



The Parliament of the Commonwealth of Australia

**REPORT INTO THE PROVISIONS OF**

- (a) **the *Corporations (Commonwealth Powers) Act 2001* (NSW); and**
- (b) **the *Corporations Bill 2001* and the *Australian Securities and Investments Commission Bill 2001***

**PARLIAMENTARY JOINT STATUTORY COMMITTEE ON  
CORPORATIONS AND SECURITIES**

**MAY 2001**

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## **MEMBERSHIP OF THE COMMITTEE**

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## DUTIES OF THE COMMITTEE

Section 243 of the *Australian Securities and Investments Commission Act 1989* sets out the duties of the Committee as follows:

The Parliamentary Committee's duties are:

- (a) to inquire into, and report to both Houses on:
  - (i) activities of the Commission or the Panel, or matters connected with such activities, to which, in the Parliamentary Committee's opinion, the Parliament's attention should be directed; or
  - (ii) the operation of any national scheme law, or of any other law of the Commonwealth, of a State or Territory or of a foreign country that appears to the Parliamentary Committee to affect significantly the operation of a national scheme law;
- (b) to examine each annual report that is prepared by a body established by this Act and of which a copy has been laid before a House, and to report to both Houses on matters that appear in, or arise out of, that annual report and to which, in the Parliamentary Committee's opinion, the Parliament's attention should be directed; and
- (c) to inquire into any question in connection with its duties that is referred to it by a House, and to report to that House on that question.



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# CHAPTER 1

## CONDUCT OF THE INQUIRY

1.1 On 5 April 2001 the Senate referred the following matter to the Committee for inquiry and report by 18 May 2001:

The provisions of:

- (a) the *Corporations (Commonwealth Powers) Act 2001* (NSW); and
- (b) the Corporations Bill 2001 and the Australian Securities and Investments Commission Bill 2001.

1.2 The Committee advertised the terms of reference of its inquiry and received four submissions, listed at Attachment A.

1.3 The Committee held a public hearing on the inquiry in Melbourne on Friday, 27 April 2001. Attachment B lists the witnesses who appeared before the Committee.

1.4 All submissions and the Hansard transcripts of the public hearings appear on the Committee's website at [www.aph.gov.au/corps\\_securities](http://www.aph.gov.au/corps_securities). Hard copies are available from the Committee staff on [corporations.joint@aph.gov.au](mailto:corporations.joint@aph.gov.au), telephone (02) 6277 3580 or facsimile (02) 6277 5809.

1.5 The Committee thanks the individuals and organisations who made submissions or who appeared as witnesses, all of whom did so at short notice. The Committee is grateful for this assistance.



## CHAPTER 2

### OVERVIEW AND BACKGROUND TO THE COMMONWEALTH BILLS

#### Overview of the Bills

2.1 The second reading speeches for the Corporations Bill 2001 and the Australian Securities and Investments Commission 2001 Bill set out the background and intention of the Bills. The speeches advise that the Bills form an historic package of legislation, which will finally deliver with certainty a single national regulatory regime for corporations. The Bills do this by addressing legal uncertainties resulting from recent decisions of the High Court, as part of a number of legislative and administrative measures under which the States will refer certain powers in relation to corporations to the Commonwealth.

2.2 The speeches emphasise that the High Court decisions are a serious threat to the national corporate regulation framework, which could prejudice the actual existence of companies established under the Corporations Law. These problems are particularly significant because they adversely affect attempts by Australia to position itself as a global financial centre and to project a message of regulatory leadership. However, the package of arrangements, of which the Bills form a key part, whereby the States will refer appropriate powers to the Commonwealth, should remedy uncertainties and enable the establishment of a scheme which is constitutionally sound.

#### Background to the Bills

2.3 The second reading speeches and the Explanatory Memoranda for the two Bills, together with material submitted to the Committee jointly by the Attorney-General's Department and the Treasury, explain the need for the legislation.

2.4 In 1982 the 'cooperative scheme' of corporate regulation replaced the haphazard uniform companies laws of the 1960s. This scheme represented a considerable advance but was deficient in that it had no proper structure of responsibility and accountability and lacked a national approach. The scheme failed to meet challenges resulting from corporate change and especially from the corporate misdeeds of the 1980s.

2.5 The *Corporations Act 1989* and the *Australian Securities Commission Act 1989* were intended to remedy these deficiencies, but several States successfully challenged the validity of some parts of the legislation in the High Court. These difficulties were addressed by a new scheme under which the Corporations Law was enacted as a law for the Australian Capital Territory, with each State and the Northern Territory applying the Corporations Law as a law of that jurisdiction. Consequently,

any changes to the Corporations Law applied automatically throughout Australia. The practical effect was a single national scheme.

2.6 The Australian Securities and Investments Commission (ASIC), a Commonwealth agency, administers the Corporations Law, with laws of each State and the Northern Territory applying relevant provisions of the Commonwealth Act. State laws also confer administrative functions under the Corporations Law on other Commonwealth bodies, such as the Director of Public Prosecutions and the Australian Federal Police. In addition, the Commonwealth, the States and the Northern Territory agreed on consultation and approval procedures as a recognition of the separation of legislative responsibility for company law. Litigation was facilitated by 'cross-vesting' provisions in the legislation, under which Federal courts could exercise relevant State jurisdiction and vice-versa.

### **High Court decisions**

2.7 The second reading speeches advise that it is widely acknowledged that the current Corporations Law scheme has provided the benefits of stability and uniformity to Australian business. However, two recent decisions by the High Court have raised concerns about the validity of the constitutional framework of that scheme.

2.8 The first case was *Re Wakim: ex parte McNally* (1999) 198 CLR 511, decided in June 1999, which invalidated cross-vesting legislation conferring State jurisdiction on Federal courts. This decision largely removed the capacity of the Federal Court to determine matters arising under the Corporations Laws of the States, which the second reading speech advises was a part of the scheme which had been working very well.

2.9 The second case was *The Queen v Hughes* (2000) 74 ALJR 802, which cast doubt on the ability of Commonwealth agencies to perform some functions under the Corporations Law. This is likely to affect adversely the administration and enforcement of the scheme, particularly the powers exercised by ASIC and the Commonwealth DPP. For instance, the registration and incorporation provisions of the Corporations Law may not be within Commonwealth legislative power. The *Hughes* decision, therefore, is a serious threat to the effective operation of the entire Corporations Law scheme which will, without remedial action, result in continuing legal challenges to regulatory and enforcement actions taken by Commonwealth officials and agencies.

### **New agreement with the States**

2.10 In order to overcome the problems raised by these two cases, a joint meeting of the Standing Committee of Attorneys-General and the Ministerial Council for Corporations agreed in principle in August 2000 that the States would refer to the Commonwealth sufficient legislative powers to enact the provisions of the Corporations Law and the *Australian Securities and Investments Commission Act 1989*. The States would also refer power to amend these provisions in relation to company formation and regulation and the regulation of financial services. However,

the parties could not agree on the details of the referral and it was not until 21 December 2000 that the Commonwealth, New South Wales and Victoria agreed on measures to rectify the constitutional flaws and resulting harmful uncertainty affecting the Corporations Law. On 23 March 2001 Queensland and Western Australia agreed in principle to refer the necessary powers. Negotiations are continuing to meet the concerns of South Australia and Tasmania but all States have agreed to work towards a commencement of the new Corporations Act on 1 July 2001.

2.11 The new agreement provides for enhanced State consultation and voting rights in relation to proposed amendments of corporate law. Where the approval of the Ministerial Council is required for an amendment to the Corporations Law, the required number of jurisdictions favourable to a proposed amendment will increase from 2 approvals to 3 approvals. The second reading speech advises that the new agreement should result in an effective, responsive and flexible regulatory framework, which will enhance Australia's position in the global marketplace. In particular, the new agreement will continue to ensure that different versions of the law will not operate in different jurisdictions and that divergent regimes will not develop.

2.12 The new agreement provides for other safeguards to meet State concerns about referral of powers to the Commonwealth. For instance, an objects clause in the State reference legislation will provide that referred powers are not intended to be used by the Commonwealth to regulate industrial relations.



## CHAPTER 3

### STRUCTURE OF THE LEGISLATION

#### **The Corporations Bill 2001**

3.1 As noted in the previous chapter, the Bill is one of a package of measures intended to respond to the decisions of the High Court in *Wakim* and *Hughes*. It will replace the present *Corporations Act 1989* and the Corporations Law of the ACT, and the corresponding legislation of the Northern Territory and those States which have referred appropriate powers to the Commonwealth, as the statutory basis for the formation of companies, corporate regulation and the regulation of the securities and futures industries. The Bill will, in effect, re-enact the existing Corporations Law as a Commonwealth Act in operation throughout Australia. It will, therefore, restore the regulatory framework which existed before *Wakim* and *Hughes*. The Bill does not involve substantial policy changes so this description of the structure of the Bill will, like the Explanatory Memorandum, concentrate on the differences between the Bill and the Corporations Law and on transitional provisions.

#### **From eight Corporations Laws to one *Corporations Act 2001***

3.2 The Bill includes the text of the present Corporations Law amended so that it may operate throughout Australia as a Commonwealth Act. Individual provisions of the Bill generally have the same numbers as the corresponding provisions of the Corporations Law. After enactment of the Act it will therefore be necessary to refer to the *Corporations Act 2001* instead of the Corporations Law. A company registered under the Bill will be incorporated in the jurisdiction of the Bill (all mainland Territories and all referring States) and taken to be registered in a particular referring State or Territory. Existing companies will be taken to be registered in the current State or Territory of registration.

#### **From the *Corporations Act 1989* to the *Corporations Act 2001***

3.3 The provisions of the Bill dealing with the jurisdiction and procedure of Courts are intended to produce the same outcomes as the corresponding provisions of the *Corporations Act 1989* and the State Corporations Acts before the *Wakim* decision.

#### **Effect on non-referring States**

3.4 The Bill has been drafted to operate effectively even if one or more States do not participate in the new arrangements or subsequently withdraw from them. However, there will be some significant consequences for non-referring States. For instance, the Bill provides that any company formed under a law of a non-referring

State must register with ASIC before carrying on business in a referring State or Territory. Also, significant provisions relating to securities and futures (such as access to the National Guarantee Fund and other fidelity funds) will not apply to non-referring States.

### **Transition from the present scheme to the new scheme**

3.5 The object of the transitional provisions in the Bill is to provide a seamless transition from the existing Corporations Law scheme to the new scheme based on the Bill. Individuals, bodies corporate and other bodies are, as far as possible, to be put in the same position as if their rights and liabilities under the present Corporations Law had arisen under the Bill.

### **The Australian Securities and Investments Commission Bill 2001**

3.6 Like the Corporations Bill 2001, this Bill is a core element in the Commonwealth package of bills responding to the High Court decisions in *Wakim* and *Hughes*. It will, in effect, re-enact the *Australian Securities and Investments Commission Act 1989* as a Commonwealth Act capable of operating throughout Australia, following suitable referral of State powers. The Bill will, for all practical purposes, restore the regulatory framework which existed before the High Court decisions. The Bill does not make any substantive policy changes.

3.7 The Bill expressly continues in existence the following bodies established under the 1989 Act:

- Australian Securities and Investments Commission
- Companies and Securities Advisory Committee
- Companies Auditors and Liquidators Disciplinary Board
- Financial Reporting Council
- Australian Accounting Standards Board
- Parliamentary Joint Committee on Corporations and Securities

3.8 The Bill provides a service obligation for ASIC, obliging it to establish an office, with its own Regional Commissioner, in every referring State and Territory, and to serve adequately the needs of business communities in those States and Territories.

3.9 The transitional provisions of the Bill, like those of the Corporations Bill 2001, are intended to ensure that individuals, bodies corporate and other bodies are, as far as possible, put in the same position that they would have been if their rights and liabilities under the present ASIC legislation had arisen under the new ASIC legislation.



**The Corporations (Commonwealth Powers) Act 2001 (NSW)**

3.10 The *Corporations (Commonwealth Powers) Act 2001* (NSW), which commenced on 4 April 2001, is the first State Act to refer powers relating to corporations and financial products and services to the Commonwealth, to enable the Commonwealth to make laws which apply in the State of their own force, instead of through the Corporations Law and other applied laws. The Act includes an objects clause excluding reliance on the reference by the Commonwealth to regulate industrial relations. The reference is in two parts, the first enabling the Commonwealth to enact the text of the Corporations Bill and the ASIC Bill and the second to ensure that those new Acts may be amended by the Commonwealth, as long as the amendments relate to the formation of corporations, corporate regulation, or the regulation of financial products and services. The reference is for five years, although this period may be extended by proclamation.



## CHAPTER 4

### VIEWS PUT TO THE COMMITTEE

#### Submissions received

4.1 The Committee received four submissions, the most detailed of which was a joint submission from the Attorney-General's Department and the Treasury. That submission naturally reflects the information in the second reading speech and the Explanatory Memorandum for each Bill, but gives more details of some significant aspects of the problem. The main points made by the submission are included in Chapters 2 and 3 of this Report.

#### The Coalition for Corporate Certainty

4.2 The Coalition for Corporate Certainty, which includes the organisations listed below, urged the Committee to support the earliest passage of the legislation:

- Australian Institute of Company Directors
- Business Council of Australia
- Institute of Chartered Accountants in Australia
- Investment & Financial Services Association
- Law Council of Australia
- Securities Institute of Australia

4.3 The Coalition advised that it was established by these business, financial and legal groups as a matter of urgency because they recognised that it was vital for all Australian governments to take immediate action to remedy the uncertain and confused status of the Corporations Law following recent decisions of the High Court. The Coalition believes strongly that a referral of powers as presently proposed is the best way of resolving these problems in the short term. The Coalition advised that the proposed arrangements reflected compromises between the States and the Commonwealth. In particular, the Coalition would have preferred that there was not a 5-year sunset clause in the State legislation.

4.4 Nevertheless, the Coalition believes that the legislation, supported by a revised Corporations Agreement between governments, sensibly balances State concerns over use of the referred power with certain and consistent national corporate regulation. The Coalition commends the passage of the *Corporations (Commonwealth Powers) Act 2001* (NSW). The Coalition considers that all the legislation at present

before the Committee is constitutionally valid and will withstand the inevitable legal challenges.

4.5 The Coalition further advised that, once the referral legislation is in operation and stability returned to corporate law, it may be appropriate for a more permanent and simpler legal and constitutional solution to be considered.

4.6 The Coalition analysed the present uncertainties in relation to the Corporations Law. It advised that since 1991 Australia has had an efficient and effective national scheme of corporate regulation, with substantial benefits for business activity and employment. Recent High Court decisions, however, have resulted not only in uncertainty and confusion, but also in the Federal Court, with all its expertise in the interpretation of the Corporations Law, not having the power to consider these matters. The Coalition suggests that unless Commonwealth and State governments act quickly, business will be adversely affected and Australia's international reputation irretrievably damaged. The High Court decisions raise doubts about such fundamental matters as the formation and operations of companies. These doubts are not merely theoretical, with major transactions being qualified due to the uncertainty.

4.7 The Coalition advises that there are particular concerns and dangers at the international level with, for instance, the status of a significant Australian listed entity involved in a major international transaction being qualified. This qualification caused surprise because an unqualified legal status is routine when dealing with companies incorporated in 'first world' economies. This has serious implications for Australia's international financial and legal reputation, with any damage being very difficult to repair.

4.8 The Coalition acknowledges the concerns of some States that the Commonwealth could misuse the referred powers to legislate in relation to, for instance, industrial relations or the environment. These concerns, however, should be addressed by the Corporations Agreement and not by exclusionary provisions in the referral legislation, which could result in legal uncertainty.

4.9 In response to questions the Coalition also advised that this legislation does not pick up the problems that still face the Commonwealth and the States in relation to other cooperative schemes, and in particular, the national competition policy.

4.10 The Coalition concluded by advising that, while it recognised that this was a complex matter, a considerable time had elapsed since the present difficulties with the national scheme of corporate regulation became apparent. The present Bills have resulted from a long negotiation process and are widely supported. The Bills should therefore be passed in time for the new regime to commence as scheduled on 1 July 2001.

**Mr Dominic Villa**

4.11 Mr Dominic Villa submitted that the solution to the problems resulting from the High Court cases was amendment of the Constitution by referendum, rather than the proposed referral of powers. The present Bills address the uncertainties in the Corporations Law, but not in other areas of cooperative schemes.

4.12 Mr Villa suggested that constitutional amendment could provide a valid legal basis not only for the Corporations Law, but also for other national schemes across diverse areas. These other schemes could then be implemented as necessary, without the legal and political uncertainties of a case by case referral of powers.

4.13 Mr Villa advised that two very minor amendments to the Constitution, expressly to deal with the problems in *Wakim* and *Hughes*, would validate current national schemes, not risk the further centralisation of power in Canberra, and allow the States to retain their present control over national schemes. An appropriate referendum should be held at the same time as the next Federal election.

**The Australian Society of Certified Practising Accountants  
The Institute of Chartered Accountants in Australia**

4.14 The CPA and the ICA submitted that they supported the referral scheme of the Act and the Bills and had no major issues to raise. However, they also advised that there had been only a limited time in which to consider the legislation.



## CHAPTER 5

### CONCLUSIONS AND RECOMMENDATIONS

#### Conclusions

5.1 The Committee accepts the main points made in the submissions by the Attorney-General's Department and the Treasury and by the Coalition for Corporate Certainty. In light of these submissions the Committee concludes that the present system of what is effectively a uniform national scheme of corporate regulation has been fundamentally compromised by the recent High Court decisions in *Wakim* and *Hughes*, resulting in uncertainty and confusion. As a consequence, business and investor confidence has been adversely affected, with the potential for considerable damage to the financial system and the economy.

5.2 In particular, the Committee accepts that this uncertainty is already causing problems for Australia's international financial and legal reputation. The Committee is deeply disturbed at the implications of these developments.

5.3 The Committee therefore concludes that urgent action is necessary to remedy the situation. In this context the Committee concludes that referral of certain State powers to the Commonwealth Parliament, as reflected in the NSW Act and the two Commonwealth Bills which are the subject of this Report, is the most practical and immediate option available. The Committee concludes that the package of arrangements of which this legislation is the core element will provide a national uniform scheme of corporate regulation which is constitutionally valid, thereby overcoming, as far as it is possible to do so, the difficulties caused by the High Court cases.

5.4 The Committee notes that the package of arrangements include a number of measures, some of which are in the legislation and others in the Corporations Agreement, intended to meet State concerns about possible ways in which the Commonwealth could exercise the referred powers. The Committee concludes that these are acceptable in the circumstances and should not be a reason to delay passage of the two Commonwealth Bills. In this context the Committee notes that the two Bills do not make any substantial policy changes to the Acts which they replace.

5.5 The Committee also notes that the package of arrangements will see an increase in the voting and consultation rights of the States, and that the referral of powers by the States is only for 5 years, unless extended by the States.

5.6 The Committee notes advice that a constitutional amendment would be the most effective and permanent way to deal with the problem. The Committee concludes, however, that while this may be theoretically the case, in practice it is not really an option in the short term when, as noted above, urgent action is needed. The

Committee therefore considers that the general package of measures to effect the referral of powers option should be implemented as soon as possible, following which the Commonwealth could, if it wished, proceed with its stated intention to consider a constitutional amendment by way of referendum.

5.7 The Committee notes that the *Corporations (Commonwealth Powers) Act 2001* (NSW) is the first State Act to refer powers to the Commonwealth under the terms of agreed arrangements between the Commonwealth and a State. The Committee believes that this was a most positive development and urges the other States to pass similar legislation as soon as practicable.

5.8 Finally, the Committee notes that the package of arrangements does not remedy all of the consequences arising from the decisions in *Re Wakim* and *The Queen v Hughes* for other national cooperative schemes. The Committee considers that the Commonwealth should examine these schemes and act to resolve the uncertainty surrounding the schemes.

### **Recommendations**

5.9 The Committee recommends that the Corporations Bill 2001 and the Australian Securities and Investments Commission Bill 2001 be passed without amendment as early as possible, with the intention of meeting the 1 July 2001 target for commencement of the new scheme.

Senator Grant Chapman  
**Chairman**



**SUPPLEMENTARY REMARKS BY**  
**SENATOR ANDREW MURRAY, AUSTRALIAN DEMOCRATS**

**May 2001**

**The provisions of:**

- (a) the *Corporations (Commonwealth Powers) Act 2001* (NSW); and**
- (b) the *Corporations Bill 2001* and the *Australian Securities and Investments Commission Bill 2001*,**

**The National Scheme**

The Australian Democrats supported the reference of these two Bills to the Committee because we agreed that confirmation was necessary that the approach being adopted to restore the Corporations Law national scheme was going to work.

I believe that the evidence received from the small number of witnesses that appeared and the submissions that were received confirms that the approach is going to work. It will restore a reasonable level of certainty into corporate regulation in this country, but the solution is by no means perfect.

It is not perfect from the perspective of the States who were, and I expect still are, concerned about any possible misuse of the powers referred by them to the Commonwealth. It is not perfect from the perspective of the Commonwealth. It is not perfect for business because of the continued ability of any of the States to withdraw from the arrangement at any time.

In the end the Australian constitution has made this revised scheme very difficult to achieve. The national interest requires that one day, probably in the far future, that the constitution be modernised and amended.

The sun sets on this arrangement in 5 years. I concur this is an unfortunate circumstance. However I expect that if this law is successfully implemented (with all States passing their referral legislation expeditiously) and is not successfully challenged in any litigation, we are entitled to expect that its life may be extended well beyond that timeframe.

The use of corporations (to use the constitutional phrasing) as 'vehicles' for engaging in trade and commerce has grown exponentially over recent decades and I would expect that trend to continue well into the future. The importance of corporations in Australians' lives and society has grown. For that reason I think that the robustness of the legislation that regulates corporations is critical to domestic and international confidence in the conduct of business in Australia. The Commonwealth government needs to commence work on a plan to obtain complete certainty in its power over corporations.

So far there has been very little political squabbling along party lines on this issue. Indeed, as I understand it, the five Labor States have agreed with the Federal Coalition government to arrive at the arrangement presently under consideration. I cannot see why that sort of cooperation would not be provided to come up with a more permanent constitutional solution.

Officers of the Attorney-General's department were a little critical of the suggestion that a constitutional amendment would fully respond to all concerns. Those witnesses seemed to be saying that such a suggestion ignored many complications which would surround such a solution.

Notwithstanding those concerns, I think it is incumbent on the government to fully explore that option. We recommend that the government commence work on a constitutional amendment to give the Commonwealth full power and certainty over the regulation of corporations.

Based on the government's commitment that the Corporations Bill contains no new policy measures or policy changes, and based on this Inquiry, I conclude that the legislation should be supported. It is urgent for the national scheme to be restored. This is however a relatively rushed process and as legislators, rewrites always make us nervous that Bills of this size might contain changes (which even if subtle) will affect the law.

### **Further Corporations Law Changes Needed**

Due to the need to expedite the passage of these bills, the Democrats do not intend to use the occasion of their presentation to the Senate to further pursue our agenda of amending the corporations law to address the democratisation of companies and to significantly improve corporate governance.

For some years now I have sought to amend Bills relating to the Corporations Law to at least give the option to shareholders of implementing methods of greater accountability into the corporate governance of public companies. So far those amendments have not been successful. I will continue to pursue those changes to empower shareholders and make directors more accountable and I expect an opportunity to do that with the passage of the Financial Services Reform Bill 2001.

There are other issues which require amendment, including provoking greater coverage of the remuneration disclosure clauses. Anyone who is interested in those matters we are concerned about should refer to previous minority reports of mine to this committee's reports, and to my speeches on the public record.

**Senator Andrew Murray**

## ATTACHMENT A

### LIST OF SUBMISSIONS

- 1 Attorney-General's Department  
The Treasury
- 2 Coalition for Corporate Certainty  
Comprising:  
Australian Institute of Company Directors  
Business Council of Australia  
Institute of Chartered Accountants in Australia  
Investment & Financial Services Association  
Law Council of Australia  
Securities Institute of Australia
- 3 Mr Dominic Villa
- 4 The Australian Society of Certified Practising Accountants  
The Institute of Chartered Accountants in Australia



## **ATTACHMENT B**

### **WITNESSES AT HEARINGS**

**Friday, 27 April 2001 - Melbourne**

#### **Departments of the Attorney-General and the Treasury**

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

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

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

#### **Coalition for Corporate Certainty**

Ms Kathleen Farrell

Mr Steven Munchenberg

Professor Bob Baxt