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The Secretary
House of Representatives
Standing Committee on Legal and Constitutional Affairs
Parliament House
CANBERRA ACT 2600

Dear Secretary

Inquiry into Harmonisation of Legal Systems

Thank you for the invitation to make a submission to this inquiry.

I am not an expert in which areas require harmonisation. It is possible to say, however, that many areas could be added to the list in the terms of reference. These might include specific areas of trade and commerce where the multiplicity of laws has a negative impact, such as markets like education. It is also possible to suggest areas that would arguably be better served by harmonised laws, such as industrial relations given the number of laws that apply to the employer/employee relationship.

Otherwise, I address the issues of constitutional law raised by the terms of reference. In doing do, I draw upon my attached article 'Co-operative Federalism and the Revival of the Corporations Law: Wakim and Beyond' (2002) 20 *Company & Securities Law Journal* 160.

Existing approaches to harmonisation include:

1. enacting a federal law to be re-enacted by the States (with subsequent amendments to the federal law then requiring amendment of the State law);
2. enacting a law for a territory under section 122 of the Constitution that the States can legislate to adopt (with amendments to the federal law automatically applying in the States), and

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3. seeking a referral of power (perhaps for a limited time) from the States under section 51(37) of the Constitution to enable the Commonwealth to enact a comprehensive federal scheme.

Each of these approaches suffers from problems. The first relies upon the States re-enacting the law in exactly the same form. This may not occur and pressures for divergence from the federal law can grow over time. The second has been undermined by recent High Court decisions that make enforcement and the determination of matters in the Federal Court difficult or even impossible. The third relies upon each of the six states being willing to transfer power on an ongoing basis to the Commonwealth.

The second option is arguably the best model because it does not depend upon a transfer of power, allows for change over time and is built upon Commonwealth – State cooperation. It was the means used to bring about the Corporations Law in 1991. However, the High Court held in *Re Wakim; Ex parte McNally* (1999) 198 CLR 511 that State jurisdiction could not be vested in a federal court. As a result many matters arising out of the scheme could not be determined in the Federal Court (while nearly 2,000 corporate law matters were filed in the Court in 1995-1996, the number dropped to almost zero for 1999-2000). A second decision in *R v Hughes* (2000) 202 CLR 595 meant that a national enforcement agency, in that case the Commonwealth DPP, might only be able to enforce an offence arising under the national scheme where the offence could have been enacted independently by the Commonwealth under one of its constitutional heads power. Of course, if the Commonwealth already had the power to enact the scheme there would not have been the need for a co-operative arrangement in the first place.

These High Court decisions can cause problems in a range of areas, including family law, GST price monitoring by the Australian Competition and Consumer Commission, competition law and in new fields such as the regulation of gene technology. The problems can sometimes be circumvented by a referral of power, such as the five-year referrals of power by the States that enabled the enactment of the *Corporations Act 2001* (Cth), or by accepting that matters arising under a harmonised scheme will be heard by the several State courts and regulated by separate enforcement agencies in the States.

There are now significant legal obstacles to effective harmonisation in Australia, even where there is bi-partisan support for co-operation across federal and State governments. Other than a change of approach by the High Court, the only complete solution is to amend the Constitution. Amendment of the Constitution by referendum is costly and difficult. On the other hand, the cost of not adapting the Constitution to Australia's contemporary needs is potentially far higher, including wasted expenditure on courts because the cross-vesting of matters is not possible and the associated costs for parties. Less quantifiable costs can include a loss of confidence in the stability of a regulatory regime and an inability to achieve appropriate policy outcomes in other fields because co-operative schemes based upon a referral of power are not politically achievable.

The actual amendment to the Constitution could be straightforward. It need not grant the Commonwealth more power, but could ensure that the Constitution enables the Commonwealth and the States to work co-operatively in corporate law and other

fields with the legislative powers that they already possess. Hence, the amendment might merely fix a defect identified by the High Court in order to facilitate federal-State co-operation. It need not transfer any power from the States to the Commonwealth. The amendment should entrench two legal propositions:

1. the States may consent to federal courts determining matters arising under their law; and
2. the States may consent to federal agencies administering their law.

The first of these changes matches that recommended by the Constitutional Commission in 1988. Its concern that cross-vesting might not be constitutionally possible led it to suggest that the following provision be inserted into the Constitution:

> 77A. The Parliament of a State or the legislature of a Territory may, with the consent of the Parliament of the Commonwealth, make laws conferring jurisdiction on a federal court in respect of matters arising under the law of a State or Territory, including the common law in force in that State or Territory.

Whatever the text of the changes, they might be placed in a new Chapter to the Constitution, perhaps as a new 'Chapter VI.A – Co-operation between the Commonwealth and the States'.

Yours sincerely

George Williams