Speech by

Hon. R. WELFORD

MEMBER FOR EVERTON

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CORPORATIONS (ADMINISTRATIVE ACTIONS) BILL
CORPORATIONS (ANCILLARY PROVISIONS) BILL
CORPORATIONS (COMMONWEALTH POWERS) BILL

Hon. R. J. WELFORD (Everton—ALP) (Attorney-General and Minister for Justice) (11.32 a.m.): I move—

That the bills be now read a second time.

This package of bills follows historic negotiations between the Commonwealth and the states to place the national scheme for corporate regulation on a secure constitutional foundation. The bills reflect the commitment of the Queensland government to achieving an effective, uniform system of corporate regulation across Australia.

The current scheme for the regulation of corporations, companies and securities commenced operation on 1 January 1991. The relevant legislation in Queensland is the Corporations (Queensland) Act 1990. The current scheme is underpinned by heads of agreement, which were agreed on 29 June 1990, and a supplementary agreement, the corporations agreement. The agreement establishes the Ministerial Council for Corporations (MINCO), which is constituted by the relevant Commonwealth, state and territory ministers responsible for the national scheme law, as the primary forum where all matters relating to corporations, securities and corporate governance are discussed and voted on.

The current scheme has worked remarkably well. The parties to the corporations agreement have, in general, complied with its spirit and letter, and there has been little discord between the states and the Commonwealth about the operation of the Corporations Law in Australia. However, recent challenges and decisions of the High Court of Australia have cast doubt on the constitutional framework which supports the Corporations Law.

The difficulties associated with the current system of corporate regulation have been identified by the High Court in two significant cases. The first case was decided in June 1999. In re Wakim: ex parte McNally the High Court held by a majority that chapter iii of the Commonwealth constitution does not permit state jurisdiction to be conferred on federal courts. Effectively, this decision removed the jurisdiction of the federal court in most states and territories to resolve Corporations Law matters, unless cases fell within the court's accrued jurisdiction or in certain other circumstances. This decision denied litigants a choice of forum for the resolution of such disputes.

The second case was the Queen v. Hughes, decided in May last year. There the High Court held that the conferral of a power, coupled with a duty, on a Commonwealth officer or authority by a state law must be referable to a Commonwealth head of power. This means that if a Commonwealth authority, such as the Director of Public Prosecutions or the Australian Securities and Investments Commission, has a duty under the Corporations Law, that duty must be supported by a head of power in the Commonwealth constitution. This decision casts doubt on the ability of Commonwealth agencies to exercise some functions under the Corporations Law.

These decisions of the High Court prompted the Standing Committee of Attorneys-General and the Ministerial Council for Corporations to meet to resolve the problems facing the national Corporations Law scheme. On 25 August 2000 Commonwealth, state and territory ministers reached an historic in-principle agreement in Melbourne, whereby states would refer to the Commonwealth parliament the

power to enact the Corporations Law as a Commonwealth law and make amendments to that law subject to the terms of the corporations agreement. These bills reflect the commitment of the Queensland government to ensuring that the uncertainty that now prevails in the business community over the future of corporate regulation in Australia is resolved as quickly as possible.

I shall refer first to the Corporations (Commonwealth Powers) Bill. This bill firstly enables the Commonwealth parliament to enact the proposed Corporations Bill and the Australian Securities and Investments Commission Bill. A copy of the Commonwealth bills, which constitute the tabled text for the purposes of this bill, are available in the Parliamentary Library for reference by members.

Secondly, it enables the Commonwealth to amend those laws, or regulations made under them, in the future as long as the amendments are confined to the matters of corporate regulation, the formation of corporations, and the regulation of financial products and services, but only to the extent of making express amendments to the bills referred to the Commonwealth parliament. This is called the amendment reference.

The bill provides in clause 1(3) that the act is not intended to allow for laws to be made pursuant to the amendment reference with the sole or main underlying purpose or object of regulating industrial relations matters. The Queensland government fought hard to ensure that such changes first and foremost protected the economic and job security of workers, the only basis on which we would contemplate a change to states' rights. Queensland played an integral role in ensuring that industrial relations matters continue to be specifically excluded from the matters referred to the Commonwealth parliament. This exclusion is to ensure that the Commonwealth cannot use the referred powers to legislate in the area of industrial relations or to override state laws dealing with industrial relations.

The bill provides that the reference of power is to terminate five years after the Commonwealth corporations legislation commences or at an earlier time by proclamation. The term of the referral can also be extended beyond five years by proclamation. The states have agreed to give the referral for only five years because the referral of power by the states to the Commonwealth is not a permanent solution to the problems of the current scheme. At the request of ministers, the Commonwealth has given a firm undertaking to examine long-term solutions to address the problems arising from the decisions of the High Court in Wakim and Hughes, including constitutional change. The states can terminate the referral earlier, by proclamation, if, for example, the Commonwealth parliament makes amendments to the new Corporations Act which go beyond what was envisaged when the referral was made, such as in the area of the environment.

The bill also provides for the termination of the power of the Commonwealth to amend the referred laws, by proclamation. However, if only the amendment reference is terminated, the effect of the Commonwealth Corporations Bill is that the state would cease to be part of the new scheme unless all of the states also revoke the reference, giving six months notice of their intention to do so. This underlines the importance of the corporations agreement, which will govern the scope of the referral. The corporations agreement is an intergovernmental agreement and, in formal terms, is not legally binding. However, the states place great weight on it, and have agreed to refer powers in the terms of the bill before the House on the understanding that the Commonwealth will abide by both the spirit and the letter of the agreement.

I now turn to the Corporations (Administrative Actions) Bill. The object of this bill is to give validity to certain potentially invalid administrative actions taken before the commencement of the proposed Commonwealth Corporations Act 2001 by Commonwealth authorities or officers acting under powers or functions conferred on them by laws of the state relating to corporations. Legislation of each state and the Northern Territory confers functions relating to the administration and enforcement of the Corporations Law on ASIC, the Australian Securities and Investments Commission, 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.

If the view of the High Court in Hughes 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 and the previous cooperative scheme.

A number of Commonwealth authorities have functions and powers under the current 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.

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 at the relevant time by a duly authorised state authority or officer of the state.

Corporations (Ancillary Provisions) Bill

The third and final bill in this group of cognate bills is the Corporations (Ancillary Provisions) Bill. Honourable members will appreciate that a number of consequential and transitional amendments to state legislation will need to be dealt with before the new scheme commences. The effect of this bill is twofold. Firstly, the bill updates references in Queensland legislation from the old Corporations Law regime to the new Commonwealth Corporations Act. Secondly, the new Corporations Act states that it is not intended to cover the field in the area of corporations. This means that any indirect inconsistencies between the Commonwealth act and any Queensland act will not result in the invalidity of the Queensland provisions.

However, as a result of the referral of corporations power, any direct inconsistencies between Queensland legislation and the Commonwealth act will result in invalidity due to the operation of section 109 of the Commonwealth constitution, which provides that the Commonwealth provision, in the event of inconsistency, will prevail. In order to protect these Queensland provisions, therefore, some legislation needs to be amended to insert declarations that the Corporations Act will not apply to those provisions.

The schedules make amendments that fall into distinct categories:

(a) amendment of provisions referring to the Corporations Law, or any part of it, so that they refer in future to the Corporations Act of the Commonwealth, or the relevant part of it;

(b) correction of references to particular provisions of the Corporations Law so that they are read in future as references to the correct provisions of the Corporations Act (this includes amendments consequential on the Corporate Law Economic Reform Program Act 1999—CLERP);

(c) similar amendment and correction in relation to existing references to the Companies (Queensland) Code and other code acts;

(d) in accordance with part 1.1A of the proposed Corporations Act of the Commonwealth (dealing with the interaction between Commonwealth legislation and state provisions), provisions to continue certain existing exemption, exceptions and exclusions from the operation of the Corporations Law that apply under state law;

(e) the re-enactment of provisions in acts that apply particular provisions of the Corporations Law as if they were part of those acts, so that the provisions continue to apply as state law;

(f) other miscellaneous adjustments necessary for the new corporations scheme.

The schedule does not amend every reference in the statute book to the Corporations Law or its predecessors. The Corporations (Ancillary Provisions) Bill contains a safety net translation for references that are not directly amended. This means that unamended references to the Corporations Law will be read as including a reference to the new Corporations Act, unless the context otherwise requires.

However, there are some references to the Corporations Law that have been identified in our state laws as continuing to be correct as they currently read, whether because they are historically correct or for any other reason, and these will be preserved by regulations made under the Corporations (Ancillary Provisions) Bill. I commend the bills to the House.