



FIRST SESSION OF THE THIRTY-SIXTH PARLIAMENT

**REPORT OF THE
STANDING COMMITTEE ON LEGISLATION**

IN RELATION TO THE

**CORPORATIONS (CONSEQUENTIAL
AMENDMENTS) BILL (NO 3) 2001**

Presented by Hon Jon Ford MLC (Chairman)

Report 13
March 2002

STANDING COMMITTEE ON LEGISLATION

Date first appointed:

May 24 2001

Terms of Reference:

The following is an extract from Schedule 1 of the Legislative Council Standing Orders:

“1. Legislation Committee

- 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 230A.
- 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 230A.”

Members as at the time of this inquiry:

Hon Jon Ford MLC (Chairman)	Hon Adele Farina MLC
Hon Giz Watson MLC (Deputy Chair)	Hon Peter Foss MLC
Hon Kate Doust MLC	Hon Bill Stretch MLC
Hon Paddy Embry MLC	

Staff as at the time of this inquiry:

Mia Betjeman, Principal Advisory Officer	Lisa Hanna, Research Officer
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EXECUTIVE SUMMARY AND RECOMMENDATIONS FOR THE
REPORT OF THE STANDING COMMITTEE ON LEGISLATION
IN RELATION TO THE
CORPORATIONS (CONSEQUENTIAL AMENDMENTS) BILL (NO 3) 2001

EXECUTIVE SUMMARY

- 1 The Corporations (Consequential Amendments) Bill (No. 3) 2001 (**Bill**) was referred to the Standing Committee on Legislation (**Committee**) on December 13 2001, under SO230A of the Legislative Council. The Committee is to report back to the House by March 21 2002.
- 2 The Bill is in response to the *Financial Services Reform Act 2001* (Cwlth) and the *Financial Services Reform (Consequential Provisions) Act 2001* (Cwlth) which amend aspects of the Corporations Law. These Acts commenced on March 11 2002. It was necessary for all state Parliaments to enact their own legislation before the Commonwealth Acts could commence.¹
- 3 The Bill makes amendments that are consequential to the amendments made by the Commonwealth Parliament to the Corporations Law. Specifically, the Bill amends state laws which make reference to the present Chapters 7 and 8 of the *Corporations Act 2001* (Cwlth) or to concepts which are dealt with in those Chapters. The amendments will ensure that those state laws maintain their meaning in the context of the Commonwealth amendment.²
- 4 The Committee notes a number of aspects of the Bill which it considers to be unusual:
 - a) it is retrospective in nature;
 - b) it provides for the validation of events in certain circumstances;
 - c) it provides for regulations and statutory rules to be made with retrospective operation and the power to do so is unlimited by any time constraints; and

¹ Hon Kim Chance MLC, Second Reading Speech, Western Australia, *Parliamentary Debates (Hansard)*, Legislative Council, December 13 2001, p. 7117.

² Ibid.

d) it raises issues relating to ‘Henry VIII clauses’.

5 The main objection to ‘Henry VIII clauses’ is that by delegating to the Executive the power to amend Acts of Parliament, the clauses have insufficient regard to the principle of separation of powers and ultimately the institution of Parliament in its role as a supreme legislature. There are limited circumstances where such clauses are not considered objectionable. In view of these concerns, the Committee has recommended some amendments to the Bill to limit the ability to make regulations and statutory rules that have retrospective operation.

RECOMMENDATIONS

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Recommendation 1: The Committee recommends that the Corporations (Consequential Amendments) Bill (No 3) 2001 be passed subject to Recommendations 2 and 3.

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Recommendation 2: The Committee recommends that clause 7(3)(b) of the Corporations (Consequential Amendments) Bill (No 3) 2001 be amended in the following manner:

Page 5, line 3 - To insert after “which the” –

“ ... regulation or ... ”.

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Recommendation 3: The Committee recommends that clause 7 of the Corporations (Consequential Amendments) Bill (No 3) 2001 be amended in the following manner:

Page 5, after line 4 – To insert the following new clause –

“ 7(4) This section expires at the beginning of the day that is one year after the commencement of this Act. ”

REPORT OF THE STANDING COMMITTEE ON LEGISLATION

IN RELATION TO THE

CORPORATIONS (CONSEQUENTIAL AMENDMENTS) BILL (NO 3) 2001

1 REFERENCE AND PROCEDURE

- 1.1 The Corporations (Consequential Amendments) Bill (No 3) 2001 (**Bill**) was referred to the Legislation Committee (**Committee**) on December 13 2001, under SO230A of the Legislative Council. The Committee is to report back to the House by March 21 2002.
- 1.2 The Committee appointed a subcommittee comprising Hon Jon Ford MLC (Convenor) and Hon Peter Foss MLC to assist in the inquiry. The subcommittee reported to the Committee on February 20 2002.
- 1.3 On February 27 2002, the Committee held a hearing with representatives of the Department of Justice and Parliamentary Counsel's Office.³

2 BACKGROUND TO THE BILL

- 2.1 The Bill is in response to the *Financial Services Reform Act 2001* (Cwlth) (**FSR Act**) and the *Financial Services Reform (Consequential Provisions) Act 2001* (Cwlth) which amend aspects of the Corporations Law. These Acts commenced on March 11 2002. It was necessary for all state Parliaments to enact their own legislation before the Commonwealth Acts could commence.⁴

The *Financial Services Reform Act 2001* (Cwlth)

- 2.2 The FSR Act makes extensive reforms to financial services in Australia which are regulated by the *Corporations Act 2001* (Cwlth). The *Corporations Act 2001* (Cwlth) is the statutory basis for the formation of companies, corporate regulation and the regulation of the securities and futures industries throughout Australia.
- 2.3 The Committee notes that the Commonwealth has controlled financial services for some years now, however, the regulation of the financial system has been fragmented

³ Mr Peter Richards, Acting Commissioner for Corporate Affairs, Department of Justice and Mr Roger Jacobs, Assistant Parliamentary Counsel, Parliamentary Counsel's Office.

⁴ Hon Kim Chance MLC, Second Reading Speech, Western Australia, *Parliamentary Debates (Hansard)*, Legislative Council, December 13 2001, p. 7117.

and inconsistent as it has been covered by different Acts.⁵ The Commonwealth has now sought to cover the entire field, through the establishment of a streamlined regulatory regime for financial services. The new FSR Act is a more comprehensive piece of legislation and is an appropriate area of responsibility for a federal government under a federal system.

- 2.4 The FSR Act repeals Chapters 7 (Securities) and 8 (The Futures Industry) of the *Corporations Act 2001* (Cwlth) and replaces them with a new Chapter 7 dealing with the financial services and markets.
- 2.5 The key objective of the FSR Act is to benefit the consumer through the introduction of a single licensing and standardised disclosure regime for the financial services sector. The FSR Act establishes that single licensing regime for the provision of financial services. The FSR Act requires that a person carrying on a financial services business will be required to hold an Australian financial services licence covering all products or a limited class of products (the Act covers a wide range of financial products).⁶
- 2.6 The regime will capture entities that deal in a financial product, provide financial product advice or make a market for a financial product. Consistent disclosure obligations will apply to retail financial products. In addition, financial markets and clearing and settlement facilities will be subject to a consistent authorisation procedure.⁷

The *Financial Services Reform (Consequential Provisions) Act 2001* (Cwlth)

- 2.7 The *Financial Services Reform (Consequential Provisions) Act 2001* (Cwlth) provides for the transition to the regulatory regime provided for by the FSR Act. It also makes amendments to other legislation, which are necessary as a consequence of the FSR Act.
- 2.8 The transitional provisions in the *Financial Services Reform (Consequential Provisions) Act 2001* (Cwlth) deal with how a person moves from their existing regulatory regime into the financial services reform regime and also when the financial services reform regime begins to apply to different people.
- 2.9 Generally, the *Financial Services Reform (Consequential Provisions) Act 2001* (Cwlth) allows for the provisions of the FSR Act to be phased in over two years. The transitional arrangement will allow those participants who are ready when the FSR Act commences to comply with the requirements of the new regulatory regime.

⁵ Commonwealth, Parliament of Australia Parliamentary Library, *Financial Services Reform Bill 2001*, Bills Digest No 26 2001-02 (November 5 2001).

⁶ Ibid.

⁷ Ibid.

Existing participants who need more time to prepare will generally have up to two years to comply.

What does Chapter 7 of the *Corporations Act 2001* (Cwlth) currently provide for?

- 2.10 It contains provisions relating to the acquisition of securities (principally shares and debentures) and the regulation and operation of the securities industry in Australia. It licences and regulates participants in the securities industry such as dealers, investment advisers and operators of managed investment schemes. It contains provisions in relation to the title to, and the transfer of, securities.

What does Chapter 8 of the *Corporations Act 2001* (Cwlth) currently provide for?

- 2.11 It provides for the regulation of the futures market in Australia. It deals with the approval and regulation of futures exchanges and participants in that industry.

3 PURPOSE OF THE BILL

- 3.1 The Bill makes amendments that are consequential to the amendments made by the Commonwealth Parliament to the Corporations Law. Specifically, the Bill amends state laws which make reference to former Chapters 7 and 8 of the *Corporations Act 2001* (Cwlth) or to concepts which are dealt with in those Chapters. The amendments will ensure that those state laws maintain their meaning in the context of the Commonwealth amendment.⁸

- 3.2 The Bill makes two types of amendments to Western Australian state laws:

- a) The Bill will amend references in state Acts to sections and provisions in the *Corporations Act 2001* (Cwlth) which have been repealed or re-numbered by the FSR Act.
- b) The Bill will amend references in terminology used in Western Australian state laws which require amendment because they will no longer be used in the *Corporations Act 2001* (Cwlth) as amended by the FSR Act.

4 SELECTED CLAUSES OF THE BILL

- 4.1 The Bill consists of 17 Parts and proposes amendments to 16 Acts. The Committee makes comment on selected clauses only.

⁸ Hon Kim Chance MLC, Second Reading Speech, Western Australia, *Parliamentary Debates (Hansard)*, Legislative Council, December 13 2001, p. 7117.

Part 1: Preliminary issues

Retrospective operation of the proposed Act

- 4.2 Clause 2 of the Bill provides that the proposed Act has retrospective application to the date that Schedule 1 of the FSR Act comes into operation, if the Act receives the Royal Assent on or after that day.
- 4.3 The Committee is of the view that it would have seemed more appropriate, as between Parliaments having respect for each other, that the Commonwealth wait until all the States had their legislation in place before commencing the FSR Act. Including this clause almost seems an invitation to the Commonwealth to ignore the States and their Parliaments when setting commencement dates. Deferral of the commencement of the FSR Act until all States had legislation in place would also have avoided the need for clauses 4 and 7 of the Bill, with which the Committee has some concern.
- 4.4 The Committee does not generally endorse the practice of making retrospectively validating legislation because such legislation could adversely affect rights and liberties or retrospectively impose obligations and therefore breach fundamental legislative principles. The Committee does, however, recognise that there may be occasions in which retrospective legislation, without significant effects on rights and liberties of individuals, may be justified. One example may be to ensure national uniformity of the commencement of aspects of the new corporations law regime.

Validation

- 4.5 Clause 4 of the Bill contains a number of validation provisions that will only apply if the proposed Act comes into operation **after** Schedule 1 of the FSR Act comes into operation (**FSR commencement time**). As the FSR Act has been proclaimed to commence on March 11 2002, and this Bill has not received the Royal Assent, the provisions of clause 4 will apply.
- 4.6 The effect of clause 4 is to validate those things that have been or could have been validly and lawfully done or omitted to have been done:
- a) had the Bill received Royal Assent before the FSR commencement time (clause 4(2)); or
 - b) had the FSR Act not yet commenced (clause 4(3)).
- 4.7 The provisions protect the valid and lawful actions of those who are aware of the law as it will become and also of those persons who are not aware of the changes to the Western Australian law or who are unsure as to what the law is during the transitional period.

- 4.8 The validation provision only applies to things done, or omitted to have been done, between the FSR commencement time and when the Bill receives the Royal Assent.
- 4.9 Clause 4(4) of the Bill ensures that no temporary advantage is to be taken by a person of the changes to the law during the transitional period; for example, temporary eligibility for assistance or tax exemption.

Regulations and statutory rules

Power to make

- 4.10 Clause 5 of the Bill provides that the Governor may make regulations to amend a statutory rule made in the exercise of a power conferred by an Act on the recommendation of the Minister. The amendment must be consequential on the enactment of the FSR Act.
- 4.11 Clause 6 of the Bill provides that the Governor may make regulations under the proposed Act. This also includes regulations that deal with matters of a transitional nature, which relate to the transition from the old regime to the new regime.

Retrospective operation

- 4.12 Clause 7(1) permits *regulations* made under clauses 5(1) or 6(1) to be expressed to take effect from a time that is before the day on which they are published in the *Gazette*. It permits retrospective operation of these regulations.
- 4.13 Clause 7(2) permits retrospective operation of consequential amendments being made to *statutory rules* by bodies other than the Governor, if the regulations are being amended as a consequence of the FSR Act.
- 4.14 Clause 7(3) provides that to the extent to which a regulation (made under clauses 5(1) or 6(1)) or a statutory rule (referred to in clause 7(2)) takes effect from a time that is earlier than the beginning of the day on which the regulation or statutory rule is published in the *Gazette*, it does not operate so as to:
- a) affect in a manner prejudicial to a person (other than the State), the right of a person existing prior to the day of the publication; or
 - b) impose any liabilities on any person (other than the State) in respect of anything done, or omitted to be done, before the day of publication.
- 4.15 The apparent purpose of clause 7(3) is to ameliorate the otherwise harsh consequences of regulations or statutory rules that operate retrospectively to alter or extinguish existing rights or impose liabilities. The Committee notes that it is an adaptation of the wording from the Commonwealth *Acts Interpretations Act 1901*.

4.16 The explanatory memorandum states that the retrospective application of regulations and statutory rules is required, if the proposed Act does not receive the Royal Assent before the FSR commencement time. The explanatory memorandum also states that the retrospectivity is to provide a safeguard in the cases where amending regulations and statutory rules cannot be prepared in time, or an unforeseen consequence arises after the FSR commencement time.⁹

Subject matter of the regulations

4.17 The Committee notes that many key aspects of the new framework are contained in regulations. These regulations have not yet been finalised but are still in draft form.¹⁰ The regulations that are necessary for the commencement of the FSR Act are the only regulations, to date, which have been prepared.¹¹

4.18 During the hearing with representatives of the Department of Justice and Parliamentary Counsel's Office, the Committee was advised that most of the regulations required by the State have been identified. The Committee was further informed that these encompass amendments to regulations dealing with stamp duty, payroll tax and trustee companies, and amendments to include reference to new terminology used in the FSR Act.¹²

Concerns about clause 7

4.19 The Committee expresses concern about clause 7. The usual position is that regulations operate from the commencement of the day they are published in the *Gazette* or on some later date *after* publication: s. 41 *Interpretation Act 1984*. The intent of clauses 7(1) and 7(2) of the Bill is to permit regulations and statutory rules to be made that, once published, operate from a time prior to publication. The Bill legally permits this retrospective operation.

4.20 Clauses such as clause 7 raise issues relating to 'Henry VIII clauses'.¹³ The main objection to such clauses is that by delegating to the Executive the power to amend

Acts of Parliament, they have insufficient regard to the principle of separation of

⁹ And see also: *Transcript of Evidence*, Mr Peter Richards, Acting Commissioner for Corporate Affairs, Department of Justice and Mr Roger Jacobs, Assistant Parliamentary Counsel, Parliamentary Counsel's Office, February 27 2002.

¹⁰ Ibid, p. 3.

¹¹ Commonwealth Department of the Treasury, *Commentary on the Exposure Draft of the Second Stage of the Amendments to the Corporations and other Regulations Related to the Financial Services Reform Act 2001* (version released January 17 2001) <<http://www.treasury.gov.au>>.

¹² *Transcript of Evidence*, Mr Roger Jacobs, Assistant Parliamentary Counsel, Parliamentary Counsel's Office, February 27 2002, p. 2.

¹³ A 'Henry VIII clause' is a clause in an Act of Parliament which enables the Act or the effect of an Act to be amended by subordinate or delegated legislation. Such clauses are so named because King Henry VIII was regarded popularly as the impersonation of executive autocracy and because of their actual use by that monarch.

powers and ultimately the institution of Parliament in its role as a supreme legislature. There are limited circumstances where such clauses are not considered objectionable.

- 4.21 Use of ‘Henry VIII clauses’ in national schemes is generally not regarded as favourable as they inappropriately and notoriously delegate legislative power and do not support effective parliamentary scrutiny.
- 4.22 The Committee touched on similar issues in its report on the Co-operative Schemes (Administrative Actions) Bill 2001 and the Agricultural and Veterinary Chemicals (Western Australia) Amendment Bill 2001, and its report on the Corporations (Consequential Amendments) Bill (No 2) 2001.¹⁴
- 4.23 There is a view that ‘Henry VII clauses’ should not be seen as ‘insurance’ against unforeseen consequences or as a substitute for careful drafting or for mere administrative convenience:

“‘Henry VIII’ clauses should not be inserted into hastily drafted legislation to be introduced in a restrictive timetable as a substitute for careful well developed drafting.”¹⁵

- 4.24 The Committee notes that the Standing Committee on Public Administration and Finance is currently conducting a substantive inquiry into these issues in the context of clause 20 of the Planning Appeals Amendment Bill 2001. The Joint Standing Committee on Delegated Legislation is involved in assisting the Standing Committee on Public Administration and Finance as a result of the passing of item 2 of the motion of referral from the House which states:

“(2) The committee is to consult with, and include within its report, any comment from the Delegated Legislation Committee relating to clause 20 of the Bill.”

- 4.25 The Planning Appeals and Amendment Bill 2001 is due to be reported to the House by March 21 2002. Accordingly the Committee does not make substantive comment on this matter in view of that current inquiry.
- 4.26 The Committee considers it appropriate that a sunset clause be applied to clause 7, otherwise regulations may indefinitely continue to be made to operate retrospectively. The Committee is of the view that one year is an appropriate time frame. This will allow time in which to cover the transitional phase-in period of the new regime

¹⁴ Legislative Council of Western Australia, Standing Committee on Legislation, Report 2, *Co-operative Schemes (Administrative Actions) Bill 2001 and the Agricultural and Veterinary Chemicals (Western Australia) Amendment Bill 2001*, June 2001, p. 22; and Legislative Council of Western Australia, Standing Committee on Legislation, Report 12, *Corporations (Consequential Amendments) Bill (No 2) 2001*, March 2002.

¹⁵ Legislative Assembly of Queensland, Scrutiny of Legislation Committee, *The use of ‘Henry VIII Clauses’ in Queensland Legislation*, January 1997, p. 50.

provided for by the *Financial Service Reform (Consequential Provisions) Act 2001* (Cwlth) and to cover any unforeseen problems associated with the new regime.

- 4.27 The possibility of amending the Bill to include a sunset clause effective after one year of commencement of the Bill was canvassed during the Committee's hearing with the representative of the Department of Justice who agreed with the proposal.¹⁶
- 4.28 In recommending these amendments the Committee emphasises that it is not endorsing the use of clauses like clause 7. Due to reporting constraints the Committee has resolved to leave substantive consideration of such matters to the inquiry into the Planning Appeals and Amendment Bill 2001.

Typographical error

- 4.29 The Committee has been made aware of a typographical error in clause 7(3)(b) of the Bill in that reference should be made to "regulation or statutory rule" as opposed to just "statutory rule".¹⁷

Recommendation 1: The Committee recommends that the Corporations (Consequential Amendments) Bill (No 3) 2001 be passed subject to Recommendations 2 and 3.

Recommendation 2: The Committee recommends that clause 7(3)(b) of the Corporations (Consequential Amendments) Bill (No 3) 2001 be amended in the following manner:

Page 5, line 3 - To insert after "which the" –

" ... regulation or ... ".

Recommendation 3: The Committee recommends that clause 7 of the Corporations (Consequential Amendments) Bill (No 3) 2001 be amended in the following manner:

Page 5, after line 4 – To insert the following new clause –

" 7(4) This section expires at the beginning of the day that is one year after the commencement of this Act. "

¹⁶ *Transcript of Evidence*, Mr Peter Richards, Acting Commissioner for Corporate Affairs, Department of Justice, February 27 2002, p. 4.

¹⁷ Telephone conversation on February 20 2002 between Mr Roger Jacob, Assistant Parliamentary Counsel and Committee staff.

Parts 2 – 13 and 15 – 17: Change in terminology

4.30 The FSR Act introduces a number of new concepts and terms and replaces a number of terms with new terms, including:

- a) replacing the term ‘stock exchange’ with ‘financial market’;
- b) replacing the term ‘stock broker’ with ‘financial services licensee’; and
- c) replacing ‘listed for quotation on a stock market’ with ‘quoted on a prescribed financial market’.

4.31 The Acts to which these amendments are made are:

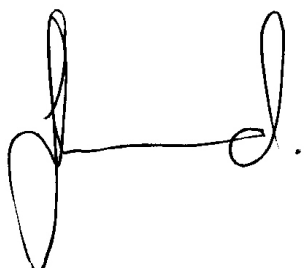
- a) *Country Housing Act 1998*;
- b) *Local Government Act 1995*;
- c) *Members of Parliament (Financial Interests) Act 1992*;
- d) *Mental Health Act 1996*;
- e) *Settlement Agents Act 1981*;
- f) *Stamp Act 1921*; and
- g) *State Superannuation Act 2000*.

4.32 Parts 4, 6, 11, 16 and 17 of the Bill amend a number of Acts by deleting the words “*within the meaning of the Corporations Act*”. These Acts provide that state agencies may enter into “*a futures contract or a futures option within the meaning of the Corporations Act.*” As the FSR Act will repeal the terms ‘futures contract’ and ‘futures options’ from the *Corporations Act 2001* (Cwlth), the amendment is necessary. However, the corporations and or organisations to which the Acts apply will still be able to trade in both ‘futures contracts’ and ‘futures options’ within the ordinary and commercially accepted meaning of the words. The Acts where this change will be made are:

- a) *Electricity Corporation Act 1994*, s. 84(1)(a)(xi);
- b) *Grain Marketing Act 1975*, s. 19(2)(b);
- c) *Port Authorities Act 1999*, s. 87(1)(a)(xi);
- d) *Water Corporation Act 1995*, s. 82(1)(a)(xi); and
- e) *Western Australian Treasury Corporation Act 1986*, s. 10(2)(fa)(xi) .

Part 14: Stamp Act 1921

- 4.33 Clause 25 of the Bill makes various amendments to the definition section of the *Stamp Act 1921*, which are required as a result of the changes in terminology as a consequence of the commencement of the FSR Act. Included in these amendments is the insertion of a new definition of 'recognised financial market'. The Committee notes that it is intended that the prescription of existing 'recognised stock exchanges' as 'recognised financial markets' will be made effective to March 11 2002 under the power to make retrospective regulations provided in the Bill.¹⁸
- 4.34 Clause 29 of the Bill inserts new subsection (4a) in s. 112B of the *Stamp Act 1921*. This will displace the operation of the proposed new s. 1070A(4) of the *Corporations Act 2001* (Cwlth). New subsection (4a) declares subsections 1112B(1)(a) and (3) to be displacement provisions for the purposes of s. 5G of the *Corporations Act 2001* (Cwlth). This will continue the existing position in Western Australia where, for the purpose of imposing stamp duty under the *Stamp Act 1921* on a share transfer, the location of company shares is where the company is taken to be registered, and not in the place where the shares are registered.¹⁹
- 4.35 Clause 32 of the Bill inserts an exclusion provision in relation to s. 1070A(1)(a) of the *Corporations Act 2001* (Cwlth). The section is excluded from application to the *Stamp Act 1921* in relation to interests in registered managed investment schemes, thereby effecting a different outcome for the State than the *Corporations Act 2001* (Cwlth) provides nationally.



Hon Jon Ford MLC
Chairman

Date: March 14 2002

¹⁸ Clause Notes to the Bill.

¹⁹ Hon Kim Chance MLC, Second Reading Speech, Western Australia, *Parliamentary Debates (Hansard)*, Legislative Council, December 13 2001, p. 7118.