 continues to be imposed under the corresponding provisions of the Bill.

6.23. The Bill also preserves time limits that commenced running under the 1989 Act (clause 278), as well as the significance of events occurring or circumstances that arose prior to the commencement of the Bill (clause 279).

6.24. Clause 280 provides that, in the absence of an express provision to the contrary, references to events, circumstances and things are taken to include references to events, circumstances and things that occurred prior to the commencement of the Bill. Clause 281 provides that references in the Bill to another provision in the Bill will be taken, in relation to events before the Bill commences, to include a reference to the corresponding provision of the old ASIC legislation. For example, the reference in clause 37(1)(b) to a warrant issued under Bill clause 36 will be taken to include a warrant issued under section 36 of the 1989 Act before the Bill commenced.

6.25. References in an instrument to the old ASIC legislation are taken to include a reference to the corresponding provisions of the new ASIC legislation (clause 283). The transitional provisions of the old ASIC legislation continue to have effect where they would produce the same results or effects under the Bill as they had before its commencement (clause 284).

Regulations dealing with transitional matters

6.26. Division 7 of Part 16 (clause 285) provides that the regulations may deal with transitional matters, retrospectively if necessary.

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