COMMONWEALTH OF AUSTRALIA

Official Committee Hansard

JOINT COMMITTEE ON CORPORATIONS AND SECURITIES

Reference: Corporations (Commonwealth Powers) Act 2001 (NSW), Corporations Bill 2001 and the Australian Securities and Investments Commission Bill 2001

FRIDAY, 27 APRIL 2001

MELBOURNE

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JOINT COMMITTEE ON CORPORATIONS AND SECURITIES

Friday, 27 April 2001

Members: Senator Chapman *(Chair)*, Senators Conroy, Cooney, Gibson and Murray and Ms Bishop, Mr Cameron, Mr Rudd, Mr Sercombe and Dr Southcott

Senators and members in attendance: Senators Chapman, Conroy, Cooney and Gibson

Terms of reference for the inquiry:

Corporations (Commonwealth Powers) Act 2001 (NSW), Corporations Bill 2001 and the Australian Securities and Investments Commission Bill 2001

WITNESSES

Committee met at 9.10 a.m.

ACTING CHAIRMAN (Senator Gibson)—Welcome. Today the committee conducts its first public hearing into the provisions of the Corporations (Commonwealth Powers) Act 2001 (NSW), the Corporations Bill 2001 and the Australian Securities and Investments Commission Bill 2001. On Thursday 5 April 2001, the Senate referred the provision of these bills to the Parliamentary Joint Statutory Committee on Corporations and Securities for inquiry and report by 18 May 2001. At a private meeting this morning the committee agreed to release all submissions received on this inquiry. Submissions will be available from the Parliamentary House web site or the secretary can send a hard copy of the submissions to those who wish to obtain one.

Before we commence taking evidence, I wish to reinforce for the record that all witnesses appearing before the committee are protected by parliamentary privilege with respect to evidence provided. Parliamentary privilege refers to the special rights and immunities attached to the parliament or its members and others necessary for the discharge of parliamentary functions without obstructions and fear of prosecution. Any act by any person which operates to the disadvantage of a witness on account of evidence given by him or her before the Senate or any of its committees is treated as a breach of privilege. I also wish to state that, unless the committee should decide otherwise, this is a public hearing and as such all members of the public are welcome to attend.

[9.13 a.m.]

FAULKNER, Mr James, Assistant Secretary, Constitutional Policy Unit, Attorney-General's Department

YEN, Mr Stephen, Special Adviser, Constitutional Policy Unit, Attorney-General's Department

SELLARS, Mr Andrew, Manager, Corporate Governance and Accounting Policy Division, Treasury

CHAIRMAN—I welcome witnesses from the Attorney-General's Department and from Treasury. We have before us your submission which we have numbered 1. Do you wish to make an opening statement?

Mr Faulkner—Yes, if you would not mind. I appreciate that. Thank you very much for giving us an opportunity to speak briefly. My colleagues have introduced themselves. I thought it was worth just mentioning that, as you will have observed, Stephen and I are from the Attorney-General's Department, whereas Andrew is from the Treasury. Officers of the Attorney-General's Department and the Treasury have been assisting the Attorney-General and Minister Hockey in working on the corporations reference package from the Commonwealth side. Something of a taskforce has been established with officers from both of those agencies, and we have been working on the matter since the beginning of last year.

What we are talking about today, the state reference legislation and the Commonwealth legislation, really has arisen out of the problems which were identified in the Corporations Law scheme by the High Court in the last couple of years in two cases. In particular, they were Re Wakim, as it is usually called, and a second case, Hughes. As you know, I am sure, Wakim decided that there were problems with the cross-vesting arrangements, which were included in the Corporations Law, and the general scheme, when it decided that there were problems in the conferral of state jurisdiction on federal courts. That meant that the Federal Court lost its jurisdiction in the main in relation to corporations matters.

Hughes last year exacerbated that problem quite dramatically when it decided that there were problems about conferring functions and powers on Commonwealth officers and bodies under cooperative schemes. Not only was there a problem with the Federal Court exercising jurisdiction but there was a problem in Commonwealth officers and bodies like ASIC and the DPP and others performing functions that were conferred on them by the cooperative scheme. Because the extent of Commonwealth powers is uncertain in relation to corporations matters, this has led to extensive uncertainty and concern in corporations in relation to the administration and enforcement of the scheme. The High Court, as I am sure you are aware, made many observations about the difficulties with the scheme. Justice Kirby, for example, talked about, in one case, fiction piled upon fiction in terms of the way the administrative arrangements are actually structured. The bottom line was that the court gave a clear indication that things needed to be fixed, and that is what the Commonwealth and states have set about doing in the reference legislation that we are looking at today.

I think the first point of substance really is that fundamentally what would be re-established by the new legislation is the regulatory environment that everyone thought existed before the decisions in Wakim and Hughes. The plan is not to make any substantive changes to the law. This is not an exercise to tidy up policy shortcomings that might be perceived in the law; it is simply to put what we have got on a secure, legal foundation.

It is also worth making clear, I think, that the particular provisions of the state references—and the corporations agreement which will underpin the operation of the references and the Commonwealth law which will be enacted pursuant to the references—involve a long, rigorous, exhaustive process of negotiation. The provisions of the agreement and the state references are all highly interdependent. They have been considered very carefully with a view to ensuring that the system that would be established by the new legislation is secure and that we would not be replacing current legal problems and uncertainties with new legal problems and uncertainties. So while they are highly interdependent and finely balanced, we are very comfortable that the arrangement that we have is safe and sound and secure and will deliver what the Attorney and Minister Hockey have said businesses have a right to expect, which is certainty in corporate regulation across Australia.

The arrangements that have been agreed, under the corporations agreement in particular, to accommodate state concerns about use of the referred powers are in our view entirely reasonable and do not give rise in particular to legal concerns which may be of concern to the business community and the legal community. Briefly, the new scheme is to re-enact the Corporations Law that we have now as a single national law capable of operating nationally. As you know, the current scheme is an aggregation of eight laws: Commonwealth, state and territory laws. To the extent that the Commonwealth cannot enact that new Commonwealth federal law on its own, it will be relying on the state references—the first of which has been passed by New South Wales and has commenced. Victoria has introduced its reference legislation. Queensland and Western Australia have indicated that they will follow suit. South Australia and Tasmania had some outstanding concerns which are being discussed with the Commonwealth but have indicated that they are working towards the 1 July commencement that the Commonwealth has identified.

Very briefly, each of the state references which will provide support for the law to the extent that it is not supported by existing Commonwealth power will be twofold. The first reference that each state will give to the Commonwealth will allow the Commonwealth parliament to enact the Corporations Act and the ASIC Act that have been introduced as the tabled text along with the New South Wales reference, so the first reference allows the Commonwealth to enact two particular pieces of legislation. The second reference given by each state will allow the Commonwealth parliament to amend that legislation—and just that legislation—as far as those amendments relate to the formation of corporate regulation or the regulation of financial products and services. It is tightly focused, it is clearly supportive of what needs to be supported: the existing law and reasonable policy changes into the future, in particular, the Financial Services Reform Bill.

This approach is based on an established model, the mutual recognition arrangements, which have been in existence since 1992. It was developed in close consultation with the Commonwealth and the state solicitors-general, and the model reference that has been introduced and commenced in New South Wales and that we expect to be introduced in all of

the other states was drafted by the Parliamentary Counsels Committee under the auspices of the Standing Committee of Attorneys-General and the Ministerial Council for Corporations. It has received, as I say, exhaustive consideration, and we are very confident of its efficacy.

One simple point I think is worth making. The new scheme will be much simpler than what we have now. It will be safer and it will be simpler. It will be one law. It will not require the complex application provisions which are required in the aggregate kind of scheme that we have at the moment. It will not require complex provisions to apply what we have referred to usually as adjectival Commonwealth laws like administrative laws, the Crimes Act and so on. They will apply of their own force, because they are simply other pieces of Commonwealth legislation applying to what will be a Commonwealth act.

There will be some other legislation to be passed by the Commonwealth and the states and territories of a consequential nature, which will be done in time for the commencement of the scheme as a whole. It is worth mentioning also very briefly that what I have been talking about is the process that will put the existing scheme on a secure foundation for the future. The states will also be enacting what has been described as validation legislation to ensure that those actions which have already been undertaken and which may be at risk following Hughes will be safe, will be validated. The states need to do that because it is state action that we are talking about. That approach also has been evolved in consultation with state and Commonwealth Solicitors-General.

I should reiterate that I think there are no policy changes in this approach. We are simply trying to make sure that what we have—what we thought we had before Hughes and Wakim—is secure and that those things that have already been done in good faith under the existing system are secure. The changes that have been made to the text of the existing law have been made simply to reflect the fact that the new law will be a single Commonwealth law of potentially national application rather than an aggregate system of laws which need to apply in each of the others' jurisdictions.

It is worth mentioning very briefly that, in order to preserve as nearly as practicable the current status quo, insofar as the states are able to enact legislation that is inconsistent with the Corporations Law, we have included provisions in the Commonwealth law that will allow for the interaction of future and past state laws that would otherwise be inconsistent.

The only other basic point that I think is probably worth mentioning at this stage, from our point of view, is that Wakim and Hughes have had extremely negative consequences for the existing system, and confidence generally has been affected. The scheme that is on the table today has received a very favourable response, so far as we are aware, from those people that have looked at it—business in particular and legal groups. We have done what we can in producing as quickly as possible the legislation we have now. Some people might think that it has been a rather more drawn out affair than might have been hoped for, but it is a process which has had to accommodate significant state concerns about the use of the powers that they will be referring.

This is the most significant reference of power in the history of the federation in terms of the complexity and the extent of the thing, and states have been adamant and vocal in stating their concerns. We have needed to accommodate those. We have needed to do that in a way, however,

that does not involve introducing risk. We do not simply want to remove one kind of risk to introduce another. It has therefore been perhaps a slightly longer process than we might have hoped for. Nevertheless, what we have, we believe, works and would work well, and we are conscious that any further delay in terms of re-arranging the arrangement would be something which would have ramifications for the scheme as a whole. The timing consideration is one which has been very much at the forefront in our thinking. That is probably all I would like to say at this stage. I am very happy to answer any kinds of questions that you might have about any aspect of the scheme.

CHAIRMAN—Thank you, Mr Faulkner. Before we proceed to questions, do Mr Yen or Mr Sellars wish to add anything?

Mr Yen—Not at this stage.

CHAIRMAN—You referred to some concerns the South Australian and Tasmanian governments have had. Could you perhaps enlarge on what they were and whether they have been resolved?

Senator CONROY—You should declare your vested interest at this point as a senator from one of the main states—

Mr Faulkner—I mentioned a moment ago that we have accommodated state concerns which have arisen during the process. Late last year in the process of putting the package together the states voiced concerns, which had been there to some extent from the start but came into a sharper focus around September or so last year, about perhaps possible reliance on referred power by the Commonwealth to get into the area of industrial relations. There was quite a deal of discussion about what would be appropriate in terms of mechanisms to be included in the package to address those kinds of concerns, and the upshot was a clause in each of the state references, indicating that the Commonwealth parliament would not be looking to rely on references to enact laws for the main or underlying purpose of regulating industrial relations. There are further safeguards in the corporations agreement which reinforce and amplify that kind of protection.

Another aspect of that concern about the Commonwealth using or relying on referred powers to get into areas that were outside what most people would generally see as the area of the Corporations Law and corporate regulation was concern that there should be perhaps limits on the extent to which the Commonwealth could rely on the references, or amend the Corporations Law, to require the adoption of corporate structures to do certain kinds of things. As you would be aware, there are already provisions in the Corporations Law which require people to adopt that structure to operate. The concern was that that might be pushed to further limits, to extreme kinds of situations. That was the particular concern of South Australia, and they were looking for further protections in that regard.

The Commonwealth was not prepared to accept very complex provisions for inclusion in the legislation which might give rise to uncertainty and arguments about what kinds of things had actually been referred. We saw—and I think Mr Hockey on several occasions made it quite clear—that the paramount concern here of the Commonwealth was not to, by re-introducing complex provisions at the heart of the reference, open something of a Pandora's box in relation

to litigation for the future about just what had been referred. The kinds of provisions that had been put on the table earlier in the piece to deal with the kinds of things that I have been describing were very much in the nature of complex legislative provisions with exclusions, and exclusions from exclusions, and there really was a question at the end of the day about what had been referred and what could be relied upon in the future to amend the legislation.

At the point where the Commonwealth felt that that kind of approach to dealing with South Australia's concern was unacceptable, I think it was accepted that the Commonwealth was open to hearing what other possibilities South Australia in particular thought might be available to deal with the concerns that they had and continue to have. As I understand it, ministers are still talking about that. The Commonwealth has indicated to South Australia that these are things that can be talked about and that, if solutions can be found in the future that everyone is happy with, this is something which may well be a possibility, and that South Australia is encouraged to get on board with the other states on the basis that these are things which we could work out and perhaps address in the future.

I cannot say myself quite where those discussions are at the moment, but I have heard nothing which suggests to me that that approach is unacceptable to South Australia.

CHAIRMAN—Is South Australia on board or not?

Mr Faulkner—We are all operating on the basis that we are working towards a 1 July start—yes, that is right.

CHAIRMAN—Apart from the industrial relations issue, what were the other key issues that concerned them? You have talked about concerns but you have not detailed what they were.

Mr Faulkner—I am afraid I would have to refer to papers which I do not have here to identify what they ended up being towards the end but perhaps others can—

Mr Yen—I think the concern was a general one. Mr Faulkner indicated that there was a concern about use of the referred power to pass laws requiring people to adopt the corporate structure. The fear in general terms went something like: the reference gives the Commonwealth the power to pass laws about what corporations can do; if the Commonwealth can also pass a law saying that X has to be done through a corporation or Y has to be done through a corporation, add the two together and the Commonwealth ends up with unlimited power. It was, in effect, a fear of the unknown and a fear of limitless possibilities as to what we might get up to at some point. No one concern was raised above any other, other than the industrial relations one in that regard.

Mr Faulkner—To my mind that was the salient point. A range of other concerns have been present throughout the negotiations, and I hesitate to attribute particular concerns to particular jurisdictions at particular times, because they all merged into one. Particular jurisdictions would raise a particular concern at a stage and it may have been another jurisdiction which made the running on that particular concern at a later stage. I would have to refer back to my papers to recall, to be honest, just where South Australia ended up towards the end of the process in terms of concerns other than the IR one and the incorporation issue that I have been describing.

CHAIRMAN—Has that particular concern about the capacity of the Commonwealth to require things to be done through a corporation been resolved or is that still hanging?

Mr Faulkner—I understood that to be certainly at the forefront of South Australia's concerns just recently. I believe that on the basis of the approach that I have just outlined—which is that, certainly from the Commonwealth's point of view, it is prepared to continue to listen to what South Australia is saying and to what the other states are saying and is prepared to consider options which are acceptable to everyone—there is a very good argument for South Australia not regarding this as something to hold up the 1 July target. I have heard nothing which indicates to me that that is unacceptable to South Australia. Obviously I cannot speak for South Australia and I cannot speak for the ministers, but we are working on the 1 July commencement. There is nothing to suggest that we should not be doing that.

CHAIRMAN—What is the problem with in a sense excluding that power—in other words, the Commonwealth not having the power to require things to be done through corporations but, if things are done through corporations, then the Commonwealth having the power to administer them? Why should the Commonwealth have the power to require things to be done through corporations?

Mr Yen—There is a large number of things in the existing corporate regulatory regime which involve obligations for things to be done through corporations. For instance, the managed investments provisions say that the responsible entity must be a corporation. Similarly, the Financial Services Reform Bill will require certain markets and certain facilities to only be provided through corporations. That kind of thing has tended to have been driven by a policy that goes something like: if you let people conduct certain activities, but these people may not exist some time in the future, you then create all kinds of risks for investors. So there is, in a large number of circumstances, the possibility of there being good corporate law policy reasons to have and to exercise this power. The difficulty then becomes distinguishing between those areas of requiring people to incorporate what are legitimate Corporations Law policies and those areas which stray into unwarranted interference with things that are properly regulated by the states. The moment you try to provide dividing lines for all legislation, you end up with a situation where you get possibilities of arguments at the edges and challenges to the validity of the legislation you have enacted, which then gets you back into this situation of replacing one uncertainty with another piece of uncertainty.

Mr Faulkner—I might perhaps add to that that the point about needing to make sure that the Corporations Law does not become fettered or snap-frozen. The Commonwealth's capacity to amend the law becoming unduly fettered has been an extraordinarily important point all through this. We have seen it as important to make sure that, where there are safeguards that need to be given to accommodate reasonable state concerns, there are clear statements about what can or cannot be done. They go into the corporations agreement in the main, an agreement that all governments have indicated they regard as a clear important document which they will treat as binding. The big advantage of that is that we do not get into litigation, we do not get into arguments by lawyers in courts holding everyone up about what has been referred or what has not. We have a situation where governments can discuss the matter between themselves and come up with reasonable outcomes which are clear and which everyone understands.

Senator CONROY—And which the Commonwealth will be able to amend?

Mr Faulkner—Precisely. These dual characterisation points, whether they be IR points or incorporation points or anything else for that matter, usually cannot be dealt with, we think—not in our experience—by means of clever drafting in the legislation. The drafting inevitably becomes complex and difficult, and that is the kind of thing that we have tried to avoid. As I say, I think the message that the Attorney and Mr Hockey are sending to South Australia in this case is that no-one is trying to shut any good idea out or to not listen. They are more than happy to talk, but whatever situation or possible solution is identified has to be agreeable to everyone. It is a reference that all the states should be involved in.

The Commonwealth's overriding concern also is to make sure that all the states are there and that they can be accommodated if at all possible. I think the approach is to listen to any sensible idea that anyone has at the moment without sacrificing the very important point that you have just made, Senator. That is, that the Commonwealth parliament will be the parliament which is responsible for making sure that the law continues to be flexible, effective and able to meet the changing requirements of a modern economy. In the Commonwealth parliament we need a reference situation that allows the Commonwealth to continue to do that in a sensible way, and we cannot have a situation where the parliament which is responsible for amending the law is looking over its shoulder at the nature of the amendment power. We are trying to avoid litigation on these kinds of points.

Senator CONROY—I want to follow up on that question. Accepting that it is untenable for the Commonwealth not to be able to modify legislation that it passes, you would not have a problem if the parliament wanted to make any amendments to this existing bill, would you?

Mr Faulkner—The existing bill being?

Senator CONROY—The one we are talking about today.

Mr Faulkner—No, there would be a very big problem with that. As I said in my introduction, what the states have referred is very tight but very safe. It is a twofold reference in each case. Each state reference bill says, firstly, that the Commonwealth parliament may enact these two bills—the ASIC Act and the Corporations Law—and these two bills only, and it must be in this exact form. That is what they say. Secondly, each state reference says that you the Commonwealth parliament can amend those bills, once you have enacted them, as long as the amendments deal with these kinds of subjects—incorporation of corporations, corporate regulations and so on.

New South Wales has introduced its reference legislation which says, 'We, New South Wales, give you the Commonwealth the power to do these things, and the law which you may enact is the law which we have tabled in our parliament, which is in the form that you have there.' That is the only legislation that the Commonwealth can enact. It can enact those acts, the Corporations Act and the ASIC Act, and only those acts. Those acts cannot be amended if the Commonwealth is to introduce them in reliance on the references and is to be able to rely on those references in the future to amend them.

Senator CONROY—Do you think that is an argument to say that the Commonwealth parliament should not make any amendments?

Mr Faulkner—To these bills?

Senator CONROY—To these bills.

Mr Faulkner—I think that, rather than putting it in terms of an argument, I would characterise it this way. I would say that what we have is the necessary mechanism to allow the Commonwealth parliament to re-enact as Commonwealth law exactly what we have now. It then also gives the Commonwealth parliament power in the future to enact any amendments it wants so long as they are within the terms of the amendment power.

Senator CONROY—I know you have made this point consistently, but you are just re-enacting exactly what is currently there. Isn't that actually the case, Mr Faulkner?

Mr Faulkner—I am sorry. Perhaps that was a little strong, yes.

Senator CONROY—The fact of your reduction in the Commonwealth's power to make future amendments to the Commonwealth Corporations Law is actually a substantive difference, can I put to you. It is not a question of our three states, two states, four states; it is actually a substantive reduction in the Commonwealth's power to administer and amend the proposed new law.

Mr Faulkner—I would have to take issue with that I think. I could not accept that. I am not meaning to be difficult here, but I think I would have to put it this way. What we have now—and I think it is important to understand what we have now because it makes talking about what we will have in the future a little bit clearer—is a situation where the Commonwealth enacts the law for the ACT, the ACT Corporations Law. That law, that exact text, is simply applied in each state, as you know, by each of the state parliaments. The Commonwealth can, as you say, in theory enact whatever it likes in the ACT act, and the states could simply continue to apply it if they chose to do so. There is nothing to prevent the states, if they thought that the Commonwealth had overstepped the mark, simply saying, 'No, we are not going to do that.' In fact, the states have proposed—and continue to propose—to pass legislation that is inconsistent with what the Commonwealth passes.

You are right in one sense. The Commonwealth can enact whatever it likes in the ACT. Whether or not that becomes the Corporations Law for the rest of Australia is a moot point. The fact is that the Commonwealth is restricted, as it will be restricted under the new scheme, by the terms of the corporations agreement. That agreement says, 'Look, if you are talking about amendments of this kind, you are going to have to go through this process. If you are talking about amendments of that kind, you are going to have to go through this process, otherwise all bets are off.' That is going to be exactly the same under the new scheme, except that probably it will be more difficult for the states to withdraw, so it adds a degree of security possibly in psychological terms if in no other.

I think it is important to note the other point which has been raised by some people, which is the voting point—whereas now the Commonwealth, where it is required to have an amendment voted on, is required to get two votes in support, it would be required to get three votes in support—was very carefully considered. We do not regard that—and I will stand corrected by my Treasury colleague here if there is any disagreement—as in any sense a limitation on

Commonwealth power, because I think quite clearly it is not. It is a consideration obviously when amendments are being considered, but it has not been the experience of the Commonwealth that the jump from two to three states will be significant in terms of what the Commonwealth will be able to pass in terms of amendments. It is conceivable that there may be timing issues on occasion, although as I understand it that does not appear to be a likely problem—or even an issue, I should add. On most occasions, as I understand it, there is never a problem in getting unanimity, if not something just short of unanimity.

Senator CONROY—Are there any other, in the department's view, insignificant changes to the bill that reduced the powers of the federal parliament?

Mr Faulkner—Are there any others that we would see as significant reductions?

Senator CONROY—No. Given that you knew this one is insignificant, I am just wondering if there are any other insignificant changes the department considers do not really reduce the powers of the Commonwealth?

Mr Faulkner—As I say, I am not trying to be pedantic here, but I think it is worth drawing the distinction between powers and considerations in the way—

Senator CONROY—Maybe, not being a lawyer, I am expressing myself inexpertly, but the capacity of the Commonwealth to amend the corporations power.

Mr Faulkner—Yes, I do take your point. Once again, either of my colleagues can jump in and correct me if I am wrong about this, but I think the only thing that might be remotely regarded as a policy thing of the kind that you are talking about would be that voting issue. The Commonwealth's powers are not reduced. Indeed, the principal concern of the Commonwealth has been to ensure that its power to amend is not cut down in any way that would reasonably affect policy development. That has been a paramount consideration. Indeed, the changes to the text of the law are really very minor and go to things like changes to 'must' and 'shall' and that kind of thing very often—apart from the application provisions that have been chopped out.

The kinds of provisions that have been included in the corporations agreement which go to protection against relying on the references to deal with IR concerns, for example—and there are some of those there—are quite acceptable from the Commonwealth's point of view, because they are utterly consistent with the Commonwealth's view and intentions which are that the Commonwealth has never intended to enact laws for the purpose of regulating industrial relations, for example. They simply do not cut across what the Commonwealth had ever proposed to do in—

Senator CONROY—I appreciate you are speaking on behalf of the executive government, but the parliament is a different issue.

Mr Faulkner—I am sorry. Yes, it has never been the intention of the government to enact a law which would enable the Commonwealth parliament to do things beyond the scope of the things that parliament—

Senator CONROY—You have met Peter Reith and Tony Abbott?

Mr Faulkner—Yes, on occasion. Obviously you are referring there to the comments that caused—

Senator CONROY—They are papers, not comments. Peter Reith wrote quite a substantive paper about what he believed the Commonwealth government of the day should do in this area.

Mr Faulkner—That is true. Although I am afraid the details in that paper are a bit hazy. It is one of a series of papers, as I am sure you know. That paper in particular, which I understood caused some angst in some quarters, said that the Commonwealth ought to explore relying on what the government may wish to consider seeing what could be done in reliance on 51(xx) as it stands—that is, the corporations power and the Constitution, as it stands—to pass laws relating to industrial relations.

I think it is worth pointing out that that is a very different issue to the reference that we are talking about here. There never has been any proposal that this reference arrangement should deal with anything other than Corporations Law. Indeed, as you are aware, the Prime Minister has written and made that clear and the Attorney and Mr Hockey have made that clear. Indeed, on close analysis I think it is quite clear that what has been proposed here simply does not affect in any way, shape or form the kind of debate that you alluded to a moment ago. It is a reference about corporations, and the Commonwealth and the other parties have gone to the extent of working out provisions which can go into the agreement to make it absolutely and abundantly clear that this is not about IR or matters which are not within the spirit of the Corporations Law and a Corporations Law reference.

Senator GIBSON—Mr Faulkner, I wonder if you could outline for us your expectation of the sort of timetable for each of the states. You have mentioned that New South Wales has passed its Commonwealth powers act. It has been through the parliament and the bill, with regard to the referral of powers, is in process. Could you run through what has happened in the other states—apart from South Australia, which we have already discussed—so we have a better idea of what the expectation is of putting this all together?

Mr Faulkner—The first point to make is that the Commonwealth has identified a target date for commencement of the new scheme of 1 July this year. In order for that to happen, states will have all passed their reference legislation. The Commonwealth will, pursuant to that, have commenced its new law; and the consequential legislation and the other bits and pieces will have been passed by the Commonwealth, states and territories before 1 July. In a sense that is the answer to your question. That is the basis that we are working on. We have heard nothing to suggest that we cannot meet that. It is possible to meet that and that is what we are working towards. No state has indicated that that is not happening.

As you say, New South Wales has enacted its reference and has commenced its reference, and it was on the commencement of that reference on 4 April that the Commonwealth introduced its legislation, which it will not commence until other states have been given an opportunity to pass and enact their legislation. Victoria has introduced its reference, and it is now in the upper house, as I understand it. The other states are yet to introduce legislation, but the only thing I can say, I am afraid, is that we have been given some indications that they are working towards making sure it is done in time. I probably cannot add much more than that. As I say, the target is 1 July for commencement of the lot. That means everyone gets done what they need to get done

in time, and no state has indicated that that is not going to happen. The Commonwealth has been very clear that that is what we are all shooting for and, as far as we are concerned, things are on track. As to what may happen, I cannot give any guarantees, I am afraid, but that is what we are going for.

Senator COONEY—We have the very important sitting of parliament down here, of course, and then we have the budget. Then I think you have three weeks of parliament sitting after that, haven't you?

Mr Faulkner—It is tight. There is no doubt it is tight. The whole thing has been tight. We are not suggesting it will be without difficulty and a bit of angst, but it can be done and we are aiming to have it done. That is all I can say.

Senator COONEY—You said it is not really a policy issue; it is a matter of getting the law right so that there is proper underpinning for the legislation. Do you know whether there is any intent to consider a referendum in this area or have you not heard anything about that?

Mr Faulkner—Perhaps I could say one or two things just very briefly about that. Obviously when Hughes and Wakim happened, and there was this problem, the Commonwealth and the states were concerned to come up with a solution that was effective, that would work and would work in time and that was certain. There have been suggestions for constitutional amendments to fix the Hughes and Wakim problems. All I can say about that is that the Commonwealth's view has been that one needs only to look to the record of referendums in Australia to see what a difficult process that can be and, in the absence of absolute unanimity and very clear support across the board, you are very much facing an uphill battle; and there is the question of finding an appropriate time for a constitutional amendment. The reference approach was seen to be certain, a clear option and, ironically enough perhaps, one that probably gives a simpler result at the end of the day, depending on which form of constitutional amendment you might be talking about.

It is worth mentioning that there has been some tendency for some people to talk rather glibly about a constitutional amendment. There is a very real question about what kind of thing you think you have in mind when you are talking about a constitutional amendment. Are we talking about the Hughes problem? Are we talking about the Wakim problem? Are we talking about simply giving the Commonwealth the kind of power it would need to enact a Corporations Law under section 51 of the Constitution? There are very big and difficult and potentially controversial questions to be decided there before you get to square one. Even if you come up with an amendment that you think everyone is happy with, there is the very real difficulty of explaining what it is that you are on about to the Australian people in any lead-up to a referendum. That has loomed large in the thinking of the Commonwealth.

It is an expensive, uncertain, lengthy process which was seen to move down the list in terms of preferences. SCAG and MINCO opted for the reference as the best approach available at the moment. The Commonwealth has undertaken to consider constitutional possibilities and to prepare to look at what might be done in the longer term, but it was seen that there was a need to act quickly and reliably within the foreseeable future. That was not the referendum option, and that is why we are where we are.

Senator COONEY—When you talk about certainty in the area, is there anything to stop any of the states withdrawing their references?

Mr Faulkner—No. That is right. There is nothing to stop the states pulling out of the scheme as it stands at the moment.

Senator COONEY—Was it one or two of the states that were worried about the IR? I could not quite get what was said there.

Mr Faulkner—I think it is probably fair to say that there was some generalised concern at certain points about that. There was a degree of—

Senator CONROY—Angst I believe was the word you used.

Mr Faulkner—Yes, it was actually. There was quite some widespread angst at various times about the IR concern, although it had been there right from the start. I think it is fair to say that it is, for probably fairly obvious reasons, something which state governments are concerned about.

Senator COONEY—I suppose the state governments are a bit worried about an extended corporations power being given to the Commonwealth in the same way as they might be worried about the external affairs power being used to intrude on areas that were not normally regarded as Commonwealth areas. Did that come through at all in the discussions?

Mr Faulkner—I think I understand the point you are getting at there. I may have missed your point but, if I have understood it correctly, I think the point here is that there is certainly that concern about use of external affairs power. There are constitutional reference books written about that very point and the way it encroaches upon state areas and what might have been regarded as state responsibility. What we have here in the reference, though, is a very different kettle of fish. It is a very targeted kind of thing. It is a reference which enables the Commonwealth parliament to enact two bits of legislation. It then allows them to amend those two bits of legislation, and only those two bits of legislation, in relation to these particular areas—corporate regulation. The states have been concerned that you might try to push the envelope and somehow manipulate this thing into something which is a vehicle for IR regulation. That possibility has been raised.

Senator COONEY—It might not only be IR, though. You could say that all racing clubs must be incorporated—the Commonwealth will take over the Melbourne Cup, it might even take over the grand final. There are all sorts of dangers.

Mr Faulkner—That is right. Those points have been raised but, as I indicated before and I think Stephen may also have mentioned it, this is a very constrained legislative package. More importantly, perhaps, it is underpinned by the corporations agreement, which makes it absolutely clear what is on and what is not on, and the things you are talking about are not on.

Senator COONEY—The way you are putting it, you say, 'Look, that is not the intention of the Commonwealth to do this,' and it is not the intention of the Commonwealth to do that. I

suppose that, once the enactment is there, any lawyer worthy of his or her salt ought to be able to extend what was seen to be an extension but really it is not an extension—

Senator CONROY—It is activism.

Senator COONEY—Yes, activism. That is exactly right.

Mr Faulkner—I do take your point but I think one should not lose sight of the fact that what we are engaged in here, in order to get anywhere, is an exercise in, for want of a better expression, cooperative federalism. We are looking, that is to say the Commonwealth and the states, to make sure that we have a system that is capable of delivering a decent system of corporate regulation, notwithstanding the inherent constitutional limitations of the various constituent parts of the federation—a problem which is not unusual in the history of the federation. It requires cooperation and some degree of goodwill to get anywhere at all.

I can accept that a lawyer can front up in court and make an argument about anything that he or she wishes to and there is a feather to fly with in terms of some of the issues that you are raising, but significant measures have been taken in this package to make sure that that does not happen. On any reasonable view, I think the Commonwealth's view is that what we have is very safe. If the worst were to come—

Senator COONEY—Is it not always reasonable in its view?

Mr Faulkner—I am sure that is absolutely right, and their reasons will make that clear. One ought not forget also that if the worst were to come to the worst—and I must say it is almost unthinkable that it should—but if it were in theory to come to the worst—

Senator CONROY—That is what they said about Hughes and Wakim.

Mr Faulkner—That was a decision of the court but, if the states really did think that the new system was out of control and the Commonwealth was going off in directions which were never contemplated and that action needed to be taken and taken quickly, states could withdraw. They could do the sort of thing that they can do now, which is simply refuse to participate. That would be a terrible thing. It would be a momentous thing, it would be something which would require an immediate re-analysis of the entire situation but that would be the ultimate safety valve. It is simply not possible that the Commonwealth could ultimately run roughshod over the states in the way which is sometimes suggested.

Senator COONEY—I take your point there but, although this scheme is a great improvement, it has had to be done and it has had to be brought out in the way it has been brought out. Doesn't it still leave some uncertainty there? Have you thought about that?

Mr Faulkner—Yes, we have lost a lot of sleep over the uncertainty point. It has been at the heart of everything we have done and, as I have said, I think one can never stop a person with enough money engaging a lawyer to run any argument they want to. We have made sure that the things that we have done do not give rise to any significant risk, so far as we can see, at the end of the day. We are very confident about that. One cannot prevent people fronting up in court and arguing whatever they like. We could do nothing and they would still do that. Anything we do

would not prevent that possibility. Obviously I cannot rule that out, but we are very confident that what we have done is safe and does not simply substitute new problems for old problems.

Senator COONEY—Who have you put this in front of? Who has looked at all of this legislation? Has the legislation been looked at not only by government but also by people outside government who might be thought to know how it is going to work?

Mr Faulkner—The process has been developed over a year through the intergovernmental committees we have talked about, the state and Commonwealth solicitors-general, and the Parliamentary Counsels Committee—which includes parliamentary counsel from all states, territories and the Commonwealth. There has also been rather detailed scrutiny of the legislation by business groups, who presumably have an eye on the workability and effectiveness of this thing—precisely the kinds of issues that you are interested in here—and who have been, as far as I am aware, very supportive of the detail. There has been quite a bit of interchange and discussion at an informal level about how it works, and I am not aware of any significant concerns.

Senator COONEY—With the IR considerations being in the picture, have you allowed the ACTU to have a look at this?

Mr Faulkner—Not as such, no.

Senator COONEY—When you say not as such, what do you mean? Do you mean not at all?

Mr Faulkner—No, I am not aware of any involvement of the ACTU in relation to this.

Senator CONROY—Those would be the same business groups that supported, say, the GST legislation, which has been such a winner and has caused no problems?

Mr Faulkner—I simply do not know the position—

Senator COONEY—If the states have raised worries about industrial relations, and no doubt other—

Mr Faulkner—Which have been overcome, I should add.

Senator COONEY—Yes, but when you say they have been overcome, you have not run it, as I take it, before one of the most significant bodies that you perhaps should have run it before: that is, the ACTU.

Mr Yen—The outcome is that the states have included in their referral legislation a provision saying that the reference is not intended to support laws which have the main purpose of regulating industrial relations. It is not obvious what role the ACTU would have in the states saying to the Commonwealth that you cannot do something with their referred power.

Senator COONEY—What you have is a power that obviously people, the state governments, are concerned about. One of the issues that you specifically raised was a concern

about the IR power. I would have thought that a body that had a central concern about that might have had a look at it. If you are going to give people generally a look at it, why should you not do that?

Mr Faulkner—I would like to add to what I said before—that it obviously was not the case that the draft legislation was circulated for general consideration, that is true. The object here was, as I said before, to simply make sure that what we have now continues on a secure basis, whereas the basis is looking very shaky at the moment. The IR issue arose, not because the Commonwealth thought there was an issue at all, and there were concerns about it which were dealt with in the sense that we came up with mechanisms which everyone was happy with, and we addressed the concerns that were raised.

Senator COONEY—When you say everybody was happy, whom do you mean by 'everybody'? That is what I am trying to find out from you. Do you simply mean the state governments and the federal government were happy or do you mean something further than that?

Mr Faulkner—Where those parties indicated that they thought they had a concern—and obviously we were principally dealing with the states; it is a state-Commonwealth legislative process—the problems were identified, and the solution we came up with was sufficient to allow the process to move on. So from our point of view one did not need to go further because, as I have said, we are not looking here to create something which is not already in existence.

Senator COONEY—You keep coming back to that. What you are talking about when you say 'we' is a very confined group. Did the Law Council of Australia get a look at this?

Mr Faulkner—They have been involved.

Senator CONROY—They are all appearing next, Barney.

Senator COONEY—I know, but did they get a look at it before the—

Mr Faulkner—I could not say exactly when they first saw it, but I am aware that they have looked at the matter closely and have indicated their support for where we have ended up. Yes, I must apologise for using the word 'we'; it is very much a shorthand thing. I suppose the underlying notion has been to try to put what Australia has at the moment in terms of the Corporations Law—simply to move exactly what we have now, to the extent that we can, onto a secure foundation. There undoubtedly are views about whether one should try to use the Corporations Law in ways that were not foreseen earlier.

Senator COONEY—This is not a matter for you, but it just seems to me that we have a piece of legislation which is a considerable size, and you expect to put that through in three weeks of parliament following a budget.

Mr Faulkner—Yes.

Senator COONEY—It is a very interesting attitude to take to legislators.

Mr Yen—If we were proposing policy changes, I could understand there being a concern. From a legislative perspective there are no policy changes.

Senator COONEY—Can I keep disagreeing with you, for the record?

Mr Yen—Your point is a point about intergovernmental agreement.

Senator CONROY—It is a policy, though. It is a policy between governments. This federal government has changed the policy from the previous Corporations Law. By agreement it has changed the policy.

Mr Yen—Sorry, there has been no change to the legislation as such. The agreement was an agreement between governments, which does not bind any parliament in Australia. There are provisions in the agreement now that make that clear, and those provisions remain in the agreement. The increase of the votes from two to three in relation to matters of which there are votes merely regulates the relationship of the federal government with the other governments who are party to the agreement. The parliament is still free to exercise all its legislative powers, including the referred power.

Senator COONEY—You say that can be all done within three weeks of a parliamentary sitting when we are discussing budgets—

Mr Faulkner—You mean the passage of the legislation?

Senator COONEY—I just think 1 July is a fairly ambitious date.

Mr Faulkner—It is ambitious. This whole undertaking has been ambitious. We were obviously hoping to have things worked out before now, but it certainly is ambitious. When I said before that I certainly was in no position to give guarantees, that is quite obviously so. All I can say is that we are doing what we can on the technical side, and we have done what we can on the technical side, to make sure that there are no technical impediments to that happening. We are not aware of there being political impediments to that at this stage.

Senator COONEY—You are giving a personal guarantee that there are no problems in the legislation.

Senator CONROY—*Hansard* lasts forever.

Mr Faulkner—I suppose all I can say is that—

Senator COONEY—A solemn undertaking before a parliamentary committee that everything is right.

Mr Faulkner—I am extremely comfortable with the way the legislation looks.

Senator COONEY—You are giving a personal undertaking?

Senator CONROY—Famous last words.

Mr Faulkner—We have all lost a lot of sleep over this and we are very confident.

Senator CONROY—I have two very quick final questions. The referral is for five years: what is contemplated at the end of five years? Is there a referendum that will possibly be brought forward or will it just be rolled over?

Mr Faulkner—The references will be capable of extension by a proclamation, which is an executive act, as you know. It does not require any further legislation to keep the things going, if that were the decision ultimately taken. There is a provision in the corporations agreement which indicates that the operation of the new arrangements ought to be reviewed within three years or so—I think it is three years—with a view to deciding in a sense whether it is working well. If it is, presumably people will think that it is worth considering extending it. What was the second part of your question?

Senator CONROY—A referendum is not proposed at any stage?

Mr Faulkner—The Commonwealth has also indicated that the future options, constitutional options, need to be looked at and that that is going to happen. As I say, that is not a straightforward point and in many ways does not offer some of the advantages that this approach does. That is on the table too in that sense.

Senator CONROY—This bill only remedies the problems surrounding the cooperative system supporting the Corporations Law?

Mr Faulkner—That is right.

Senator CONROY—What about the other cooperative systems?

Mr Faulkner—There are other cooperative systems out there. To go back slightly and very briefly to the Hughes decision, it is the implications of the Hughes decision that are important, and it has implications for cooperative schemes other than the corporation scheme, which is arguably the biggest and most important of those schemes. On the question of what you do for a particular scheme in order to put it on a secure foundation for the future, the answer will vary depending very much on the particular scheme you are looking at. If it is a scheme the operation of which is significantly undermined by the decision—and there is apparently a political will to perhaps look to something like a reference to put it on a secure foundation for the future—then that would obviously be considered. To this point, that kind of approach had not really been discussed in relation to other schemes.

Within the Commonwealth there is a process being undertaken at the moment of finding out exactly how many of these schemes there are and what the problems really appear to be in practice, and what would appear to be a sensible thing to be done for the future to put them on a secure foundation. There is also consideration at the Commonwealth and state level about making sure that the validation action—that is to say, the action that covers things that have already been done up to the point at which the scheme in question is put on a secure foundation for the future—and the legislation that is drafted to do that validating process are capable of

being extended to cover other schemes as and when they are identified. That is the kind of thing that people have in mind. Some action, for example, in relation to the NCA—the National Crime Authority, which is a cooperative scheme—has already been taken in the Commonwealth parliament to provide solutions for the future, and there are other schemes that are being looked at. I need to be a bit careful about what I say here about those things.

Senator CONROY—They are being looked at?

Mr Faulkner—They are being looked at, yes.

Senator CONROY—Thank you.

CHAIRMAN—As there are no further questions, I thank the three of you for appearing before the committee and for the evidence you have given us this morning.

Mr Faulkner—Thank you very much.

Mr Yen—Thank you.

[10.18 a.m.]

BAXT, Professor Robert, Deputy Chairman, Business Law Section; and Deputy Chairman, Specialist Corporate Law Committee, Law Council of Australia

FARRELL, Ms Kathleen, Chairman, Corporations Law Committee, Law Council of Australia

MUNCHENBERG, Mr Steven John, Assistant Director, Business Council of Australia

CHAIRMAN—I welcome the representatives of the Coalition for Corporate Certainty, which includes the Australian Institute of Company Directors, the Business Council of Australia, the Institute of Chartered Accountants, the Investment and Financial Services Association, the Law Council of Australia and the Securities Institute of Australia. Do you have any comments to make about the capacity in which you are appearing?

Prof. Baxt—Good morning. I am a partner at Arthur Robinson and Hedderwicks, and I am here to represent the Australian Institute of Company Directors.

Ms Farrell—I am a consultant to Freehills, and I represent the Law Council of Australia.

Mr Munchenberg—I represent the Business Council of Australia.

CHAIRMAN—We have before us your submission, which we have numbered 2. Would you care to make an opening statement?

Prof. Baxt—I will start. We would like to thank the committee for giving us the opportunity to put in the submission on what we believe to be an extremely important and very unusual set of pieces of legislation to come before the federal parliament and, hopefully, all state parliaments very quickly. We would like to perhaps give you some very brief background as to why we are here in this rather unusual coalition, as we call ourselves, and answer any questions that you have in relation to our short submission. We submitted out submission in strong support of the initiatives that are being taken by the Commonwealth and state governments—in particular, the governments at least of New South Wales and Victoria initially, but we hope for all the governments—to ensure that this difficulty that has arisen in relation to our Corporations Law is overcome.

The coalition, which comprises six organisations, as you can see from the document, was put together very quickly as a result of concerns amongst business people, lawyers and other professionals, following first of all the decision of the High Court in Wakim and then later in Hughes. It has been quite remarkable how well the groups that are represented by this coalition have worked together in dealing with this particular issue.

We have been able to meet with representatives of all the governments involved, other than the territory governments, directly to talk about these issues and we have tried to, we believe, enhance and enrich the process which has led to this short submission going in to you. We

appreciate that there are tensions still between some of the state governments and the Commonwealth, or perhaps not the Commonwealth government itself but certain members. We believe that the plan that has been put forward is the best plan that can go forward at this time. There is a good deal of business uncertainty, there is legal and other professional uncertainty, as a result of the decisions in Wakim and Hughes. There are a group of judges there sitting in the Federal Court who have expertise and who are available to the business and legal communities to deal with issues that arise in evaluating questions that come up through the operation of the Corporations Law that, as a result of Wakim, have been unable basically to deal with these areas. We have worked as a group, together with the Commonwealth and the various state governments, in trying to help put this package together.

We obviously have not done the drafting but we have been consulted. Kathleen Farrell in particular has worked very closely with the parliamentary counsel in relation to some of these matters. We do not, as a group amongst ourselves, have the constitutional expertise but we have consulted within the organisations that we represent with persons who do have the constitutional expertise. We are confident that the scheme will work and that it will achieve the desired result in the short term.

You will see from our submission that we recognise that this is not the perfect solution. It is not a very neat solution. We hope that, as a result of these bills being passed and the system starting to work again, there will be some time for the exploration of a more permanent solution. I listened with interest to Senator Cooney's questions about the referenda approach and how that might proceed.

We hope that we can continue to work with, in particular, the South Australian government. Kathleen and others have met with members of the South Australian government to talk to them about the process, why we believe that this process is the proper way and the best way to deal with these issues, and trying to alleviate concerns that have been expressed. We will continue to do that. We want to continue to do that. We want to continue to work with the state governments—and, of course, we have also included the territory governments in our correspondence—to ensure that this system comes into effect and comes into effect fairly quickly. We think it is in Australia's financial and other interests for that to occur. That is all I want to say by way of introduction. I am not sure whether Kathleen or Steven would like to add something in relation to their perspectives on this.

Ms Farrell—I think there are a couple of things. I do not know that politicians always get the credit that they should when they do something good. When, in 1990 and 1991, the scheme for corporate law was put in place, the Commonwealth and the states created an incredibly valuable asset. I know that because I was a practising lawyer during that period in mergers and acquisitions. I did a lot of takeovers and prospectus work during that period. During 1992 and 1993 I was the national coordinator for enforcement at the ASC, so I have practised this law daily from both sides.

The degree to which business is facilitated by having this law in place cannot possibly be overrated. If you are a country as small as Australia is in the capital markets that it seeks to operate in, the law that you are dealing with that facilities business has to be as user friendly and simple and certain as it possibly can be. When the High Court came to make its decisions very recently, that was very disconcerting and it put in jeopardy that extremely valuable asset.

There is an example given in the paper of a large transaction undertaken in Europe, where the standing of an Australian listed corporation had to be questioned and qualified. I was actually the practitioner involved in doing that, and I cannot tell you how embarrassing it was to have to say to European and American lawyers that I did not know whether or not an Australian listed company actually had standing today. I could have spent a lot of money researching it and I might still have gotten it wrong in terms of what the High Court may subsequently have to say upon the issue. If you are a lawyer whose house is on the line when you are going to do that, then you are deliberately conservative. You have to be because that is how you assign the risk.

Once for Australia the degree of the problem that is presented by the uncertainty created by the High Court's decisions becomes generally known, then it is going to be very difficult for Australia to redeem that position, and we have been very concerned to have as many politicians as we can understand the degree of urgency that we think is attached to this. If the High Court comes down with another decision before we have a certain solution, it is going to be very difficult for business to continue to be conducted easily. You have to have employers to have an IR problem in the first place. Most of the employers in Australia are corporations, and we need to know that they are actually able to conduct business in order to continue to pay their employees. We have a first order issue in getting this right as quickly as we can.

On behalf of the Law Council, we have consulted with Dennis Rose, who is one of Australia's leading constitutional experts. He has said this legislation is not particularly pretty in some respects and it reflects the compromises that were made to get it to where it is today, but he believes that it is constitutionally sound to effect the textual referral of the Corporations Law to the Commonwealth and to confer then the power on the Commonwealth to amend that legislation down the track. That is what we are looking for. What we want, as soon as we can have it, is certainty that the Corporations Law is well founded and that Australian companies can do business secure in that knowledge.

We have spent a lot of time in talking to the various state governments, and I do not seek in any way to underrate the genuineness of the concerns that have been put forward. I must say that I am convinced that the balance that has been achieved in getting as certain legislation as we can so that citizens cannot easily challenge it—together with protections at a government level in the corporations agreement—is the best solution that we can get in the timeframe that we have. That people should talk subsequently about whether or not we should have a constitutional amendment or whether we should just roll this over as time goes by is a conversation we are definitely going to have. This is not the end of the story but, as I have said before, the urgent imperative is getting a solution now and getting as clean a solution in a legislative sense as we can. I think that is what this represents.

Mr Munchenberg—There is not a lot that I will add to the comments made by my colleagues, and you have already been extensively briefed by Treasury and Attorney-General's as well, but I would just like to emphasise from a purer business point of view, if you like, that we have a situation now where the High Court has made a number of decisions, quite legitimately, where it has created uncertainty. From a business perspective it is even harder to get a measure of how uncertain the uncertainty is but we have clearly got it. It is not serving anyone's interests. There has been a long and detailed and, judging by the media at times, rancorous negotiation between the Commonwealth and the states. A very workable solution has been reached, notwithstanding that South Australia and to some extent Tasmania still have

outstanding concerns. It is seen by us as an important but temporary resolution of the situation. It gives us a safety net that we can use to now move forward and try to work out a more permanent solution to these problems, but it is very important after a year of negotiation that this issue be resolved as quickly as it can be.

Senator CONROY—Ms Farrell, you mentioned compromises to get to where we are today. Are you referring to compromises that are in the existing legislation or compromises that were needed to get this bill from, if you like, 1990 to 2001?

Ms Farrell—When this coalition got together we thought about what the indicia were that we thought had to be satisfied, what the criteria were that had to be satisfied, in finding a solution. The first and foremost was obviously certainty. The second was a capacity to amend, because this world is changing at a pace by which any piece of business legislation is going to date relatively quickly. We would have preferred, for instance, that there was not a five-year sunset clause in it, but it is one of the compromises that we thought was an appropriate compromise to give the states some level of comfort that they could gracefully get out of this in the event that the Commonwealth was abusing its power. That it is hard for the states to get out of it gracefully I think is a good thing, because it means that people will not do things simply because they are irked that someone has offended them in some way or that you have one government that is a little bit more extreme than some of the others, on Left or Right or in any particular faction. I think there should be some degree of difficulty in getting out, but if the Commonwealth is abusing this power and it is a consensus view of a number of the states, then they can.

The other compromise in this is that it is not just a referral of the corporations power, which is where the Commonwealth originally would have wanted to go and in some ways has some intellectual attraction to it. It raised all the issues that amending the Constitution today raised, so the compromise of a textual amendment followed by a capacity to amend actually creates quite a bright line test about whether or not the Commonwealth is abusing its power, because there are parliamentary conventions about putting material into legislation that conforms with the title of the legislation. So if suddenly the Commonwealth is doing things that look like industrial relations, smell like industrial relations and walk like industrial relations and have very tenuous connection with the Corporations Law, it is going to be very obvious very quickly. I think that that is again a compromise and a safeguard that allows people to actually see in a very transparent way what is going on.

I do not think that either the states or the Commonwealth got everything that they wanted out of this and, frankly, business did not get everything that it wanted out of it either. As I said, for instance, we would have preferred that that five-year sunset clause was not there, but that this gives us a solution today and tells us that we have still got to keep talking is, I think, probably the best position that we can find ourselves in.

Senator CONROY—Professor Baxt, you do not have any evidence of the Commonwealth abusing its powers or any of its authorities, have you?

Prof. Baxt—No, but just picking up on Kathleen's point about compromise and the range of reforms that need to be achieved, for example, this legislation does not pick up the problems that still face the Commonwealth and the states in making national competition policy work, because you still have the problems of the Federal Court and other courts simply not having

powers in relation to competition cases—the access issues in relation to gas, et cetera. No, I am confident that the Commonwealth will not—

Senator CONROY—As long as we keep the ACCC away from it.

Prof. Baxt—It is not the ACCC so much; it is the interaction of the NCC and the ACCC and all of the state organisations. They need to work together. We really do have to have a consistent policy to the extent that we are getting more and more businesses that are operating throughout Australia. It is very sad, I think, that you get differences in approach that are not explained away by the fact that there are genuine state differences. These are differences that are not intellectually sound or in any way business sound. You create the problems that Steven talks about, that business finds these costs and burdens so unattractive that they say, 'Well, there may well be a better country to do business in than Australia.'

Senator CONROY—Mr Munchenberg, what will be the consequences for a state if it did not enter? Let us take South Australia as an example, and I am not trying to pick on South Australia. If South Australia did not want to actually enter or one of the states down the track does pull out, what are the actual real world consequences for business?

Mr Munchenberg—I would have to say that the consequences perhaps fall more heavily on the actual state that chooses to do that.

Senator CONROY—I am thinking in terms of the businesses in South Australia. What disadvantages are those businesses that are based in South Australia going to face?

Mr Munchenberg—The problem we are going to face is that we are going to have diverging corporations regulation. We have a state that either opts out of an evolving national scheme or indeed evolves in its own particular direction. In times when businesses are frantically looking to minimise their costs and to make sure that their management is as straightforward as possible, that would act as a disincentive for a business to engage in South Australia. A business would need to look at the additional costs of having to manage the increasingly different and potentially contradictory corporate regulation between the national scheme and the South Australian scheme.

Senator CONROY—Would you see that businesses would be scared off from going to South Australia, that they would leave South Australia?

Mr Munchenberg—It would potentially act as a disincentive. It is going to depend on any particular set of circumstances. It is going to be one of the things that they would have to weigh in the balance if you like. We have had detailed discussions with South Australia; we have met with the Attorney-General over there personally to discuss his concerns about the proposed referral. It is difficult to see how his concerns, while we understand them, outweigh the more significant concerns that there would be if South Australia were, for example, to go it alone—which we would certainly hope would not happen and ultimately would expect would not be the case.

Prof. Baxt—With regard to the railway that they hope to build from Adelaide to Darwin, quite clearly the effect would be that South Australia would be the odd state out and the

Northern Territory would be subject to the Commonwealth regime, and lenders and others involved would say, 'Hey, what's going on here? This is going to be an extra cost, an extra burden, we are just not going to—

Senator CONROY—You have pointed that out to them?

Prof. Baxt—I am sure that Kathleen and others have pointed that out to them.

Senator CONROY—That surely would bring them on board within seconds. It seems to me that it is so obvious that these are the problems that arise that one would have thought that they would be very clear in facing, and I am sure their investors will tell them that.

Ms Farrell—I am sure that the state will also be aware that, were it to withdraw, the funding that comes back from ASIC operations, the South Australian share, will no longer be coming back and they will have to fund corporate regulation in that state out of their own resources. That would be a really unfortunate outcome, because then you get very uneven enforcement of, in fact, probably ultimately very different laws, and that is very undesirable.

Senator CONROY—With regard to Tasmania, have you had any success? There are some reports that—

Prof. Baxt—We are still talking with them, and there is the Australian Institute of Company Directors national conference in Tasmania in May, and it is intended that a number of us are going to go down there to try to talk to them and work with them and try to hopefully allay their concerns.

Mr Munchenberg—The coalition will also, subsequent to that, be meeting with the Attorney-General as well to again sit down and discuss his concerns and his perspective and our perspective.

CHAIRMAN—What is your reaction to the other side of the argument that a state, South Australia for instance, could become the Delaware of Australia?

Ms Farrell—I think it will not for a couple of reasons. The first is that, once you are dealing with a trading and financial corporation, you are within the power of the Commonwealth to regulate the securities and the activities of those corporations. Any company who uses a telephone or the Internet to do business the corporation can attach in how it is operating. What you will really do to South Australian companies is force them in essence to a dual system of registration of some kind. It is very hard to see why you would do that. The most significant company that is still incorporated in South Australia—well at one level the most significant company—is Newscorp. It is a lot of the index in Australia but query whether or not a company like that is going to want to stay incorporated there in the event it is put to those sorts of difficulties. Every time they go to do business, every time they go to do an international transaction, they are going to require various sorts of opinions about their incorporation and capacity to do business—back in the bad old days where you needed more than one, just a whole range of administrative things that take time and cost money that are a pain in the neck that business will not want to engage in.

Mr Munchenberg—Can I just add, as a South Australian I honestly cannot see any advantage for our home state in opting out of the system.

Senator COONEY—I want to ask one thing about what Ms Farrell said when she said, 'Look, if South Australia does not come on board, there are all sorts of powers the Commonwealth has to force them to come in, such as the telegraph power.' That is how you described it anyhow.

Ms Farrell—It does not force South Australia to come in, but once you are dealing with the company that is incorporated and is trading in financial, it is automatically subject to Commonwealth law in that area.

Senator COONEY—Yes, so what you are doing is looking for other powers outside the corporations powers to affect it, to affect the way people might do business and in that way to affect the state. One of the problems with what has happened here is that this legislation has been brought in on the basis of very narrow consultation, and you outlined here today how business is affected, whereas corporations are now one of the great institutions of society generally. What we have had is a very narrow ticking off of the corporations legislation, and when I say 'narrow', the only people who have really looked at it are the governments and the Law Council of Australia, only from a business perspective, and there is a matter I think of some concern that legislation like this that has not been widely looked at. We are told it is just a technical matter but we have to rely on a very narrow band of evidence to accept that.

Ms Farrell—I understand the concern that you are raising and, if this legislation were not a textual referral, I think there would be scope for far greater concern and a requirement for much wider consultation about the implications of doing that, because it does raise all of the inconsistency issues and a whole range of other issues if you are talking about a subject matter referral. In dealing with a textual referral you are preserving the status quo and I guess, in balancing the range of possible woes and the advantages that are obtained out of that textual referral—and I can only speak for myself and for the Law Council, and the Law Council's submission is the Law Council's submission, not just a corporations committee of the Law Council's submission; the Law Council looks after a whole range of areas of interest—it is necessary to get this done as quickly as we can.

Senator COONEY—I see people wandering around with big volumes of this new legislation, so it is not as if what we are doing is giving the blessing to the legislation that is already there; we are introducing new legislation.

Ms Farrell—But the big volume is the same volume that is sitting on every desk today already.

Senator COONEY—Same words?

Ms Farrell—Yes, absent the application legislation. The complicated bit—

Senator COONEY—You are telling the committee that the actual drafting of the new volumes is identical to the old volumes?

Prof. Baxt—Except for, of course, the financial services legislation, which you are considering as well. That is not new in the sense that it just came out last week; it has been around for some time, variations on it. I think Kathleen Farrell, on behalf of the Law Council, is going to be making separate submissions in relation to that. But I think there has been time. I think there has been an unfortunate set of events last year which sort of threw the discussions and negotiations off the rails, which was disappointing, because things were moving along much more smoothly. There was some misunderstanding and, if we could all have our time back again, perhaps things might have been done a little differently and we would not be talking about it now; we would be talking about just the new financial services legislation. That is politics; that is the way politics will always operate, and there will be concerns and a bit of distrust here and a bit of concern there.

What we believe is that all of that is really just human nature. We are very convinced that the intention has always been to ensure that it is a very narrow compass that is involved and that those concerns expressed by South Australia and, to a lesser extent, Tasmania are not major concerns and that we will eventually be able to satisfy their concerns.

Senator COONEY—The people from the departments, from Treasury and Attorney-General's argued in terms of intention as well. People are saying to us, 'Look this is a real good deal. The intentions are very honourable.' I have no doubt that they are but, having been around a while, people like Senator Conroy look at me as though he wonders how I live. You see how legislation does sort of take on a new aspect as time goes by, and people look in there and the use of this power to take over the racing clubs or to do something with the IR or what have you. I am just a bit worried about the argument being done in terms of intention.

Ms Farrell—In the statute, in the referral legislation that New South Wales has enacted which is to be the pattern for all of the other states, there is no constraint on withdrawing that referral. So that if New South Wales at a later date or Victoria or South Australia or any other state for its own reasons determines that it should withdraw the referral—notwithstanding the provisions of the corporations agreement where it says it will wait for, I think, three other states to agree with it before it effects the referral—it can do that. It can do that as an essence and administrative action. It is not required to go through both houses of parliament under that legislation.

Senator COONEY—Does that not then leave the whole Corporations Law in a state of some considerable uncertainty?

Ms Farrell—We are not telling you that this solution is necessarily the best permanent solution. What we are telling you is that in our view there is a problem that requires as a matter of urgency to be fixed in terms of certainty. We think this legislation does that, and that is the priority. If what we did was, for instance, go to what is in essence the best solution, then, firstly, I do not know what that is today and, secondly, that is going to require a period of a lot of consultation. If what we do is wait for that to happen, then we are at serious risk that the High Court will come down with some further decision and in the meantime Australia's reputation is put at risk, because when lawyers have to give opinions in the context of international capital raisings, in the context of international borrowings, it has to tell the world that we do not know at the moment whether or not our companies are properly incorporated. I really do not know that we have the time. The real concern is—

Senator COONEY—The Law Council has a whole range of acknowledged skills available and knowledge: did you talk about this matter with the industrial relations section?

Ms Farrell—I do not know what internal processes the secretariat went through with that at all. The president of the Law Council has authorised it, and indeed a number of the committees of the Law Council, when this issue first was raised, commissioned a research paper about what the possible solutions were that looked at the pros and cons of each of them—not, I admit, focusing on the industrial relations power per se, because that got raised in another way, but out of the range of possible solutions, and in particular possible solutions that were available soon, this was the best of them.

Prof. Baxt—It is easy to be wise after the event, but there was a perception that Wakim was a one-off and could be dealt with constitutionally by a referendum giving the Federal Court back its powers. That was I think with respect a misreading of the way the High Court was going to deal with it. Then Hughes came along and suddenly it became serious. So the work that was being done on the basis of a referendum to deal with that issue became just inappropriate in the context of the timeframe that was facing business. What Kathleen is saying—and it is fairly important that we do not rest of on laurels in our view; I think this coalition has said this in its submission—is that once this package of legislation goes through we need to continue to work on this to create a better and more permanent solution.

Senator COONEY—Can I just say one other thing, Mr Chairman, just to embarrass somebody, because I do not think I will have the opportunity again. Can I just pay tribute to the contribution that Professor Baxt has made to the Corporations Law and corporations over the years. I think it has been quite magnificent and I would just like to make that observation.

Prof. Baxt—Thank you.

CHAIRMAN—That is accepted, Senator. If there are no further questions, can I thank each of you for appearing before the committee and for evidence you have given to us this morning. It has been very helpful. That concludes our hearing on the corporations reference.

Committee adjourned at 10.52 a.m.