FIRST SESSION OF THE THIRTY SIXTH PARLIAMENT

REPORT OF THE STANDING COMMITTEE ON LEGISLATION IN RELATION TO THE

CORPORATIONS (COMMONWEALTH POWERS) BILL 2001
CORPORATIONS (ANCILLARY PROVISIONS) BILL 2001
CORPORATIONS (ADMINISTRATIVE ACTIONS) BILL 2001
CORPORATIONS (CONSEQUENTIAL AMENDMENTS) BILL 2001

Presented by Hon Jon Ford MLC

Report 1

June 2001

STANDING COMMITTEE ON LEGISLATION

Date first appointed:

May 24 2001

Terms of Reference:

1.1 A *Legislation Committee* is established.

1.2 The Committee consists of 7 members.

1.3 The functions of the Committee are -

(a) to consider and report on any bill referred by the House;

(b) to review the form and content of the statute book;

(c) to inquire into and report on any proposal to reform an existing law;

(d) to consider and report on a bill referred under SO 230 (c).

1.4 Unless otherwise ordered, the policy of a bill referred under subclause 1.3(a) at the second reading or any subsequent stage is excluded from the Committee's consideration.

1.5 The Committee of its own motion, or on a reference from a Minister, may inquire into and report to the House on any or all aspects, including policy, of a proposal for an agreement or arrangement that, to have effect, would necessitate the enactment of legislation of a type described in SO 230 (c).

Members as at the time of this inquiry:

Hon Jon Ford MLC (Chairman)
Hon Kate Doust MLC
Hon Paddy Embry MLC
Hon Peter Foss MLC
Hon W.N. Stretch MLC
Hon Giz Watson MLC
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EXECUTIVE SUMMARY

i. The development of the four Referral and Validation Bills referred to the Committee arose from meetings of the Standing Committee of Attorneys General (SCAG) and the Ministerial Council on Corporations (MINCO), representing the various Australian jurisdictions.

ii. The Commonwealth Government argued that the recent High Court decisions of *Wakim* and *Hughes* regarding the possible constitutional invalidity of aspects of the scheme, put in doubt the current 'cooperative scheme'. The Commonwealth Government said that the decisions lead to concerns about the ability of Commonwealth officers (particularly from the Australian Securities and Investments Commission (ASIC)) and the federal courts to administer and adjudicate with regard to State matters.

iii. The scope of the Commonwealth's powers with regards to corporations has two limitations: it is limited to certain types of corporations; and does not have a general power of incorporation. The new scheme seeks to provide the Commonwealth with a mechanism to regulate corporations beyond its capacity under the Commonwealth Constitution.

iv. The current corporations arrangements between the Executives of the Commonwealth, States and Territories regarding corporations are set out in the current Corporations Agreement formally signed in 1997 (in effect since 1 January 1991). A new inter-governmental agreement was reached in March 2001 but has yet to be formally signed (Draft Agreement). It qualifies the corporations arrangements between the Commonwealth, States and Territories in the Referral and Validation Bills.

v. Inter-governmental agreements are entered into on an Executive government level and cannot bind the State Parliament. However, in practical terms, such agreements result in considerable pressure being placed on State Parliaments to enact uniform legislation by such methods as making Commonwealth funding contingent on compliance with such agreements.

SUMMARY OF OBSERVATIONS AND RECOMMENDATIONS

Observations

vi. Experience has shown that these corporations arrangements lead to a gradual erosion of services and the removal of decision making power to the eastern states. This is likely to continue, but the alternative cannot be contemplated, because if Western Australia did not participate in the proposed arrangements it would result in the complete isolation of Western Australian businesses and corporations.

vii. The effect of the Draft Agreement is that the Commonwealth with the agreement of only two States can alter the constitutional arrangements between the Commonwealth and the States with regards to corporations.

viii. If the Australian Capital Territory were to become part of MINCO, the provisions relating to voting will have to be revisited.

ix. The 21 day consultation period on proposed amendments effectively gives the State and the State Parliament no meaningful input into those amendments.

x. The Draft Agreement is as important as the legislation itself in determining what the effect of this scheme is.

xi. Partial termination is the only effective power the State has to enforce compliance by the Commonwealth with the Draft Agreement. Limitations on the exercise of that power under the Draft Agreement make it extremely difficult to exercise. History has shown that the Commonwealth exploits any differences which the States have on any matter. This makes resort to clause 512B of the Draft Agreement even more difficult.

xii. The Committee is concerned that the Commonwealth Parliament has the ability to make amendments inconsistent with those agreed to in MINCO, although there are some protections in clauses 508(2) and (3) of the Draft Agreement.

xiii. The Committee observes that although cooperative schemes such as this relating to corporations can have an adverse effect on the people and Parliament of Western Australia, Part 1.1 A of the Corporations Bill 2001 (Cwlth) is a useful mitigation of their impact.

xiv. Although the Corporations (Administrative Actions) Bill 2001 contains elements of retrospectivity the intention is to preserve what is believed to be the existing rights rather than disturbing them. It is to give effect to the law as was the original intention of Parliament.

Recommendations

Page 20:

Recommendation 1: **The Committee recommends that in view of the complications in the Draft Agreement clause 512B, that the Western Australian Government develop urgently a formal agreement with other States dealing with the exercise of the power under clause 512B, so as to reduce the opportunity for the Commonwealth to exploit any differences between the States.**

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Recommendation 2: The Committee recommends that the Corporations (Commonwealth Powers) Bill 2001 be adopted.

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Recommendation 3: The Committee recommends that should there be any future National Scheme Laws which involve the possibility of a section 109 Commonwealth Constitution inconsistency problem, the Government should ensure that the uniform legislation includes provisions such as those contained in Part 1.1A of the Corporations Bill 2001 (Cwlth).

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Recommendation 4: The Committee recommends that the Corporations (Ancillary Provisions) Bill 2001 be adopted.

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Recommendation 5: The Committee recommends that the Corporations (Administrative Actions) Bill 2001 be adopted including the retrospective provisions.

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Recommendation 6: The Committee recommends that the Corporations (Consequential Amendments) Bill 2001 be adopted.

CHAPTER 1
BACKGROUND

REFERENCE

1.1 The Legislative Council referred the following Bills to the Standing Committee on Legislation (the Committee) on second reading adjourned by Hon Bruce Donaldson MLC (Tuesday, May 29 2001):

- Corporations (Commonwealth Powers) Bill 2001;
- Corporations (Ancillary Provisions) Bill 2001;
- Corporations (Administrative Actions) Bill 2001; and
- Corporations (Consequential Amendments) Bill 2001.

1.2 The Bills stand referred to the Committee to report by June 19 2001.

BACKGROUND TO THE CORPORATIONS LAW AND THE NATIONAL CO-OPERATIVE SCHEME

1.3 The development of these four Bills before the Committee (collectively referred to as the Referral and Validation Bills) arose from meetings of the Standing Committee of Attorneys General (SCAG) and the Ministerial Council on Corporations (MINCO) representing the various Australian jurisdictions.

1.4 The current arrangements between the Executives of the Commonwealth, States and Territories regarding corporations are set out in the current Corporations Agreement formally signed in 1997 (in effect since 1 January 1991).[1] A new agreement (the Draft Agreement) was reached in March 2001 but has yet to be formally signed.[2] It qualifies the arrangements between the Commonwealth, States and Territories[3] in the Referral and Validation Bills.

1.5 The term 'cooperative scheme' in this context refers to the arrangements between these Australian jurisdictions for regulating corporations. The legislative framework

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1 Explanatory Memorandum for the Corporations (Commonwealth Powers) Bill 2001, p. 2; also note that it is sometimes referred to as the "Alice Springs Agreement".

2 Historically there has been considerable delay in such agreements being signed but the spirit of the agreement is being adhered to; see Transcript of Evidence of Dr J. Thomson, June 11 2001, pp. 6 and 11.

3 To date the Northern Territory is the only territory that is party to the Draft Agreement with no intention presently for the Australian Capital Territory to join as a party; see Transcript of Evidence of Mr P. Richards, June 11 2001, p. 13.

which the Commonwealth Bills[4] are intended to replace consists of the *Corporations Act 1989* (Cwlth) and the *Corporations (Western Australia) Act 1990* (WA) (Corporations Law) and accompanying regulations. Under the cooperative scheme the Corporations Law was enacted as a law for each State and Territory by applying the *Corporations Act 1989* (Cwlth) as a law of that jurisdiction.[5]

1.6 The Commonwealth Government argued that the recent High Court decisions of *Wakim and Hughes*, regarding the possible constitutional invalidity of aspects of the scheme, put in doubt the current 'cooperative scheme'. The Commonwealth Government said that the decisions lead to concerns about the ability of Commonwealth officers (particularly from the Australian Securities and Investments Commission (ASIC)) and the federal courts to administer and adjudicate with regard to State matters.

1.7 Section 51(xx) of the Commonwealth Constitution provides:

> *"The Parliament shall, subject to this Constitution have power to make laws for the peace, order, and good government of the Commonwealth with respect to: … foreign corporations, and trading or financial corporations formed within the limits of the Commonwealth."*

1.8 The Commonwealth Parliament has further powers to legislate to regulate interstate trade and commerce (section 51(i)), and the postal and telegraphic, telephonic and other like services power (section 51(v)).

1.9 The Commonwealth Parliament, unlike State Parliaments, is not a plenary Parliament and is strictly limited to the powers that can be found in the Commonwealth Constitution. The State, on the other hand, has broad powers with respect to corporations and corporate activities.[6]

1.10 The scope of the Commonwealth's powers with regards to corporations has two limitations: it is limited to certain types of corporations; and it does not have a general power of incorporation.[7] The limitations to the Commonwealth's power with regard

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4 Corporations Bill 2001 (Cwlth) and the Australian and Securities Commission Bill 2001 (Cwlth).

5 The Parliament of the Commonwealth of Australia, Parliamentary Joint Standing Committee on Corporations and Securities, *Report into the Provisions of (a) the Corporations (Commonwealth Powers) Act 2001 (NSW); and (b) the Corporations Bill 2001 and the Australian and Securities and Investments Commission Bill 2001*, May 2001, p. 3.

6 Explanatory Memorandum for the Corporations (Commonwealth Powers) Bill 2001, p. 1.

7 *New South Wales v The Commonwealth – The Incorporation Case* (1990) 169 CLR 482.

to corporations are discussed in more detail in this report with the examination of the relevant case law. The cooperative scheme seeks to provide the Commonwealth with a mechanism to regulate corporations beyond its capacity under the Commonwealth Constitution.

1.11 The present proposal seeks to step around these difficulties in mechanisms without amending the Commonwealth Constitution. The proposal is for each State and Territory to enact like legislation which refers a bill with regards to corporations to the Commonwealth.[8] Therefore, instead of the current arrangements of each jurisdiction having like legislation, which creates the appearance of a National Law, there would only be the one Commonwealth Act, relying on both Commonwealth and referred State powers. As the Explanatory Memorandum for the Corporations (Commonwealth Powers) Bill 2001 states:

> *"The overall effect of the proposed State, Territory and Commonwealth Bills is that the Corporations Law will be re-enacted as a law of the Commonwealth, rather than as laws of the Commonwealth, the States and the Northern Territory. There will therefore be no barrier to Commonwealth legislation incorporating companies, or conferring jurisdiction with respect to Corporations Law on the Federal Court, or conferring functions and powers with respect to Corporations legislation on Commonwealth authorities and officers."*

1.12 One of the fundamental consequences of moving from a National Law to a Commonwealth law is that section 109 of the Commonwealth Constitution comes into play so as to render any inconsistent state law invalid.

1.13 There are certain events that are required to put into place the new scheme. Firstly, the New South Wales Parliament, in April 2001, enacted and commenced the Corporations (Commonwealth Powers) Bill 2001 (New South Wales Bill).[9] Attached to this Bill was the text of the Commonwealth Bills, which permitted their introduction into the Commonwealth Parliament. The Commonwealth Bills will not be enabled until all States and Territories have enacted their related legislation. Section 51 (xxxvii) is relevant to this process because it allows the Commonwealth Parliament to enact legislation relating to:

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8 Commonwealth Constitution, section 51(xxxvii).

9 Explanatory Memorandum for the Corporations (Administrative Actions) Bill 2001, p. 3.

> *"Matters referred to the Parliament of the Commonwealth by the Parliament or Parliaments of any State or States, but so that the law shall extend only to States by whose Parliaments the matter is referred, or which afterwards adopt the law…"*

1.14 The New South Wales Bill makes reference to the "*tabled text*" which provides that the referral is only in relation to provisions in Commonwealth Acts enacted in the terms (or substantially in the terms) of the tabled Commonwealth Bills.[10] This text was also tabled in the Western Australian Parliament with the Corporations (Commonwealth Powers) Bill 2001 (WA).

1.15 Apart from two major provisions relating to section 109 of the Commonwealth Constitution and the referral powers, the substance of the Corporations Law, is essentially the same as it is now.[11] Pursuant to the Draft Agreement the amendment process will continue. New provisions of the Commonwealth Bills are:

- Part 1.1, which deals with the referral;
- Part 1.1A which deals with inconsistency issues under section 109 of the Commonwealth Constitution; and
- Part 9.6A which deals with jurisdiction of the federal and state courts.

Therefore, the Committee for the purposes of this inquiry, will focus on these clauses and the issues surrounding the referral of the relevant legislation and the related Draft Agreement.

RELEVANT CASE LAW

Wakim

1.16 The High Court case of *Re Wakim: ex parte McNally*[12], decided in June 1999, invalidated the cross-vesting[13] legislative arrangements between the Commonwealth and States. In practical terms, it largely restricted the jurisdiction of federal courts to

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10 Explanatory Memorandum for the Corporations (Commonwealth Powers) Bill 2001, p. 4; also see Corporations Bill 2001 (Cwlth) and Australian Securities and Investments Commission Bill 2001 (Cwlth).

11 Transcript of Evidence of Dr J. Thomson, June 11 2001, pp. 24-25.

12 (1999) 198 CLR 511.

13 Cross-vesting is a process by which one superior court may exercise the jurisdiction of another superior court under cross-vesting legislation. Cross-vesting legislation between federal, State and Territory courts came into force in 1988, after the Commonwealth's *Jurisdiction of Courts (Cross Vesting) Act 1987* was passed. Cross-vesting for corporations law matters commenced in 1989 and 1990.

determine matters under State laws, which included the Corporations Law of each State, to the extent that it conferred state jurisdiction on federal courts. The High Court viewed as invalid the State legislation, conferring jurisdiction in such matters on federal courts, and the Commonwealth law consenting to such a conferral.[14]

1.17 To reach its conclusions, the High Court relied on a negative implication arising from Chapter III of the Commonwealth Constitution. The High Court stated that by granting power to the Commonwealth to create federal courts and by *expressly* stating the matters about which Commonwealth Parliament may confer jurisdiction on those courts, Chapter III implicitly forbids the conferring of any other jurisdiction on federal courts by the Commonwealth or States.[15] There was no process to confer such jurisdiction.

1.18 In 1995, *BP Australia Ltd v Amann Aviation Pty Ltd*[16] raised questions of the validity of the Commonwealth's *Jurisdiction of Courts (Cross Vesting) Act 1987*. An appeal from *BP Australia Ltd v Amann Aviation Pty Ltd* came to the High Court.[17] Six Judges were evenly divided on the issue of validity.[18] The *Wakim; Ex parte McNally* case essentially represented the next phase of a challenge to the cross-vesting legislation. Historically, cross-vesting legislation was lauded as an example of co-operation between the Parliaments of the Commonwealth. However, as the law is invalid, no amount of parliamentary cooperation can fix the essential problem that there is no constitutional power to do so. The Commonwealth can invest a State court with federal jurisdiction.[19]

1.19 Once the Corporations Law becomes an entirely Commonwealth law through the mechanism of referral, the Commonwealth will be able to confer Corporations Law jurisdiction on both State and federal courts and to provide for matters to be transferred between both court systems without the need for State legislation. The

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14 (1999) 198 CLR 511.

15 The court used a common law rule of statutory interpretation, the '*expressio unius*' rule.

16 (1996) 62 FCR 451.

17 *Gould v Brown* (1998) CLR 346.

18 In such a situation, when the High Court is evenly divided, the decision appealed from is affirmed as per section 23(2)(a) of the *Judiciary Act 1903.* Justices Gummow and Hayne said that because the Court was divided the case establishes no principle or binding precedent, the authority for such a principle being found in *Tasmania v Victoria* (1935) 52 CLR 157 at p. 183 per Dixon J.

19 As per section 77 (iii) of the Commonwealth Constitution.

Commonwealth Corporations Bill 2001 at Part 9.6A confers federal jurisdiction on the State and federal courts in relation to matters arising under that Bill.[20]

Hughes

1.20 The High Court decision in *The Queen v Hughes*[21] indicated that the State Corporations Law did not provide a basis for Commonwealth law to impose a *duty* on Commonwealth officers or entities to perform functions and exercise powers. A head of power under the Commonwealth Constitution must support such Commonwealth legislation.[22] It could be presumed therefore that Commonwealth law that merely *permits* the performance and exercise of such functions and powers would be valid.[23]

1.21 The High Court also noted that any State law that supposedly grants a wider authority than that prescribed by the Commonwealth would be inconsistent and invalid under section 109 of the Commonwealth Constitution. Section 109 states:

> *"109. When a law of a State is inconsistent with a law of the Commonwealth, the latter shall prevail, and the former shall, to the extent of the inconsistency, be invalid."*

1.22 The High Court left open the question of whether the imposing of a duty by Commonwealth legislation was necessary not only to implement the cooperative scheme arrangements between the various Executive governments but as a *"constitutional imperative"*.[24]

1.23 The High Court saw constitutional amendment as the preferable solution to the current jurisdictional difficulties:

> *"So complex is the interlocking legislation, with fiction piled upon fiction, that it must be doubted whether any of those presenting or enacting it were truly aware of precisely what they were doing. It may be hoped that this and other recent decisions, together with the great national importance of the subject matter of the legislation, will encourage its early reconsideration and the adoption of a simpler*

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20 Transcript of Evidence of Mr G. Calcutt, June 11 2001, p. 2; also see *Jurisdiction of Courts (Cross Vesting) Act 1987.*

21 (2000) 171 ALR 155.

22 Ibid., para 32; also see section 51 of the Commonwealth Constitution.

23 Commonwealth Department of Parliamentary Library Information Research Services, *Agricultural and Veterinary Chemicals Legislation Amendment Bill 2001*, Bills Digest No. 133 2000-01, pp. 5 - 6.

24 (2000) 171 ALR 155 at para 34.

> *constitutional foundation to reduce the perils that are otherwise bound to recur, possibly with serious results."*[25]

1.24 The constitutional problems seen by the High Court have not been resolved by the current arrangements. It would appear therefore that amendments to the Commonwealth Constitution would be a more permanent solution to these jurisdictional difficulties, especially if national cooperative schemes are to continue and be expanded.

1.25 Dr Thomson, Legal Officer, Attorney General's office noted, at the Committee's hearing, the possible future scenarios with regard to the scheme:

> *"One is the possibility of a High Court challenge to unravel the scheme, and the second is the momentum that is building up for a long-term solution.… If the States lost a referendum to impose a national corporations scheme, would they start thinking whether they should end this scheme? I could envisage that this would not necessarily run on. One reason is a push for a wider permanent solution."*[26]

[25] Ibid., para 60.

[26] Transcript of Evidence of Dr J. Thomson, June 11 2001, p. 18.

CHAPTER 2
INTER-GOVERNMENTAL CORPORATIONS AGREEMENT

2.1 There is presently in place a Corporations Agreement (also known as the "Alice Springs Agreement") which has arisen out of SCAG and MINCO and has been operational since 1991. Inter-governmental agreements are entered into at an Executive government level and cannot bind the State Parliament. They are usually expressed to be non-justiciable[27]. However, in practical terms, such agreements result in considerable pressure being placed on State Parliaments to enact uniform legislation by such methods as making Commonwealth funding contingent on compliance with such agreements. Experience has shown that these corporations arrangements lead to a gradual erosion of services and the removal of decision making power to the eastern states. This is likely to continue, but the alternative cannot be contemplated. If Western Australia did not participate in the proposed arrangements it would result in the complete isolation of Western Australian businesses and corporations.

2.2 The High Court in *Hughes*[28] stated that:

> *"In construing that legislation* [the present Corporations Law], *regard may be had to the Alice Springs Agreement as part of the relevant context."*[29]

2.3 The Draft Agreement that directly relates to the Referral and Validation Bills, although not a legislative instrument, is a vital part of the new scheme.

2.4 It is necessary in order to understand the overall framework of the new scheme to examine this Draft Agreement when examining the Referral and Validation Bills. This is particularly in relation to the amendment of the Commonwealth legislation from time to time and termination of the referral arrangement.

2.5 Clause 501 of the Draft Agreement states:

> *"… This Part establishes procedures involving both consultation between the parties on legislation covering a wide range of matters and a commitment not to promote certain kinds of legislation without the approval of the Ministerial Council."*

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27 'Justiciable' means that it is subject to resolution by a court of law.

28 (2000) 171 ALR 155.

29 Ibid., para 1.

2.6 This indicates that the draft agreement qualifies the arrangements in the provisions of the Corporations (Commonwealth Powers) Bill 2001. Clause 4(4) of this Bill[30] uses the term "*other than by express amendment*", which envisages the Commonwealth Bills being able to be amended and affected by Commonwealth legislation enacted in reliance of other powers. This is where the clauses in the Draft Agreement become significant in setting out agreement between the Commonwealth and, the States and Territories regarding such amendment.

2.7 Clause 504A(1) of the Draft Agreement states that:

> *"The Commonwealth will not introduce a Bill that depends, in whole or in part, on a State referral* mentioned in paragraph 502(a) [that is, section 51(xxxvii) of the Commonwealth Constitution] … *for a purpose other than that specified in paragraph 502(b)* [that is, the formation of corporations and the regulation of corporations, financial products and services]. *In particular, the Commonwealth will not introduce a Bill that depends, in whole or in part, on a State referral mentioned in paragraph 502(a) for the purpose of regulating:*
>
> *(a) industrial relations;*
>
> *(b) the environment; or*
>
> *(c) any other matters declared unanimously by the members of the Ministerial Council representing referring States to be a matter to which this clause applies."*

2.8 In this way the parties to the Draft Agreement seek to restrict the scope of the legislative powers being referred to the Commonwealth by means of the Corporations (Commonwealth Powers) Bill 2001.

2.9 During the negotiations of this agreement, Queensland, Victoria and to a lesser extent New South Wales expressed concern about the possibility of the referred legislation being used by the Commonwealth to regulate industrial relations matters. A compromise was reached between New South Wales, Victoria and the Commonwealth whereby a statement is made in the objects clause of each State's Corporations (Commonwealth Powers) Bill stating that nothing in the Act will, with regard to the amendment reference, allow the making of a Commonwealth law for the:

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30 This Bill will be discussed at greater length in Chapter 3 of this report.

> *"sole and main underlying purpose or object of regulating industrial relations matters".*[31]

2.10 This ties in with clause 504A of the Draft Agreement and was included due to concerns arising from a Commonwealth discussion paper and comments by the Commonwealth Industrial Relations Minister regarding intentions of the Commonwealth to use section 51(xx) of the Commonwealth Constitution to regulate industrial relations. Inclusion of such matter in the Draft Agreement and the objects clause of the relevant Bill was done to avoid having to refer to a series of exceptions in the Bill thus possibly giving rise to litigation and uncertainty.[32]

2.11 The Commonwealth has a right of veto on proceeding with any legislation approved by MINCO. Clause 505(2) of the Draft Agreement states that:

> *"The Commonwealth is not obliged to introduce, make or support any legislation, or proceed with any legislative proposal, with which it does not concur."*

2.12 Clause 506A of the Draft Agreement provides that the Commonwealth should consult with MINCO in relation to express amendments to the Commonwealth Bills on matters that are listed in clause 506 and which include debentures, managed investment schemes, the securities industry and the futures industry. These are matters which the Commonwealth has powers over in its own right.

2.13 No express time is stated within which the Commonwealth must first consult MINCO for the time of the development of such amendments.[33] The States' Ministers then have a twenty-one day period (clause 506A(1)(b)) in which to respond. Clause 506(1)(a) required that at least four or more States' Ministers advise the Chairperson (Commonwealth) that they consider the amendment is other than for the reason the corporations powers were referred. At this time a meeting is held and the amendment considered.[34]

> *"The bar has been set fairly high because of negotiations that were carried out between the Commonwealth and some of the States. On the one hand, the bar has been set high for the provisions that apply*

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31 Corporations (Commonwealth Powers) Bill 2001, clause 1(3).

32 Transcript of Evidence of Dr J. Thomson, June 11 2001, p. 21.

33 Transcript of Evidence of Mr P. Richards, June 11 2001, p. 12; note that this is usually done by letter to the relevant Ministers.

34 Ibid., p. 12.

> *to the use of state powers by the Commonwealth Parliament. On the other hand is the practical problem of consultation between the States and the Commonwealth and whether 21 days is sufficient notice for the States. It could be argued that that is not sufficient time because the Government gives the States a lot of paperwork that deals with complex matters. It could also be argued that a series of negotiations are conducted at the officer level to develop legislation. It is a problem. The Commonwealth was very tough on this matter. A number of States might have objected and wanted a lower bar set precisely because state powers are being used. This is an important clause."*[35]

2.14 Significant to the Commonwealth's ability to amend the proposed Commonwealth legislation is clause 506(2) which states that approval of at least three State or Territory Ministers are required for a Commonwealth bill or regulation to amend the Commonwealth Bills with regard to referred matters.

2.15 The Committee observes that the original arrangement agreed by the Commonwealth with the States, was that the approval of the majority of MINCO, including 4 States' Ministers, would be required to approve an amendment. The rationale for this was that an amendment altered the constitutional arrangements and therefore it was appropriate that a majority should agree to it. The reduction in the number of States required to approve an amendment was part of the compromise agreed by New South Wales and Victoria referred to in paragraph 2.9. Therefore, only two States and one Territory would be required to agree to proposed Commonwealth amendments while the objection of four States are required to prevent alterations covered by clause 506A.

2.16 Concern has been raised as to the effect of the Australian Capital Territory joining MINCO and apparently further increasing the imbalance of the States' relationship with the Commonwealth. Mr Calcutt, Parliamentary Counsel, has informed the Committee that in the event of the Australian Capital Territory becoming part of the agreement, it could be assumed that the voting provisions and quorum requirements of MINCO would have to be revisited.[36]

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35 Transcript of Evidence of Dr J. Thomson, June 11 2001, p. 13.

36 Transcript of Evidence of Mr G. Calcutt, June 11 2001, p. 13.

2.17 Clause 508 of the Draft Agreement deals with the introduction and passage of Bills through the Commonwealth Parliament:

> *"(1) When introducing into a House of the Commonwealth Parliament a Bill referred to in clause 505(1), a Minister of State for the Commonwealth will inform the House of the outcome of any consultation with the Ministerial Council and, in the case of matters requiring the approval of the Ministerial Council, the outcome of voting.*
>
> *(2) If amendments to such a Bill are or are to be moved in the Commonwealth Parliament (whether or not on behalf of the Government), the Commonwealth will use its best endeavours to ensure adequate consultation with and, if the subject matter would ordinarily be required to be considered under subclause 506(2), a vote by, the Ministerial Council on those amendments.*
>
> *(3) In addition to the obligations undertaken in subclause 508(2), the Commonwealth will not move amendments to such a Bill and will oppose amendments to such a Bill which are moved by other parties if the amendments:*
>
> *a) rely to any extent on the reference by the States referred to in paragraph 502(a); and*
>
> *b) are other than for the purpose of the formation of corporations, corporate regulation and the regulation of financial products and services."*

2.18 This is also affected by clause 511 which details the 'fallback' process where there has been an alteration made to a Commonwealth bill or regulation. That this is a problem was indicated to the committee by the evidence of Mr Richards, Ministry of Justice:

> *"… that does not avoid another problem with commonwealth legislation that arises occasionally; that is, amendments are sometimes made by the Senate and the Senate has not had a chance to notify the States. Changes do occur that way; for example, changes were made in the Senate to the Corporate Law Economic Reform*

> *Program Act 1999 that were passed by the House of Representatives."*[37]

2.19 As further discussed in Chapter 3 of this report there are two kinds of termination. There is total termination of the referral and partial termination of the amendment power. An important aspect of the Draft Agreement is the provision relating to the partial termination of the referral. Clause 512B(2) states that the Commonwealth Bills will provide that if six States partially terminate the amendment reference on the same day, the Commonwealth Bills will continue to apply to those States and they will continue to be referring States. Clause 512B(3) states that the Commonwealth Bills will treat any State that unilaterally terminates its amendment reference as a *"non-referring State"*. However, there are consequences for non-referring States that would discourage such action. The Commonwealth Bills provide that any company formed under a non-referring State is required to register with ASIC to carry on business in a referring State or Territory. Other provisions, for example the National Guarantee Fund will not apply to non-referring States.[38]

2.20 These clauses of the Draft Agreement tie in with the sunset clause in the Corporations (Commonwealth Powers) Bill 2001 which states that the agreement will terminate after a five year period or earlier or later by proclamation of the Governor.[39] In a practical sense it is envisaged that the sunset clause will be extended. Total termination would leave Australia without any clear Corporations Law and is therefore not likely to occur. In addition the effect from the time of termination on companies incorporated under the Commonwealth law has also not been adequately addressed in the courts.[40]

2.21 In practice the termination of the referral would not be simple.[41] As the Commonwealth already has powers in its own right to legislate on many corporations matters, it can legislate for Western Australia to that extent. If there was a total termination of reference to the Commonwealth, the provisions of the Commonwealth law based on our reference would cease to apply in Western Australia. If a State was

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37 Transcript of Evidence of Mr P. Richards, June 11 2001, p. 12.

38 The Parliament of the Commonwealth of Australia, Parliamentary Joint Standing Committee on Corporations and Securities, *Report into the Provisions of (a) the Corporations (Commonwealth Powers) Act 2001 (NSW); and (b) the Corporations Bill 2001 and the Australian and Securities and Investments Commission Bill 2001,* May 2001, p. 8.

39 Corporations (Commonwealth Powers) Bill 2001, clause 5 and 6; also see Transcript of Evidence of Dr J. Thomson, June 11 2001, p. 17.

40 Transcript of Evidence of Dr J. Thomson, June 11 2001, p. 18.

41 Transcript of Evidence of Mr G. Calcutt, June 11 2001, p. 17.

to unilaterally terminate the amendment reference only, the Commonwealth Bills would have the effect of terminating the whole reference for that State only.[42]

2.22 Unless all six States partially terminate on the same day, then the effect is that each of these terminating States becomes a non-referring State. The Bill states that the effect of this is that all six States have to withdraw on the same day or else one State will become isolated from the arrangements. Clause 4 of the Commonwealth Corporations Bill 2001 states that:

> *(6) A State ceases to be a **referring State** if the State's initial reference terminates.*
>
> *(7) A State ceases to be a **referring State** if:*
>
> *a) the State's amendment reference terminates; and*
> *b) subsection (8) does not apply to the termination.*
>
> *(8) The State does not cease to be a **referring State** because of the termination of its amendment reference if: …*
>
> *(c) that State's amendment reference, and the amendment reference of every other State, terminates on the same day.*

2.23 The effect of this is moderated by clause 512B which provides a mechanism whereby if four States give notice that the Commonwealth has breached the agreement and the Commonwealth does not remedy that breach, all six States would withdraw their reference on the same day. In particular see clause 512B(4)(a) in annexure A

OBSERVATIONS

2.24 Experience has shown that these corporations arrangements lead to a gradual erosion of services and the removal of decision making power to the eastern states. This is likely to continue, but the alternative cannot be contemplated, because if Western Australia did not participate in the proposed arrangements it would result in the complete isolation of Western Australian businesses and corporations.

2.25 The effect of the Draft Agreement is that the Commonwealth with the agreement of only two States can alter the constitutional arrangements between the Commonwealth and the States with regards to corporations.

2.26 If the Australian Capital Territory were to become part of MINCO, the provisions relating to voting will have to be revisited.

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42 Ibid., p. 17.

2.27 The 21 day consultation period on proposed amendments effectively gives the State and the State Parliament no meaningful input into those amendments.

2.28 The Draft Agreement is as important as the legislation itself in determining the effect of this scheme.

2.29 Partial termination is the only effective power the State has to enforce compliance by the Commonwealth with the Draft Agreement. Limitations on the exercise of that power under the Draft Agreement make it extremely difficult to exercise. History has shown that the Commonwealth exploits any differences which the States have on any matter. This makes resort to clause 512B of the Draft Agreement even more difficult.

2.30 The Committee is concerned that the Commonwealth Parliament has the ability to make amendments inconsistent with those agreed to in MINCO, although there are some protections in clauses 508(2) and (3) of the Draft Agreement.

RECOMMENDATION

Recommendation 1: **The Committee recommends that in view of the complications in the Draft Agreement clause 512B, that the Western Australian Government develop urgently a formal agreement with other States dealing with the exercise of the power under clause 512B, so as to reduce the opportunity for the Commonwealth to exploit any differences between the States.**

CHAPTER 3
CORPORATIONS (COMMONWEALTH POWERS) BILL 2001

PURPOSE OF THE BILL

3.1 The purpose of the Corporations (Commonwealth Powers) Bill 2001 is to:

> *"… refer certain matters relating to corporations, corporate financial products and services to the Parliament of the Commonwealth for the purposes of section 51(xxxvii) of the Constitution of the Commonwealth, so as to enable that Parliament to make laws that apply to their own force in the State, instead of those matters being dealt with by the Corporations Law* [State law] *and other applied laws."*[43]

3.2 This Bill refers the text of the following Commonwealth Bills to the Commonwealth. The authentic text has been tabled in the Legislative Assembly of New South Wales:

3.2.1 Corporations Bill 2001; and

3.2.2 Australian Securities and Investments Commission Bill 2001.[44]

3.3 These are referred to in the Bill as the "*tabled text*".[45] As stated in paragraph 1.1 of this report, this Bill is one of a package of Referral and Validation Bills. These Referral and Validation Bills are proposed uniform legislation which relate to like Bills (and/or Acts as the case may be) in the other States and Territory.

3.4 In the second reading speech, the Minister for Racing and Gaming, Hon Nick Griffiths MLC, stated:

> *"The Western Australian Government is committed to ensuring that there exists in Australia a uniform national corporations law which is constitutionally secure and certain. That is the most appropriate way to promote business efficiency, as well as regulation of corporate activity and enforce corporations laws throughout Australia.*

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43 Corporations (Commonwealth Powers) Bill, clause 1(2).

44 Explanatory Memorandum for the Corporations (Commonwealth Powers) Bill 2001, p. 1.

45 Corporations (Commonwealth Powers) Bill, clause 3(1).

> *For these reasons, the Western Australian Government has decided to refer powers over corporations to the Commonwealth Parliament. As has been clearly recognised by other jurisdictions in Australia, this is a matter of national importance."*[46]

3.5 This Bill and the referral by the State was prompted by the High Court decision in *Hughes*. However, whether this legislation is necessary in practical terms (given the existing Commonwealth power with regards to corporations) is debatable:

> *"We do not think Hughes is that broad. We do not think it is necessary to validate anything, but the legislation has been born out of the abundance of caution; for example, someone might take a technical constitutional point with the Australian Securities and Investments Commission to get out of a criminal prosecution, such as a fraud prosecution."*[47]

3.6 The Committee also finds it somewhat curious that the Commonwealth Government's alarmed reaction to the *Hughes* decision has subsided since the States entered into the agreements to refer. It questions whether the referral to the Commonwealth in its own right is the true motivating factor in developing this new scheme and, in any case, if a scheme is necessary at all to address issues raised in the *Hughes* decision. The Committee notes with interest the alternative view that another possible course of action would be to wait for more High Court decisions before attempting to legislate or develop a referendum.[48]

3.7 This Bill is to come into operation by means of proclamation, rather than by Royal Assent or a date specified, to ensure simultaneous commencement with the other Australian jurisdictions of this scheme.[49] The Committee has been informed that the intended starting date is July 1 2001.[50]

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46 Second reading speech: Corporations (Commonwealth Powers) Bill 2001, Hon Nick Griffiths MLC, Minister for Racing and Gaming, Parliament of Western Australia Legislative Council, May 29 2001, p. 557.

47 Transcript of Evidence of Dr J. Thomson, June 11 2001, p. 23.

48 Rose, D. 2000, 'The Hughes Case: The Reasoning, Uncertainties and Solutions', *Western Australian Law Review*, vol. 29, October 2000, p. 180 at p. 192.

49 Corporations (Commonwealth Powers) Bill, clause 2.

50 Second reading speech: Corporations Bill 2001 (Cwlth), Hon Joe Hockey, MP, Minister for Financial Services and Regulation, Parliament of Australia House of Representatives, April 4 2001, p. 26433.

3.8 Hon Nick Griffiths MLC also stated in the second reading speech that:

> *"The Corporations (Commonwealth Powers) Bill 2001 provides in the objects clause 1(3) that this Bill 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."*[51]

CLAUSE 4 – REFERENCE OF MATTER

Initial Reference

3.9 Clause 4(1) sets out the matters that are referred by this Bill to the Parliament of the Commonwealth, being the text of the current Corporations Law with appropriate amendments, and the *"tabled text"* of the Commonwealth Bills.[52]

3.10 The relevant Explanatory Memorandum notes that the phrase "*substantially in the terms*" of the tabled text is to "*enable minor adjustments to be made to the tabled text"*.[53]

3.11 During a hearing before the Committee, Mr Calcutt, Parliamentary Counsel, explained the practical outcomes of such a clause. It appears that if the State totally terminated the corporations power referral, the provisions of the Commonwealth Bills, which are not based on this referral power would continue to operate.[54]

Amendment Reference

3.12 Clause 4(1)(b) refers to the same subject matter but to the extent of express amendment of the Commonwealth Bills and instruments that affect its operation otherwise than by express amendment.[55] This means that the Commonwealth cannot use this power to introduce any other legislation, but only to amend the Commonwealth Bills and to create instruments under it.

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51 Second reading speech: Corporations (Commonwealth Powers) Bill 2001, Hon Nick Griffiths MLC, Minister for Racing and Gaming, Parliament of Western Australia Legislative Council, May 29 2001, p. 559.

52 Explanatory Memorandum for the Corporations (Commonwealth Powers) Bill 2001, p. 6.

53 Corporations (Commonwealth Powers) Bill 2001, clause 4(1)(a); also see Explanatory Memorandum for the Corporations (Commonwealth Powers) Bill 2001, p. 6.

54 Transcript of Evidence of Mr G. Calcutt, June 11 2001, p. 17.

55 Explanatory Memorandum for the Corporations (Commonwealth Powers) Bill 2001, p. 6.

3.13 In clause 4(2) the reference is of a matter only to the extent that the Commonwealth Parliament otherwise does not have legislative power and providing that it is within the legislative power of the State Parliament.

3.14 Mr Calcutt further explained to the Committee that if the State terminated the amendment reference, this would in effect be akin to terminating the whole reference, as the State would cease to be part of the national scheme.[56] The referred provisions of the Commonwealth Bills would cease to apply in Western Australia.[57]

3.15 Clause 4(4) envisages that the Commonwealth Bills can be amended and affected by reliance on other powers. However, it appears that the use of the amendment power will be subject to the Draft Agreement.

3.16 The words *"other than by express amendment"* in clause 4(4)(b) were included to ensure that no general power was referred by the States to the Commonwealth and to clarify that, the only other way in which the Commonwealth Bills can be affected is by subordinate legislation. Such instruments cannot change the effect of the primary legislation. There is not a general power conferred by the Bill to support any legislation, only express amendments (as was the case with the Mutual Recognition legislation[58]).[59]

3.17 If the Commonwealth makes amendments that do not comply with the Draft Agreement the State could respond by terminating its references.[60] However, as discussed earlier in this report, this is not necessarily a practical option.

3.18 Substantial parts of the Corporations Law could currently be enacted by the Commonwealth Parliament under the existing heads of power of the Commonwealth Constitution.[61] The Commonwealth has the power under section 51(xx) of the Commonwealth Constitution to regulate foreign corporations and trading and financial corporations within the limits of the Commonwealth.[62] The Commonwealth Constitution also provides the Commonwealth Parliament with legislative power in

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56 Commonwealth Corporations Bill 2001, clauses 3, 4(6), 4(7) and 5(2).

57 Transcript of Evidence of Mr G. Calcutt, June 11 2001, p. 17.

58 *Mutual Recognition (Western Australia) Act 1995*.

59 Ibid., p. 7; also note that this is an 'anti-Henry VIII clause'.

60 Parliament of New South Wales Explanatory Notes, [Online], Available: http://www.parliament.nsw.gov.au/prod [2001, April, 12].

61 Ibid.

62 Explanatory Memorandum for the Corporations (Commonwealth Powers) Bill 2001, p. 1.

relation to interstate trade and commerce (section 51(i)), and postal, telegraphic, telephonic and other like services power (section 51(v)).[63]

3.19 Section 51(xxxix) of the Commonwealth Constitution provides the Commonwealth Parliament with incidental power to legislate with regards to *"matters incidental to the execution of any power vested by this Constitution of the Commonwealth, or in the Federal Judicature, or in any department or officer of the Commonwealth"*.

CLAUSES 5 AND 10 – TERMINATION OF REFERENCE

3.20 Clause 5 provides that the reference terminates on the fifth anniversary of the commencement date. This is unless the Governor fixes, by proclamation, an earlier or later date of termination. It would appear however that it is most likely that this "sunset clause" will simply be regularly extended. One reason for having such a clause inserted is to ensure that the parties in the scheme, particularly the Commonwealth Government, look at longer-term options for creating a constitutionally secure Corporations Law regime.[64] This is also done out of constitutional caution to ensure that there is not an irrevocable referral.

3.21 Clause 10 states that the Act (the present Bill) will expire at the beginning of the day on which the initial reference terminates:

> *"This is a standard "sunset clause" inserted into WA legislation to ensure removal from the WA statute book as a spent statute at the appropriate time. Also, it effectively ensures that as long as the reference is operational, including by its extension, the Act will not expire. However, if the reference is terminated then new referral legislation must be brought before the WA Parliament to recommence any referral."*[65]

3.22 In clause 5(4)(a), the reference also provides for a partial termination, with a continuation of the legislation already in place to that effect. Therefore, if all States terminate the reference, this would result in a position of having Commonwealth

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63 Ibid.

64 Transcript of Evidence of Dr J. Thomson, June 11 2001, p. 17.

65 Explanatory Memorandum for the Corporations (Commonwealth Powers) Bill 2001, p. 7.

corporations legislation applying to States as it is in force at the time but not in relation to future amendments.

RECOMMENDATION

Recommendation 2: The Committee recommends that the Corporations (Commonwealth Powers) Bill 2001 be adopted.

CHAPTER 4
CORPORATIONS BILL 2001 (COMMONWEALTH)

THE COMMONWEALTH PARLIAMENT

4.1 In this report the Committee is not examining at length the Commonwealth Bills because for the major part it is a re-enactment of the current Corporations Law. However, the Committee believes certain clauses of the Corporations Bill 2001 (Cwlth) identified by Mr Calcutt, Parliamentary Counsel, (Parts 1.1, 1.1A and 9.6A) are significant as they are new and relate to the referral and jurisdiction of the courts.

PART 1.1

4.2 Part 1.1, clauses 4(6), (7) and (8) of the Commonwealth Corporations Bill 2001 outlines when a State ceases to be a referring State. A State ceases to be a referring State by terminating the initial reference and also by terminating the amendment (partial) reference unless:

- it has terminated the amendment reference on the same day as every other State terminated; and
- the termination date of the amendment reference is as least six months after the proclamation date.[66]

4.3 These provisions were inserted by the Commonwealth as a means of controlling actions by the States. It establishes a regime, which is punitive to the States unless they act unanimously. The effect of this is mitigated by clause 512B(4)(a) of the Draft Agreement, which reduces the number of States required for a partial termination to four. In any other case a State taking action, even to terminate the reference partially, is ejected from the scheme.

PART 1.1A

4.4 A significant consequence of the change from a State based National Law to a Commonwealth Law for Corporations is that it brings section 109 of the Constitution into operation. The case law has given a wide effect to section 109 so that it can

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66 Tapley, M. (2001), Law and Bills Digest Group, Commonwealth Department of the Parliamentary Library, Information and Research Services, "Corporations Bill 2001", *Bills Digest*, No. 140 2000-01, p. 17.

render State laws invalid even if they do not directly contradict the Commonwealth law and even if they are apparently for an unrelated purpose.

4.5 Part 1.1A is intended to restore the relative position of State and Commonwealth legislation so that State legislation is not unwittingly rendered invalid. It does this in four ways:

- it specifically states that it is not the intention of the Commonwealth legislation to occupy the field;[67]
- it specifically preserves inconsistent State legislation;[68]
- it provides for priority of State legislation in the case of inconsistency;[69] and
- it permits the State specifically to override the Corporations law[70].

4.6 Whilst there is a power in the Commonwealth to negate that override, it can only do so with the consent of the State concerned.[71]

4.7 Whilst it would be considerably simpler not to have a regime where section 109 came into play, given that it does, Part 1.1A is about as good an effort at offsetting its effect as can be made.[72] In fact, the Committee hopes that it becomes a precedent to be used in future where it is appropriate that the States should continue to have the capacity to legislate unconcerned by section 109. This approach could herald a much more cooperative relationship between the State and Commonwealth. Obviously exercise of referral powers is a clear case for such an inclusion but exercise of treaty powers could be another.

4.8 Clause 5E of the Commonwealth Bill provides that the Commonwealth legislation is not intended to exclude or limit the concurrent operation of State and Territory laws such as those that impose additional obligations or liabilities on directors or companies or provide for the formation of a body corporate.[73]

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67 Corporations Bill 2001 (Cwlth), clause 5E(1).

68 Ibid., clause 5E(4).

69 Ibid., clause 5E(4).

70 Ibid., clause 5F.

71 Draft Agreement, clauses 509A & 509B.

72 Transcript of Evidence of Mr G. Calcutt, June 11 2001, pp. 4 & 5.

73 Tapley, M. (2001), Law and Bills Digest Group, Department of the Parliamentary Library, Information and Research Services, "Corporations Bill 2001", *Bills Digest*, No. 140 2000-01, pp. 17 & 18.

4.9 Clause 5F provides that if a State law declares a particular matter to be an excluded matter, the Commonwealth Bills cannot apply.[74] Clause 5F(3) retains the Commonwealth's power to limit the application of State and Territory declarations by regulation.[75]

4.10 Clause 5G of the Commonwealth Bill deals with future State amendments and provides that they will apply despite inconsistency with the Commonwealth Bills. These proposed provisions are to address the normal rule that Commonwealth legislation will override State legislation to the extent of inconsistency.[76] The normal rule is that the Commonwealth law will prevail if there is inconsistent State law arises by virtue of section 109 of the Commonwealth Constitution which states that:

> "*109. When a law of a State is inconsistent with a law of the Commonwealth, the latter shall prevail, and the former shall, to the extent of the isnconsistency, be invalid."*

4.11 It is interesting to note that:

> *"The protection against a finding of inconsistency provided by proposed Part 1.1A only applies to laws of States and Territories in 'just jurisdictions'. This term is defined in clause 9 as each referring State, the ACT and the Northern Territory …). These effect of this provision therefore is that the laws of non-referring states are more likely to be found to be invalid for inconsistency with Commonwealth laws."*[77]

PART 9.6A

4.12 Part 9.6A deals with the jurisdiction and procedure of courts. Clause 1337B confers jurisdiction on the Federal Court and the Supreme Courts of the States and Territories in respect of civil matters arising under the Commonwealth Bills. This appears to be a response to the High Court decision in *Wakim* in which the Court found the conferring of jurisdiction on federal courts to hear matters with regard to State laws (such as the concurrent Corporations Law enacted in each State) was invalid.

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74 Transcript of Evidence of Mr G. Calcutt, June 11 2001, p. 4.

75 Tapley, M. (2001), Law and Bills Digest Group, Department of the Parliamentary Library, Information and Research Services, "Corporations Bill 2001", *Bills Digest*, No. 140 2000-01, p. 18.

76 Transcript of Evidence of Mr G. Calcutt, June 11 2001, p. 4; also see the Commonwealth Constitution, section 109.

77 Supra., note 75.

4.13 One of the clear casualties of the litigation over the Corporations Law has been the cross-vesting provisions. This was an excellent arrangement that plainly benefited the people of Australia. It avoided sterile jurisdictional disputes that served no purpose in resolving disputes between parties or in furthering matters that required the approval of a Court.

4.14 Unfortunately, the High Court has made it quite clear that only an amendment to Chapter III of the Commonwealth Constitution would give the Federal Court (and any other courts created by the Commonwealth) the capacity to exercise a State jurisdiction, other than by way of accrued jurisdiction.

4.15 However, the Commonwealth Parliament can invest State Courts with Federal jurisdiction and by Part 9.6A, it has done so.

OBSERVATION

4.16 The Committee observes that although cooperative schemes such as this relating to corporations can have an adverse effect on the people and Parliament of Western Australia, Part 1.1 A of the Corporations Bill 2001 (Cwlth) is a useful mitigation of their impact.

RECOMMENDATION

Recommendation 3: The Committee recommends that should there be any future national scheme laws which involve the possibility of a section 109 Commonwealth Constitution inconsistency problem, the Government should ensure that the uniform legislation includes provisions such as those contained in Part 1.1A of the Corporations Bill 2001 (Cwlth).

CHAPTER 5
CORPORATIONS (ANCILLARY PROVISIONS) BILL 2001

PURPOSE OF THE BILL

5.1 The Corporations (Ancillary Provisions) Bill contains transitional provisions relating to State law superseded by Commonwealth law:

> *"… if an existing Western Australian Act expressly has an exclusionary effect by virtue of which the current state Corporations Law does not apply to it in particular circumstances, the proposed commonwealth Corporations Act 2001 will preserve that position."*[78]

5.2 The second reading speech of Hon Nick Griffiths MLC also notes that the Bill:

> *"… translates references in Western Australian legislation to the old state Corporations Law regime which are now to be read as references to the new proposed commonwealth corporations legislation."*[79]

5.3 The Corporations (Consequential Amendments) Bill 2001 (discussed in Chapter 7 of this report) makes *specific* reference to updating existing references, while this Bill contains *general* saving provisions which state that current Western Australian laws are deemed to expressly say that they have an exclusionary effect.[80]

TRANSITIONAL PROVISIONS

5.4 Transitional provisions are temporary in nature and are spent when all the past circumstances that it is designed to deal with have been dealt with.[81]

5.5 Clause 6 limits the application of the existing Western Australian corporations legislative framework to matters that arose before the new proposed arrangements to

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78 Second reading speech: Corporations (Ancillary Provisions) Bill 2001, Hon Nick Griffiths MLC, Minister for Racing and Gaming, Parliament of Western Australia Legislative Council, May 29 2001, p. 560.

79 Ibid.

80 Ibid.

81 *Britnett v Secretary of State for Social Security* [1991] 2 All ER 726 at 730.

the extent that they are not dealt with in the Commonwealth Bills or laws that pre-dated the present scheme in Western Australia.[82]

5.6 The national scheme laws, by reason of clause 6(1), operate of their own force only in relation to matters arising before the Commonwealth Corporations Bill 2001 comes into force, or matters arising out of such earlier matters.

5.7 Clause 8 declares the continuing operation of State laws that are inconsistent with the Commonwealth Bills.[83] Such relevant State law:

> *"… is declared by this subsection to have effect despite the provision or provisions of the national scheme law of this jurisdiction with which it is inconsistent and as if the relevant law… has itself provided expressly for this outcome."*[84]

5.8 Clause 14 facilitates the application of new Commonwealth Bills for the purposes of State law where it has no application of its own force:

> *"The effect is not to extend the operation of the Commonwealth legislation but to enable it to be applied as State law. The clause enables the use of a legislative device (a declaratory provision) which will result in either the whole, or a specified portion, of the new Commonwealth legislation being applied for the purposes of State law."*[85]

5.9 Clause 14 allows for wording of another Act to be adopted by reference to avoid a mass of duplicate legislation:

> *"The new arrangements mean that a provision of that kind will apply the words of a commonwealth Act rather than those of another state Act. It can do that because we are not talking about applying that law to ourselves; we are talking about taking those words and including them as though they were in our Bill, which we are entitled to do."*[86]

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82 Explanatory Memorandum for the Corporations (Ancillary Provisions) Bill 2001, p. 2.

83 Ibid., p. 3.

84 Corporations (Ancillary Provisions) Bill 2001, clause 8(1).

85 Explanatory Memorandum for the Corporations (Ancillary Provisions) Bill 2001, p. 4.

86 Transcript of Evidence of Mr G. Calcutt, June 11 2001, p. 7.

5.10 Clause 17 qualifies any declaratory provisions by limiting the circumstances in which a function can be conferred on ASIC. The clause states that ASIC is not under a duty to perform a function.

5.11 This provision is designed to avoid a challenge to a Commonwealth officer's ability to administer corporations laws as was the case in *Hughes* where the High Court found, that constitutionally, the States cannot impose a duty on Commonwealth officers to administer State law.[87] It is important to note however that:

> *"There has not yet been an instance to which the Hughes case applies. The action involved in that case was found to be valid because a relevant commonwealth backup power was identified as justifying what was done."*[88]

5.12 Clause 18 also qualifies the effect of declaratory provisions on the State Supreme Court or other court by stating that a duty or function is conferred on such courts *"as may be specified by or under the declaratory provision"*.

5.13 Clause 30(17) inserts a new Division 17 in Part 13 of the *Corporations (Western Australia) Act 1990* which clarifies that Commonwealth officers and authorities are not under a duty to exercise functions conferred under the older corporations legislation. This is to specifically address the constitutional invalidity of such action as stated by the High Court in *Hughes.*

RECOMMENDATION

Recommendation 4: The Committee recommends that the Corporations (Ancillary Provisions) Bill 2001 be adopted.

87 Ibid.

88 Ibid., p. 8; also note *In the matter of Damian Michael Lunch; GPS First Mortgage Securities Pty Ltd v Lynch* (B51.2000) a matter due to be argued before the High Court (referred to The Parliament of the Commonwealth of Australia, Parliamentary Joint Standing Committee on Corporations and Securities, *Report into the Provisions of (a) the Corporations (Commonwealth Powers) Act 2001 (NSW); and (b) the Corporations Bill 2001 and the Australian and Securities and Investments Commission Bill 2001*, May 2001, at footnote 8 of that article).

CHAPTER 6
CORPORATIONS (ADMINISTRATIVE ACTIONS) BILL 2001

PURPOSE OF BILL

6.1 The second reading speech of Hon Nick Griffiths MLC states that the purpose of the Corporations (Administrative Actions) Bill 2001:

> *"… is to validate past actions of commonwealth authorities and officers to the extent necessary to give their actions the same effect as they would have had if they had been taken by duly authorised state officers. The Bill will ensure that the rights of all persons are the same as they would have been if the administrative actions taken by the Commonwealth officer had been validly exercised by state officers."*[89]

ADMINISTRATIVE ACTIONS

6.2 The comments in the second reading speech refer to the High Court decision in *Hughes* which found that State law did not provide a basis for Commonwealth legislation to impose a duty on Commonwealth officers or entities to perform functions and exercise powers created and conferred by State laws.

6.3 The Explanatory Memorandum to the Bill notes that the High Court indicated 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"*.[90]

6.4 The National Companies and Securities Commission (NCSC) which was the controlling body under the previous cooperative scheme, was superseded in 1991. Today it continues in a very limited form, still retaining some functions and powers under the existing scheme. State or Territory delegates carry out much of its work. This Bill applies to the actions of those delegates as actions of the principal.[91]

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89 Second reading speech: Corporations (Administrative Actions) Bill 2001, Hon Nick Griffiths MLC, Minister for Racing and Gaming, Parliament of Western Australia Legislative Council, May 29 2001, p. 560.

90 Explanatory Memorandum for the Corporations (Administrative Actions) Bill 2001, p. 2.

91 Ibid.

6.5 The Explanatory Memorandum to this Bill further notes that, although many of the actions of the Commonwealth officers and authorities fall under a Commonwealth Constitutional head of power, the validity of each action:

> *"… can only be determined on a case by case basis, having regard to the particular circumstances of each action".*[92]

6.6 In order to address the High Court's ruling in *Hughes,* this Bill seeks to validate the administrative actions of Commonwealth officers and authorities that were found to be invalid in that decision. This approach was supported by the High Court in *The Queen v Humby, Exparte Rooney*[93] decision.

6.7 Clause 8(1) seeks to address this issue by stating that:

> *"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."*

6.8 Clause 3 defines an "*invalid administrative action*" as meaning an administrative action that was taken before the commencement of the Commonwealth Bills. It addresses any action that may be invalid because a Commonwealth Constitution head of power does not support the conferral by State law to a Commonwealth officer or authority.[94]

RETROSPECTIVITY

6.9 Provision is made in this Bill for some provisions to operate retrospectively. The Corporations (Commonwealth Powers) Bill 2001 and the Corporations (Ancillary Provisions) Bill 2001 also have clauses that are intended to operate retrospectively.[95] Clauses 5 to 10 of this Bill were discussed at the Committee's hearing:

> *"The Corporations (Administrative Actions) Bill relates only to the possible invalidity of actions in relation to corporations matters; that is, under the existing Corporations Law and the existing Australian*

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92 Ibid.

93 (1973) 129 CLR 231.

94 Supra., note 88.

95 Transcript of Evidence of Mr G. Calcutt, June 11 2001, p. 23.

Securities and Investments Commission Act. Clauses 5 to 10 are intended to operate retrospectively in the sense that they try to identify anything that may have been ineffectually done in the past, so it is as good for the future, and is taken to have always been as good, as it would have been if it had been done by a state authority".[96]

OBSERVATION

6.10 Although the Corporations (Administrative Actions) Bill 2001 contains elements of retrospectivity the intention is to preserve what is believed to be the existing rights rather than disturbing them. It is to give effect to the law as was the original intention of Parliament.

RECOMMENDATION

Recommendation 5: The Committee recommends that the Corporations (Administrative Actions) Bill 2001 be adopted including the retrospective provisions.

96 Transcript of Evidence of Mr G. Calcutt, June 11 2001, p. 23.

CHAPTER 7
CORPORATIONS (CONSEQUENTIAL AMENDMENTS) BILL 2001

PURPOSE OF BILL

7.1 The second reading speech of Hon Nick Griffiths MLC in relation to the Corporations (Consequential Amendments) Bill 2001 identifies that the Bill:

> *"… amends over 100 Acts that contain references to the Corporations Law, or to a previous Corporations Law scheme, or that otherwise need amendment because of the change from a state-based to a commonwealth-based system of Corporations Law.*
>
> *… The alternative, and less satisfactory, approach would have been to rely on interpretation provisions of a general nature without direct amendment of individual Acts."* [97]

CONSEQUENTIAL AMENDMENTS

7.2 This Bill makes specific reference to Acts while the Corporations (Ancillary Provisions) Bill 2001 contains 'safety net' clauses that refer to Acts not directly amended by this Bill.[98]

7.3 This Bill is to come into operation by means of proclamation, rather than by Royal Assent or a date specified, which would presumably be to coincide with the commencement of the Commonwealth Bills.

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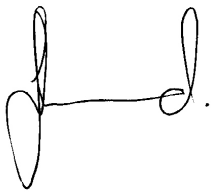
97 Second reading speech: Corporations (Consequential Amendments) Bill 2001, Hon Nick Griffiths MLC, Minister for Racing and Gaming, Parliament of Western Australia Legislative Council, May 29 2001, p. 561.

98 Ibid.

RECOMMENDATION

Recommendation 6: The Committee recommends that the Corporations (Consequential Amendments) Bill 2001 be adopted.



Hon Jon Ford MLC
Chairman **June 18 2001**

ANNEXURE A

CORPORATIONS AGREEMENT 2001

TABLE OF PROVISIONS

Division 2 – alteration of the national law

Division 2A—Alteration of State referral legislation

Division 3—Miscellaneous

PART 6—ADMINISTRATION

PART 7—FINANCE

PART 8—INVESTIGATIONS AND PROSECUTIONS

CORPORATIONS AGREEMENT 2001

An agreement made on [ ] between the following parties:

THE COMMONWEALTH OF AUSTRALIA ("the Commonwealth")
THE STATE OF NEW SOUTH WALES
THE STATE OF VICTORIA
THE STATE OF QUEENSLAND
THE STATE OF SOUTH AUSTRALIA
THE STATE OF WESTERN AUSTRALIA
THE STATE OF TASMANIA
THE NORTHERN TERRITORY OF AUSTRALIA ("the Northern Territory").

WHEREAS:

(1) representatives of the Commonwealth, the States and the Northern Territory met at Alice Springs on 28–29 June 1990 to consider future corporate regulation in Australia; and

(2) those representatives agreed that draft heads of agreement formulated at that meeting ("Heads of Agreement") should be submitted to their respective Governments; and

(3) the Heads of Agreement, as subsequently amended, were endorsed by the Governments of the Commonwealth, the States and the Northern Territory; and

(4) under the Heads of Agreement it was agreed (among other things) that:

(a) the Australian Securities Commission should be the sole administering authority for companies and securities regulation in Australia; and

(b) the provisions of the Corporations Act 1989 of the Commonwealth, amended to give effect to the Heads of Agreement, should apply as law for the Capital Territory by law of the Commonwealth and as law for each State and the Northern Territory by law of the State or Territory; and

(5) the Parliaments of the Commonwealth, the States and the Northern Territory subsequently enacted legislation pursuant to the Heads of Agreement; and

(6) the Governments of the Commonwealth, the States and the Northern Territory entered into an agreement on 23 September 1997, entitled the Corporations Agreement, to supplement that legislation; and

(7) in light of certain decisions of the High Court, the parties have entered into this Agreement to facilitate the establishment of a replacement legislative foundation for Australia's national scheme of corporate regulation relying in part on State referrals in accordance with subsection 51(xxxvii) of the Constitution; and

(8) the parties consider that it is appropriate, in view of the fact that the Legislative Assembly of the Northern Territory has legislative power in relation to corporate regulation and the role of the Northern Territory under the original Corporations

Agreement, to include the Northern Territory as a party to this agreement, although it will not make a referral in accordance with subsection 51(xxxvii) of the Constitution.

IT IS HEREBY AGREED:

PART 1—PRELIMINARY

Citation

101. This Agreement may be referred to as the Corporations Agreement 2001.

Definitions

102. (1) In this Agreement, unless the contrary intention appears:

"CAC" means a Corporate Affairs Commission, Commissioner for Corporate Affairs or other authority having the responsibility of administering co-operative scheme laws;

"Commission" means the Australian Securities and Investments Commission;

"Commonwealth Minister" means the member of the Ministerial Council who represents the Commonwealth, and includes a Minister who is acting as a member of the Council in place of that member;

"Consumer Price Index" means the All Groups Consumer Price Index (being the weighted average of the eight capital cities) published by the Australian Statistician;

"co-operative scheme law" means:

(a) an Act of the Commonwealth that is a Co-operative Scheme Act for the purposes of Part 12 of the Corporations Act 1989 of the Commonwealth as in force on 31 December 2000 ; or

(b) a law of a State or the Northern Territory that is a co-operative scheme law of that State for the purposes of a national scheme law of that State or Territory;

"**Corporations Agreement**" means the agreement of that title dated 23 September 1997 between the Governments of the Commonwealth, the States and the Northern Territory;

"enact" legislation includes make or approve subordinate legislation;

"financial year" means a year commencing on 1 July;

"Heads of Agreement" means the document referred to in the preamble to this Agreement, a copy of which was tabled in the Senate of the Parliament of the Commonwealth on 11 December 1990;

"Minister" means a Minister of State for the Commonwealth or a Minister of the Crown (including a Parliamentary Secretary) for a State or Territory;

"Ministerial Council" means the Ministerial Council for Corporations established by the Corporations Agreement and continued by this Agreement;

"national law" means:

(a) the Corporations Act [when enacted];

(b) the Australian Securities and Investments Commission Act [when enacted]; and

(c) Corporations (Futures Organisations Levies) Act [when enacted], Corporations (Securities Exchanges Levies) Act [when enacted], Corporations (National Guarantee Fund Levies) Act [when enacted], Corporations (Fees) Act [when enacted];

as enacted by the Commonwealth Parliament and amended from time to time;

"national scheme law" means an Act or law of the Commonwealth or another jurisdiction that was a national scheme law for the purposes of the Australian Securities and Investments Commission Act 1989 as in force on 1 July 2000;

"Parliament" includes the Legislative Assembly of the Northern Territory;

"party" means a party to this Agreement;

"Regional Commissioner" means a Regional Commissioner employed under the Australian Securities and Investments Commission Act [when enacted]of the Commonwealth

"referring State" means a State which:

(a) in accordance with subsection 51(xxxvii) of the Constitution, has referred matters to the Commonwealth Parliament sufficient to enable the following legislation to extend to that State of its own force:

(i) the Corporations Act [when enacted] and the Australian Securities and Investments Commission Act [when enacted] as first enacted by the Commonwealth Parliament; and

(ii) express amendments to those Acts, that are amendments with respect to the formation of corporations, corporate regulation or the regulation of financial products or services; and

(b) has not withdrawn, in whole or in part, any of the matters so referred other than where all States have terminated the reference referred to in paragraph (a)(ii) on the same day after having given at least 6 months notice.

"State" means a State of the Commonwealth;

"State Minister" means a member of the Ministerial Council who represents a State, and includes a Minister who is acting as a member of the Council in place of that member;

"Territory" means the Northern Territory;

"Territory Minister" means the member of the Ministerial Council who represents the Northern Territory, and includes a Minister who is acting as a member of the Council in place of that member.

(2) In this Agreement, unless the contrary intention appears, words and expressions have the same meanings as in the Australian Securities and Investments Commission Act [when enacted] of the Commonwealth.

(3) In this Agreement, a reference to an Act (whether of the Commonwealth or a State or Territory) includes a reference to:

(a) that Act as amended and in force for the time being; and

(b) an Act passed in substitution for that Act.

PART 2—EFFECT AND OPERATION OF AGREEMENT

Commencement

201. This Agreement comes into operation when it has been executed by or on behalf of all of the parties named above.

Amendment of Agreement

202. This Agreement may be amended only by the unanimous decision of all the parties to it.

Obligations

204. Where this Agreement is expressed to impose an obligation on an officer or authority of a party, or an employee of such an officer or authority, it is the responsibility of the party to take such steps as are appropriate to ensure that the officer or authority complies with the obligation.

PART 3—PRINCIPAL RESPONSIBILITIES

Principal responsibilities

301. (1) The Commission will have sole responsibility for the general administration of the national law.

(2) This clause has effect subject to the national law and to this Agreement.

The Commission

302. (1) The Commission will be responsible and accountable to the relevant Commonwealth Minister and the Commonwealth Parliament, and not to State or Territory Ministers or State or Territory Parliaments.

(2) The Ministerial Council has no power of control or direction over the Commission.

Commission's functions and powers

302A. (1) The Commission has national law functions and powers, being functions and powers mentioned in section 11 of the Australian Securities and Investments Commission Act [when enacted] of the Commonwealth.

(2) The Commission has functions and powers not mentioned in subclause (1), being functions and powers mentioned in section 12A of the Australian Securities and Investments Commission Act [when enacted] of the Commonwealth.

(3) This Agreement applies only in respect of the national law functions and powers of the Commission mentioned in subclause (1).

PART 4—MINISTERIAL COUNCIL

Continuation of Ministerial Council

401. The Council of Commonwealth, State and Territory Ministers established by the Corporations Agreement, and known as the Ministerial Council for Corporations, continues under this Agreement.

Membership

402. The Ministerial Council consists of one member, who is a Minister, representing each party to this Agreement.

Acting members

403. (1) A Minister who is acting for a Minister who is a member of the Ministerial Council may act as a member of the Council in place of the member.

(2) A member of the Ministerial Council may appoint a Minister (being a Minister in the government in which the member is a Minister) to act as a member of the Ministerial Council in place of the member. Such an appointment may be limited to a particular meeting or particular meetings or to a particular period or particular periods, and may be revoked at any time.

(3) References in this Agreement (other than in this clause) to a member of the Ministerial Council extend to an acting member.

(4) Without limitation, an acting member may in that capacity:

(a) attend and participate in meetings of the Ministerial Council in place of the member concerned (including meetings referred to in clause 407(2)); and

(b) exercise the voting rights of the member concerned (including voting rights under clause 411 or 412).

Representation by officers

404. (1) A member of the Ministerial Council may appoint an officer to attend and participate in a meeting of the Council in the absence of the member or of a Minister who is acting in place of the member.

(2) Such an appointment must be notified in writing to the Chairperson or Secretary at or before the meeting.

(3) An officer is not to be counted in determining the quorum at the meeting and cannot cast a vote on any matter before the Ministerial Council.

Observer status

405. (1) The Ministerial Council may, by unanimous resolution, and on such terms as it thinks fit, confer non-voting observer status on a representative of a government that is not a party to this Agreement.

(2) The representative's observer status ceases when a member of the Ministerial Council notifies the Chairperson or Secretary in writing that the member does not support continuation of that status.

(3) The Secretary will notify the other members of the Ministerial Council in writing of the receipt and contents of a notification under subclause (2).

Functions

406. The Ministerial Council has the functions conferred on it by this Agreement, in particular Part 5.

Meetings

407. (1) Meetings of the Ministerial Council are to be held at such times and at such places as are from time to time decided by the Council, but the Council is to meet at least 3 times each calendar year unless it decides to meet less frequently, either generally or in any particular year.

(2) A meeting of the Ministerial Council may be held, if all members so agree, wholly or partly by means of telephone, television or some other mode of communication approved for the purposes of this subclause by the Council.

(3) Clause 403 extends to meetings referred to in subclause (2) of this clause, and references in clause 403 to attending a meeting of the Ministerial Council extend to joining in the meeting in whatever way the meeting is held.

Quorum

408. The quorum for a meeting of the Ministerial Council is a majority of the members for the time being, one of whom must be the Commonwealth Minister.

Chairperson

409. The Commonwealth Minister is the Chairperson of the Ministerial Council.

Voting

410. Except as provided in subclauses 506(2), 506A(2), 507(3) and 509(4):

(a) a resolution will be carried by the Ministerial Council if a majority of the votes cast on the resolution are in favour of it; and

(b) each member has one vote; and

(c) the Chairperson does not have a casting vote.

Voting out of meetings

411. (1) Except for matters under clause 506A, all or any members of the Ministerial Council may vote on a matter referred to all members of the Council, even though the Council is not in session, and whether or not the matter has been considered at a meeting of the Council.

(2) When a vote is cast by a member of the Ministerial Council outside a meeting of the Council:

(a) the vote should be cast at the earliest opportunity; and

(b) the vote may be cast by communicating by facsimile transmission, or by any other mode of communication approved by the Council, to the Secretary of the Council or other recipient approved by the Council.

(3) Nothing in this clause affects or is affected by clause 412.

Reserving a vote before or at a meeting

412. (1) A member of the Ministerial Council not attending a meeting of the Council may reserve a vote by informing the Secretary of the Council in writing, before the date of the meeting, that the member wishes to reserve a vote.

(2) If a matter is considered at a meeting of the Ministerial Council and a vote is taken:

(a) a member may reserve a vote until the member has taken further advice in respect of the matter; or

(b) an officer attending the meeting in the absence of the member may, on behalf of the member, reserve a vote.

(3) When a vote is reserved under this clause by or on behalf of a member:

(a) the member may cast a vote after the meeting; and

(b) the vote should be cast at the earliest opportunity, but in any event within 21 days after the meeting or such other period as the Council may from time to time determine either generally or in any particular case; and

(c) the vote may be cast by communicating by facsimile transmission, or by any other mode of communication approved by the Council, to the Secretary of the Council or other recipient approved by the Council.

(4) This clause does not apply to a Council meeting convened in accordance with clause 506A.

Secretariat

413. (1) The secretariat functions for the Ministerial Council will be carried out by the Commonwealth Treasury.

(2) The Secretary of the Ministerial Council will be the person for the time being designated as such by the Commonwealth Minister.

(3) Any such designation of a person as Secretary will be communicated by the Commonwealth Minister to the other members of the Ministerial Council as soon as possible.

Procedure generally

414. Subject to this Agreement, the Ministerial Council may determine its own procedure.

PART 5—LEGISLATION

Division 1—the national law

Purpose of this Part

501. The purpose of this Part is to preserve and promote the legislative scheme that the parties are to enact for the formation of corporations, corporate regulation and the regulation of financial products and services and other matters. This Part establishes procedures involving both consultation between the parties on legislation covering a wide range of matters and a commitment not to promote certain kinds of legislation without the approval of the Ministerial Council.

Basic nature of the legislative scheme

502. The legislative scheme agreed to by the parties involves:

(a) the enactment by State Parliaments of legislation referring certain matters to the Commonwealth Parliament in accordance with subsection 51(xxxvii) of the Constitution; and

(b) the enactment by the Commonwealth Parliament of laws of national application, partly in reliance on State referrals mentioned in paragraph (a), for the formation of corporations, corporate regulation and the regulation of financial products and services; and

(c) the amendment from time to time of the laws mentioned in paragraph (b) in accordance with this Agreement.

Extent of the legislative scheme

503. (1) Except as provided in subclause (2) or agreed unanimously by resolution of the Ministerial Council, the national law (including regulations under the national law) will not provide for the regulation of State or Territory statutory authorities, corporations established by specific State or Territory enactments, or corporations established under State or Territory statutes (other than State or Territory companies legislation) that authorise the incorporation of particular classes of corporations, including co-operative societies and incorporated associations, but not including building societies, credit unions and friendly societies.

(2) Except as agreed unanimously by resolution of the Ministerial Council, the national law will apply to authorities and corporations to which subclause (1) applies, both within and outside their respective jurisdictions of establishment or incorporation, only to the same extent (if any) and in the same way as the provisions of the co-operative scheme laws applied to those authorities and corporations immediately before the Corporations Law came into operation in 1991.

Alternative systems

504. The parties acknowledge that, while nothing in this Agreement prevents a State or Territory from legislating in relation to the formation and regulation of business entities other than companies, this Agreement is entered into on the basis that the company is, and is expected to continue to be, the primary vehicle for corporate business enterprises.

Use of referred power

504A. (1)The Commonwealth will not introduce a Bill that depends, in whole or in part, on a State referral mentioned in paragraph 502(a) for a purpose other than that specified in paragraph 502(b). In particular, the Commonwealth will not introduce a Bill that depends, in whole or in part, on a State referral mentioned in paragraph 502(a) for the purpose of regulating:

(a) industrial relations; or

(b) the environment; or

(c) any other matter declared unanimously by the members of the Ministerial Council representing referring States to be a matter to which this clause applies.

A declaration of a matter for the purposes of paragraph (c) may be revoked by unanimous agreement of the referring States.

(2) Subject to subclause (3), the Commonwealth will not introduce a Bill that depends in whole or in part on a State referral mentioned in paragraph 502(a) for the purpose of requiring the adoption of a corporate structure by natural persons or unincorporated bodies, or requiring any activities of natural persons or unincorporated bodies to be conducted by employees of a corporation.

(3) The Commonwealth may introduce a Bill that depends in whole or in part on a State referral mentioned in paragraph 502(a) prohibiting the formation of partnerships or associations that consist of more than 20 members. The Commonwealth may also introduce a Bill if it is for the purpose of the regulation of financial products, financial services, or markets regulated by the national law, or a purpose unanimously agreed by the Council.

Division 2 – alteration of the national law

Commonwealth legislation relating to the national law

505. (1) The Commonwealth will not introduce a Bill that would repeal or amend the national law, or make a regulation under the national law unless, before its introduction or making, the Ministerial Council has been consulted about it and, except as provided by this Part, has approved it.

(2) The Commonwealth is not obliged to introduce, make or support any legislation, or proceed with any legislative proposal, with which it does not concur.

Provisions relating to approval of Commonwealth legislation

506. (1) The approval of the Ministerial Council is not required for a Commonwealth Bill or regulation, so far as it relates to:

(a) subject matters for which Chapters 2L, 5C, 6, 6A, 6B, 6C, 6D, 7 and 8 of the Corporations Law as in force on 1 July 2000 make provision, in particular:

- debentures;
- managed investment schemes;
- takeovers, compulsory acquisitions and buy-outs, and rights and liabilities in relation to these matters;
- information about ownership of listed companies and managed investment schemes;
- fundraising;
- the securities industry; and
- the futures industry; and

(b) subject-matters for which Chapter 9.10 of the Corporations Law as so in force makes provision; and

(c) subject-matters for which the other provisions of Chapter 9 of the Corporations Law as so in force make provision, to the extent that those other provisions apply to the chapters referred to in paragraph (a) or the subject-matters referred to in paragraph (ea); and

(d) subject-matters for which Chapter 1 of the Corporations Law as so in force makes provision, to the extent that Chapter 1 applies to the provisions referred to in paragraphs (a), (b), (c) and (ea); and

(e) subject-matters for which the provisions (limited to those specified in subclause (3)) of the Australian Securities and Investments Commission Act [when enacted] of the Commonwealth as so in force make provision; and

(ea) to the extent not otherwise covered by this subclause, financial products and services, including general insurance and life insurance (but not State insurance within the meaning of s.51(xiv) of the Constitution), superannuation, derivatives, retirement savings accounts, foreign exchange, means of payment and banking (but not State banking within the meaning of s.51(xiii) of the Constitution); and

(f) other subject-matters agreed on unanimously by resolution of the Ministerial Council; and

(fa) a tax imposed under the proposed Corporations (Futures Organisations Levies) Act [when enacted], Corporations (Securities Exchanges Levies) Act [when enacted], Corporations (National Guarantee Fund Levies) Act [when enacted], Corporations (Fees) Act [when enacted]; and

(g) the preservation of the operation of a State or Territory law in accordance with subclause 509D(1).

(2) The approval of at least 3 State or Territory Ministers is required for a Commonwealth Bill to amend the national law, or for a Commonwealth regulation under the national law, to the extent that the Bill or regulation deals with any other subject-matter.

(2A) If approval is sought for amendments to a Bill which is currently before the Parliament, then State and Territory Ministers will use their best endeavours to vote within a time frame nominated by the Commonwealth.

(3) For the purposes of subclause (1)(e), the following provisions of the Australian Securities and Investments Commission Act [when enacted] of the Commonwealth are specified:

(a) The following provisions of Part 1 (Preliminary):

Section 4 (Extension to external Territories)

Section 6C (Presentation of papers to the Parliament)

Section 6D (Periodic reports).

(b) Part 5 (The Commission's Members).

(c) Part 6 (The Commission's Staff).

(d) The following provisions of Part 7 (Preventing Conflicts of Interest and Misuse of Information):

Division 1 (Disclosure of interests).

(e) Part 8 (Finance).

(f) The following provisions of Part 9 (The Advisory Committee):

Sections 149–155 in Division 1 (General)

Division 2 (Staff and finance).

(g) The following provisions of Part 10 (The Corporations and Securities Panel):

Sections 175–183 in Division 1 (General).

(h) The following provisions of Part 11 (Companies Auditors and Liquidators Disciplinary Board):

Sections 205–214 in Division 1 (Constitution of Disciplinary Board).

(i) The following provisions in Part 12 (Australian Accounting Standards Board):

Sections 227–234.

(j) Part 14 (The Parliamentary Committee).

(k) The following provision in Part 15 (Miscellaneous):

Section 243D (Financial Transaction Reports).

Further consideration of Commonwealth legislation that does not require approval

506A. (1) Where:

(a) under clause 505, the Commonwealth consults the Council in relation to an express amendment of the national law that does not require the approval of the Council under clause 506; and

(b) within 21 days of the Commonwealth consulting the Council, the Chairperson is advised by 4 or more State Ministers that they consider the amendment is for a purpose other than the formation of corporations, corporate regulation or the regulation of financial products or services;

the Chairperson must convene a meeting to consider the amendment.

(2) The Commonwealth must not pursue an amendment in relation to which a meeting under subclause (1) is convened if, at the meeting, 4 or more State Ministers vote against the amendment.

Exposure of Commonwealth draft Bills

507. (1) All Commonwealth Bills referred to in clause 505(1) will be exposed for public comment for at least 3 months before introduction.

(2) If the Bill is one referred to in clause 506(1), the Commonwealth may shorten or dispense with the period of exposure without the agreement of the Ministerial Council. In that event, the

Commonwealth Minister will advise each other member of the Ministerial Council of the reasons for this action.

(3) If the Bill is one referred to in clause 506(2), the Commonwealth may shorten or dispense with the period of exposure, but only with the approval of at least 3 State or Territory Ministers.

Introduction and passage of Commonwealth Bills

508. (1) When introducing into a House of the Commonwealth Parliament a Bill referred to in clause 505(1), a Minister of State for the Commonwealth will inform the House of the outcome of any consultation with the Ministerial Council and, in the case of matters requiring the approval of the Ministerial Council, the outcome of voting.

(2) If amendments to such a Bill are or are to be moved in the Commonwealth Parliament (whether or not on behalf of the Government), the Commonwealth will use its best endeavours to ensure adequate consultation with and, if the subject matter would ordinarily be required to be considered under subclause 506(2), a vote by, the Ministerial Council on those amendments.

(3) In addition to the obligations undertaken in subclause 508(2), the Commonwealth will not move amendments to such a Bill and will oppose amendments to such a Bill which are moved by other parties if the amendments:

(a) rely to any extent on the reference by the States referred to in paragraph 502(a); and

(b) are other than for the purpose of the formation of corporations, corporate regulation and the regulation of financial products and services.

Exposure of Commonwealth draft regulations

509. (1) Except as provided by this clause, a Commonwealth regulation referred to in clause 505(1) is not required to be exposed for public comment before being made.

(2) If the regulation is one referred to in clause 506(1), or is one referred to in clause 506(2) and relates exclusively to the imposition or alteration of fees or taxes, the Commonwealth may expose the regulation for public comment for any period it considers appropriate or may decide not to expose it for public comment at all. The Commonwealth Minister will advise each other member of the Ministerial Council whether or not it is to be exposed. The advice will include either the reasons for deciding not to expose it, or a statement of the period of exposure and the reasons for choosing the period of exposure.

(3) The Commonwealth Minister will consult the Ministerial Council as to whether a regulation referred to in clause 506 (2) should be exposed for public comment. This subclause does not apply to a regulation that relates exclusively to the imposition or alteration of fees or taxes.

(4) If the regulation is one to which subclause (3) applies and the Ministerial Council resolves that the regulation should be exposed for public comment, the regulations will be exposed for public comment for at least one month or a shorter or longer period not exceeding 3 months approved by the Commonwealth Minister and at least 3 State or Territory Ministers.

Concurrent State and Territory legislation

509A. (1) The national law will provide that it does not exclude the operation of State and Territory legislation (whether enacted before or after the commencement of the national law) that is capable of operating concurrently with it.

(2) Nothing in this Part is intended to impose obligations in relation to such State or Territory legislation.

Operation of existing inconsistent State and Territory legislation

509B. (1)Subject to this clause, the national law will provide for the continued operation of State and Territory legislation that is in force immediately before the commencement of the national law that:

(a) would otherwise be inconsistent with the national law; and

(b) has an operation that is not preserved by the provision referred to in clause 509A; and

(c) prevailed over the Corporations Law immediately before the commencement of the national law.

(2) The national law will provide that the State and Territory laws whose operation is continued under the provisions referred to in subclause (1) do not operate to the extent:

(a) prescribed by regulations under the national law; and

(b) provided by the relevant legislation of the State or Territory concerned including a regulation made under such a law.

(3) The Commonwealth must not make a regulation of the kind referred to in subclause (2) without the agreement of the State or Territory Minister concerned.

Operation of future inconsistent State and Territory legislation

509C. (1) The national law will provide for the operation of State and Territory legislation that commences after the commencement of the national law that:

(a) is inconsistent with the national law;

(b) has an operation that is not enabled by the provision referred to in clause 509A; and

(c) the State or Territory legislation expressly indicates that it is inconsistent legislation in accordance with the provisions of the national law.

(2) Subclause (3) applies to:

(a) proposals for State and Territory legislation which is of a kind referred to in subclause (1); and

(b) State or Territory legislative proposals which rely on a State or Territory legislative declaration that the matter is an excluded matter in relation to the whole or specified provisions of the national law;

and which would significantly alter the effect or operation of the national law having regard to the operation of provisions to preserve the operation of State and Territory laws unless:

(c) the provisions are of specially limited application (such as transitional provisions relating to the corporatisation or privatisation of a government owned enterprise or entity); or

(d) without limiting paragraph (2)(c), the provisions are provisions of State or Territory legislation for the temporary administration of a corporation authorised by the State or Territory to provide electricity, gas, water, drainage, sewerage, railways, pipeline or other essential services.

(3) A State or Territory must not introduce a Bill or make a regulation which subclause (2) provides is subject to this subclause unless:

(a) the relevant State or Territory gives the Council reasonable notice of the inconsistent provisions; and

(b) the Council has approved the enactment or making of the inconsistent provisions in accordance with clause 410.

(4) A State or Territory must not introduce a Bill or make a regulation which is of the kind referred to in subclause (1) or paragraph (2)(b) but which is not subject to subclause (3) unless it has notified the Ministerial Council of the legislative proposal.

(5) The notification required by subclause (4) should ordinarily occur at the earliest practicable time after the development of a legislative proposal and preferably before the introduction of the Bill concerned, or the submission of the subordinate legislation concerned to the Governor in Council (or other appropriate body), to maximise the opportunity for members of the Ministerial Council to comment on the proposed legislation.

(6) It is sufficient compliance with the notification provisions of subclause (4) if the State sends to the members of the Ministerial Council a document describing fully:

(a) the relevant provisions of the proposed Bill or subordinate legislation; and

(b) the manner in which each such provision would alter the effect, scope or operation of the national law.

The State will, at the earliest practicable time, provide a draft of any such provision to each member of the Council.

(7) If, because of exceptional and unavoidable considerations of government, the requirements of subclauses (3) or (4) cannot be undertaken before the introduction of the Bill concerned or the submission of the subordinate legislation concerned, the State or Territory will, at the earliest practicable time (and, in the case of a Bill, preferably before passage of the Bill), provide copies of the Bill or subordinate legislation to members of the Ministerial Council and indicate the extent to which comments made by them may be able to be taken into account.

(8) If amendments to a Bill are or are to be moved in the State or Territory Parliament (whether or not on behalf of the Government) and those amendments would require approval under subclause (3) or notification under subclause (4), the State or Territory will use its best endeavours to notify the Ministerial Council of those amendments at the earliest practicable time.

(9) Where State or Territory legislation which is preserved under the mechanism referred to in clause 509B is amended after the commencement of the national law in such a manner that the inconsistency is dealt with in substantially the same terms, then the requirements of subclauses (3) and (4) do not apply but the relevant State or Territory must notify other members of the Council about the amendments, preferably before their introduction or making.

Additional mechanism

509D. (1) In addition to the mechanisms referred to in subclauses 509B(1) and 509C(1), the national law will provide for the making of regulations to allow the effective operation of specified State or Territory laws that may otherwise be incompatible with the national law or regulations under the national law.

(2) If a State or Territory requests a regulation of the kind referred to in subclause (1), the Commonwealth must determine that request within 6 weeks of receipt unless a longer period is approved by the Ministerial Council. The Commonwealth must not refuse the request without reasonable cause.

(3) The Commonwealth must expose for public comment any draft regulation made in accordance with this clause for a period of 4 weeks unless a different period is approved by the Ministerial Council.

(4) The Commonwealth must use its best endeavours to ensure that a regulation to be made under this clause is made at the earliest reasonable opportunity.

Commonwealth to notify Ministerial Council of other legislation

510. (1) Subject to this clause, the Commonwealth will notify the Ministerial Council of all other legislative proposals for Commonwealth legislation (including Commonwealth legislation for the Capital Territory) that would alter the effect, scope or operation of the national law.

(2) The notification required by subclause (1) should ordinarily occur at the earliest practicable time after the development of a legislative proposal and preferably before the introduction of the Bill concerned, or the submission of the subordinate legislation concerned to the Governor-General in Council, to maximise the opportunity for members of the Ministerial Council to comment on the proposed legislation.

(3) It is sufficient compliance with the notification provisions of subclause (1) if the Commonwealth sends to the members of the Ministerial Council a document describing fully:

(a) the relevant provisions of the proposed Bill or subordinate legislation; and

(b) the manner in which each such provision would alter the effect, scope or operation of the national law.

The Commonwealth will, at the earliest practicable time, provide a draft of any such provision to each member of the Council.

(4) If, because of exceptional and unavoidable considerations of government, the notification required by subclause (1) cannot be undertaken before the introduction of the Bill concerned or the submission of the subordinate legislation concerned, the Commonwealth will, at the earliest practicable time (and, in the case of a Bill, preferably before passage of the Bill), provide copies of the Bill or subordinate legislation to the members of the Ministerial Council and indicate the extent to which comments made by them may be able to be taken into account.

(5) If amendments to a Bill are or are to be moved in the Commonwealth Parliament (whether or not on behalf of the Government) and those amendments would require to be notified under subclause (1) because they would alter the effect, scope or operation of the national law, the Commonwealth will use its best endeavours to notify the Ministerial Council of those amendments at the earliest practicable time.

(6) The approval of the Ministerial Council is not required for any such legislative proposals or amendments.

Alterations to legislation

511. (1) The purpose of this clause is to make provision in regard to alterations made to a Commonwealth Bill or regulation referred to in clause 505 (1) before it is introduced or made.

(2) A Commonwealth Bill or regulation requiring the approval of the Ministerial Council has to be approved in the form in which it is to be introduced or made.

(3) However, the approval of the Ministerial Council to such a Bill or regulation may be given so as to permit the making of alterations of a drafting nature, or alterations of other kinds or for other purposes, as specified in the approval, without the need for further approval.

(4) The exposure provisions of this Division do not apply again to a Commonwealth Bill or regulation merely because it has been altered. However, those provisions do apply again if the alteration amounts to the inclusion in the Bill or regulation of a substantially new subject-matter.

(5) The Commonwealth will provide to the members of the Ministerial Council a statement of and commentary on alterations made to a Commonwealth Bill or regulation after the Council was consulted about the Bill or regulation.

(6) The statement and commentary referred to in subclause (5) will be provided as follows:

(a) If the Bill or regulation is one to which clause 506(1) applies, the statement and commentary will be provided not later than the day when the Bill or regulation is first introduced or made.

(b) If the Bill or regulation is one to which clause 506(2) applies and the alterations all fall within subclause (3) of this clause, the statement and commentary will be provided not later than the day when the Bill or regulation is first introduced or made.

(c) If the Bill or regulation is one to which clause 506(2) applies and the alterations do not all fall within subclause (3) of this clause, the statement and commentary will be

provided when the Bill or regulation is submitted or re-submitted for the approval of the Ministerial Council.

Exceptions

512. (1) This Part does not apply to the re-enactment of Commonwealth legislation, so long as the matters are dealt with in substantially the same terms.

(2) This Part does not apply to Commonwealth legislation that is, or is of a class, approved by a resolution of the Ministerial Council supported by the Commonwealth Minister.

Division 2A – Alteration of State referral legislation

Amendment of State referral legislation

512A. (1) A State shall not introduce a Bill that would amend the referral legislation referred to in the definition of 'referring State' in clause 102 of this Agreement unless the Council has been consulted about the proposed amendments.

(2) If amendments to such a Bill are or are to be moved in a State Parliament (whether or not on behalf of the Government), the State will use its best endeavours to ensure adequate consultation with the Ministerial Council on those amendments.

Partial termination of referral

512B. (1) The State legislation will include provisions by the use of which a State could terminate the amendment reference.

(2) The Commonwealth legislation will provide that if 6 States terminate the amendment reference on the same day then the Corporations Act, as in force at the time the termination becomes effective, will continue to apply in those States.

(3) However, the Commonwealth legislation will treat any State which terminates its amendment reference in circumstances where the condition referred to in subclause (2) is not satisfied as a non-referring State.

(4) A State will withdraw its amendment reference where and only where:

(a) each of 4 or more State Ministers has advised the Chairperson that legislation specified in the advice is considered by that Minister to have been introduced, made or enacted by the Commonwealth in breach of a prohibition imposed by this Part;

(b) after the expiry of the period of 6 months beginning on the day on which the advice was given under paragraph (a) of this subclause, 4 or more State Ministers agree:

(i) that the breach mentioned in paragraph (a) of this subclause has not been remedied; and

(ii) that the amendment references of all the States should be withdrawn;

and

(c) each State withdraws its amendment reference in such a manner that the withdrawals have effect on the same day in each of the States.

(5) If the advice under subclause (4)(a) is given on different days the period of 6 months mentioned in subclause (4)(b) begins on the later or latest of those days.

(6) In this clause, 'amendment reference' means the reference by a State to the Commonwealth Parliament of the matters of the formation of corporations, corporate regulation and the regulation of financial products and services to the extent of express amendments of the national law.

Division 3—Miscellaneous

Concurrent jurisdiction

517. Jurisdiction under and in relation to the national law is to be conferred on State and Territory Superior Courts of Record and other appropriate State and Territory courts to the extent conferred under the national scheme laws.

Extension of prohibition on introduction or making of legislation

519. A prohibition imposed by this Part on the introduction or making of any kind of legislation imports a requirement to oppose and take all practicable steps to prevent the introduction, making or enactment of any such legislation.

Meaning of amendment

520. Except as provided in clause 506A, in this Part, "amend" the national law means:

(a) directly amend the text of the national law by the insertion, omission or substitution of matter; or

(b) indirectly amend the national law by making provisions that would significantly alter its effect, scope or operation, unless the provisions are of specially limited application (such as transitional provisions relating to the corporatisation or privatisation of a government owned enterprise or entity).

PART 6—ADMINISTRATION

The Commission

601. (1) The Commonwealth will consult the Ministerial Council on the making of appointments to the Commission.

(2) The Commonwealth will consider the desirability of appointing part-time members of the Commission in the light of experience with the operation of the Commission and having regard to the views of the Commission and the State and Territory Ministers.

Regional administration

603. (1) The Regional Offices of the Commission to be established in the referring States and the Northern Territory will be located in the capitals of the respective States and the Northern Territory.

(2) The Commission will establish Business Centres in those capitals and also in the major provincial cities that warrant such a presence.

(3) The Commission will consult the relevant State or Territory Minister in relation to the appointment of the Regional Commissioner who will have responsibilities in relation to that Minister's jurisdiction.

(4) Regional Commissioners are to be employed on contract outside the framework of the Australian Public Service.

(5) The Commission will, to the fullest extent practicable, and having regard to issues of efficiency, delegate its functions and powers to the Regional Commissioners.

(6) Subject to the ultimate authority of the Commission, the Regional Commissioners will be fully consulted on the allocation of the Commission's resources and the setting of the Commission's priorities.

Levels of service

604. (1) The Commission will, through the Regional Office and Business Centres established in each referring State and the Northern Territory, maintain levels of service not lower than the levels of service formerly provided in that State or Territory in the course of the local administration of co-operative scheme laws.

(2) The Commission will establish a system of performance indicators in relation to the levels of service in each referring State and the Northern Territory, and will monitor and report to each relevant State or Territory Minister on the performance of the Commission against the indicators in the Minister's State or Territory. The frequency of reporting to each such Minister will be as agreed between the Commission and the Minister concerned, but will not be more than twice each calendar year.

(2A) The Commission will include, in its annual report, a statement on the performance of the Commission against those performance indicators during the relevant period.

(3) Each Minister mentioned in subclause (2) will be entitled to make a complaint at a meeting of the Ministerial Council about the levels of service provided by the Commission in the Minister's State or Territory.

(4) The Commonwealth Minister will provide a written response to such a complaint within one month to all members of the Ministerial Council, if the Ministerial Council so resolves in relation to the complaint or to the class of complaints to which the complaint belongs.

(5) The Commonwealth acknowledges that a State or Territory Minister may, subject to and in accordance with any relevant law, make a complaint to the Parliamentary Joint Committee on Corporations and Securities (established under the Australian Securities and Investments Commission Act [when enacted] of the Commonwealth) about the levels of service provided by the Commission in the Minister's State or Territory.

(6) The provisions of this clause are subject to clause 302.

Regional Liaison Committees

605. (1) The Regional Commissioner for each State and the Northern Territory will establish a Regional Liaison Committee to meet regularly for the purpose of:

(a) briefing representatives of the local business community on the work of the Commission; and

(b) receiving views on the levels of service provided by the Commission in the State or Territory.

(2) Each Committee will meet quarterly, or otherwise as agreed by the Committee.

(3) The Commission will use its best endeavours to have a member of the Commission present at each meeting of each Committee.

(4) The annual report of the Commission will include a report on the activities of the Committees.

Companies and Securities Advisory Committee

606. (1) The Commonwealth will consult the Ministerial Council on the making of appointments to the Companies and Securities Advisory Committee.

(2) Each State and Territory Minister will be entitled to nominate a panel of persons for potential appointment to the Advisory Committee and the Legal Sub-Committee of the Advisory Committee.

(3) The Commonwealth will ensure so far as practicable that at any time there is at least one member of the Advisory Committee from the Northern Territory and each referring State.

(4) The Commonwealth will ensure so far as practicable that at any time there is at least one member of the Legal Sub-Committee from the Northern Territory and each referring State.

(5) For the purposes of subclauses (3) and (4), a member is from a particular State or Territory if he or she is a resident of that jurisdiction.

(6) The Commonwealth Minister will confer with the relevant State or Northern Territory Minister if it is proposed that no person be appointed from the panel of persons nominated by that Minister.

Corporations and Securities Panel

607. (1) The Commonwealth will consult the Ministerial Council on the making of appointments to the Corporations and Securities Panel.

(2) The selection of persons for appointment to the Panel will be made from persons with knowledge of, or experience in, relevant fields, with the objective that members of the Panel should, subject to the national law, be equipped to make a peer group assessment of the acceptability or unacceptability of relevant practices.

(3) As far as practicable, at least one member of the Panel must, at any time, be a qualified person nominated by one or more of the State or Territory Ministers.

Integrated offices

608. (1) The Commission will, at the request of any referring State or the Territory, enter into negotiations with that State or Territory for the purpose of entering into arrangements for the integration, within the Business Centre in the capital of the jurisdiction, of registration functions under laws of the State or Territory relating to business names and corporations, where those functions remain or become the responsibility of the State or Territory.

(2) Any such arrangements will be on the following basis:

(a) the functions that may be performed by the Commission on behalf of the State or Territory will be limited to counter, registry and the like services;

(b) the services will be provided by the Commission on a full cost recovery basis;

(c) the presence of State or Territory officers and employees will be confined to the minimum decision-making presence necessary for the efficient discharge of the service;

(d) the State or Territory officers and employees will be administratively responsible to the Commission for office functions, but responsible to the State or Territory for policy and legislative matters;

(e) enforcement of relevant State or Territory laws will remain exclusively a matter for the State or Territory.

(3) The Commission will, at the request of any State or the Northern Territory, enter into negotiations with that State or Territory for the co-location, with the Business Centre in the capital of the State or Territory, of the State or Territory office at which continuing State or Territory business regulation functions are performed.

National database

609. (1) The Commission will maintain its national companies database and a document imaging system.

(2) The Commission will provide to each referring State and the Northern Territory free on-line access to its public national companies database and free access to the documents stored on its document imaging system, in the manner and subject to the terms agreed to by Commonwealth, State and Territory Ministers at Cairns on 12 July 1991.

(3) The Commission will, through the national companies database, maintain and progressively enhance existing levels of data related service in each referring State and the Northern Territory .

(4) The Commission will provide to each referring State and the Northern Territory free certification of documents produced by its public national companies database, in the manner and subject to the terms agreed to by Commonwealth, State and Northern Territory Ministers at Perth on 2 July 1992.

(5) If a State or the Northern Territory has transferred microfiche companies records to the Commission, that State or Territory will be entitled to free access to those microfiche records, in the manner and subject to the terms agreed to by Commonwealth, State and Territory Ministers at Cairns on 12 July 1991.

Access by State and Territory Ministers to information

610. (1) Each State and Territory Minister will be entitled to request the Regional Commissioner responsible for that jurisdiction for information not available on the Commission's public national database.

(2) To facilitate consideration of such requests, the Chairperson of the Commission will, to the fullest extent practicable, and having regard to issues of efficiency, delegate his or her functions and powers to the Regional Commissioners under paragraph 127(4)(b) of the Australian Securities and Investments Commission Act [when enacted] of the Commonwealth.

(3) The response to a request by a State or Territory Minister will be at the discretion of the Chairperson of the Commission or the Chairperson's delegate.

Access by Commission to information

611. (1) The Commission will be entitled to free on-line access to any State or Territory electronic business names register.

(2) The cost of terminals, lines and other equipment is to be borne by the Commission or as otherwise agreed between the State or Territory concerned and the Commission.

(3) If a State or Territory does not have an electronic business names register, the Commission will be entitled to free access to the business names register of the State or Territory in whatever form it is kept.

PART 7—FINANCE

Funding

703. (1) The Commonwealth will distribute among the referring States and the Northern Territory in respect of the year commencing on 1 July 1991, and each succeeding year commencing 1 July, an amount determined in accordance with this clause.

(2) The amount for any such year ("the current year") is the amount ascertained by adjusting the base amount of $102,000,000 upwards in line with movements in the Consumer Price Index for the financial year 1989/1990 and each succeeding financial year to and including the financial year immediately preceding the current year.

Distribution

704. (1) The amount to be distributed under clause 703 is to be distributed among the referring States and the Northern Territory on the basis of the following percentages:

New South Wales 33.23%

Victoria 29.05%

Queensland 16.36%

Western Australia 10.07%

South Australia 7.49%

Tasmania 2.32%

Northern Territory 1.48%

(2) The amount to be distributed to each referring State and the Northern Territory is to be paid by way of monthly instalments during the period to which it relates, with any necessary adjustments being made during the period or as soon as possible after the end of the period.

Grants Commission assessments

705. The distribution resulting from the agreed formula will be quarantined from Grants Commission assessments, and the Grants Commission will be asked to exclude the companies and securities regulation functions being transferred to the Commonwealth from its future assessments and relativities updates.

Nature of annual distributions

706. The distribution of amounts under clause 703 will be made by way of separate specific purpose payments designated as compensation for permanent loss of revenue.

PART 8—INVESTIGATIONS AND PROSECUTIONS

National law offences

801. (1) The Commission and the Commonwealth Director of Public Prosecutions will have responsibility for the prosecution of offences under the national law and regulations under the national law.

(2) Notwithstanding subclause (1), arrangements may be entered into under which:

(a) State or Territory prosecuting authorities may prosecute offences under the national law, where the relevant conduct is associated with the prosecution of offences under State or Territory criminal law; and

(b) the Commonwealth Director of Public Prosecutions may prosecute offences under State or Territory criminal law, where the relevant conduct is associated with the prosecution by the Commonwealth Director of Public Prosecutions of offences under the national law or arises out of an investigation by the Commission.

(3) The national law and State and Territory law will enable such arrangements to be entered into.

National scheme rights and liabilities

802. (1) The national law will, to the greatest extent possible:

(a) confer rights and liabilities (whether criminal or civil) on persons under that law, equivalent to the rights and liabilities they had under national scheme law; and

(b) enable court proceedings under the national scheme laws in progress at the time of commencement to continue as if they were proceedings under the national law

(2) To the extent that rights and liabilities are so conferred and court proceedings are so continued:

(a) the Commission and the Commonwealth Director of Public Prosecutions is to be responsible for any enforcement action in the same way as they are responsible for prosecution of other national law offences under clause 801; and

(b) the States and Northern Territory will ensure that the relevant rights and liabilities under the national scheme laws are extinguished.

(3) The States and Northern Territory will enact legislation to preserve rights and liabilities in relation to which equivalent rights and liabilities are not created under the national law (‘national scheme rights and liabilities’).

(4) In respect of national scheme rights and liabilities, State and Northern Territory legislation will:

(a) confer on the Commonwealth Director of Public Prosecutions and the Commission the function of continuing to carry out any enforcement action, including the continuation of any prosecutorial or appeal action, or civil litigation, in relation to national scheme rights and liabilities; and

(b) enable the relevant State or Northern Territory Minister to appoint any other person to perform such functions where it appears to the Minister on reasonable grounds that such an appointment is appropriate or necessary in all the circumstances.

Co-operative scheme rights and liabilities

802A. (1) The States and Northern Territory will enact legislation to preserve rights and liabilities under the co-operative scheme legislation (‘co-operative scheme rights and liabilities’).

(2) In relation to co-operative scheme rights and liabilities, state law will:

(a) confer on the Commonwealth Director of Public Prosecutions and the Commission the function of continuing to carry out any enforcement action, including the continuation of any prosecutorial or appeal action, or civil litigation, in relation to cooperative scheme rights and liabilities; and

(b) enable the relevant State or Northern Territory Minister to appoint any other person to carry out such functions where it appears to the Minister on reasonable grounds that such an appointment is appropriate or necessary in all the circumstances.

Ancillary provision in relation to national scheme and co-operative scheme rights and liabilities

802B. (1) The national law will:

(a) enable the Commonwealth Director of Public Prosecution, or his or her delegate, or the Commission to perform the functions referred to in clauses 802 and 802A; and

(b) enable the Commonwealth Director of Public Prosecutions or the Commission to make available any information or evidence and to provide any other assistance to persons appointed under clauses 802((4)(b) and 802A(2)(b) necessary for the purposes of carrying out the functions for which they are appointed.

(2) State and Northern Territory law will make provision for any information/evidence or other assistance so provided to only be used for the purpose of carrying out those functions.

PART 9—CEASING TO BE A PARTY

Withdrawal and cessation

901. (1) A party may withdraw from this Agreement on giving at least 6 months' notice to the other parties.

(2) A State ceases to be a party if it ceases to be a referring State.

Agreement continues with remaining parties

902. (1) The failure of a State or Territory to remain a party does not terminate this agreement. In the event that a State or Territory ceases to be a party, the Agreement will remain in force in relation to the remaining parties.

(2) If a State or Territory ceases to be a party, the Commonwealth will, within 3 months, convene a meeting of the remaining parties for the purpose of negotiating such amendments to this Agreement as are necessary to take account of that fact (including amendments relating to the voting arrangements for the Ministerial Council).

PART 10—MISCELLANEOUS

Business names

1001. (1) The national law will contain provisions prohibiting the incorporation of a company whose name is identical with a business name recorded on an electronic national business names register (being a register to which the Commission has on-line access) as a currently registered business name.

(2) The register is to be provided by and at the expense of the States and Territories.

Ministerial power to direct conduct of investigations

1002. The power of the Minister under section 14 of the Australian Securities and Investments Commission Act [when enacted] of the Commonwealth to direct the Commission to investigate a matter will be retained in the national law.

Archives

1003. (1) The Commission has responsibility on and from 1 January 1991 for:

(a) all CAC public registers of company documents; and

(b) all files relevant to current CAC operations relating to companies and the regulation of the securities and futures industries; and

(c) other classes of CAC files identified by the Commission as necessary for the ongoing activities of the Commission.

(2) Where CAC public registers are in the form of microfiche (including microjacket) records:

(a) the CAC reading and printing equipment will be made available without charge to the Commission; and

(b) the Commission will take those records in their current state and without obligation to enhance or add to them.

(3) The Director-General of the Australian Archives will confer with relevant State and Northern Territory authorities regarding storage of and access to other State and Northern Territory company archives.

Stamp duties

1004. (1) The Commonwealth will not stand in the way of the continued collection of State and Territory stamp duty and will, if necessary, facilitate as far as practicable the removal of any perceived impediment to the continued levying of State and Territory stamp duty on relevant transactions as a result of the passage of the national law.

(2) For the period during which State or Territory stamp duty laws continue to operate, the national law will contain provisions requiring the Commission to satisfy itself, when registering a charge, that the instrument is accompanied by a certificate to the effect that all documents accompanying the instrument have been duly stamped in accordance with any applicable State or Territory law in respect of the charge.

Reconsideration of the constitutional basis of the scheme

1005. As soon as possible after the third anniversary of the commencement of the national law, responsible Ministers will review the operation of the legislative framework encompassing the national law having regard to possible alternative constitutional bases for that framework.

IN WITNESS WHEREOF this Agreement has been respectively signed for and on behalf of the parties as at the date first mentioned in this Agreement.

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in the presence of:

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