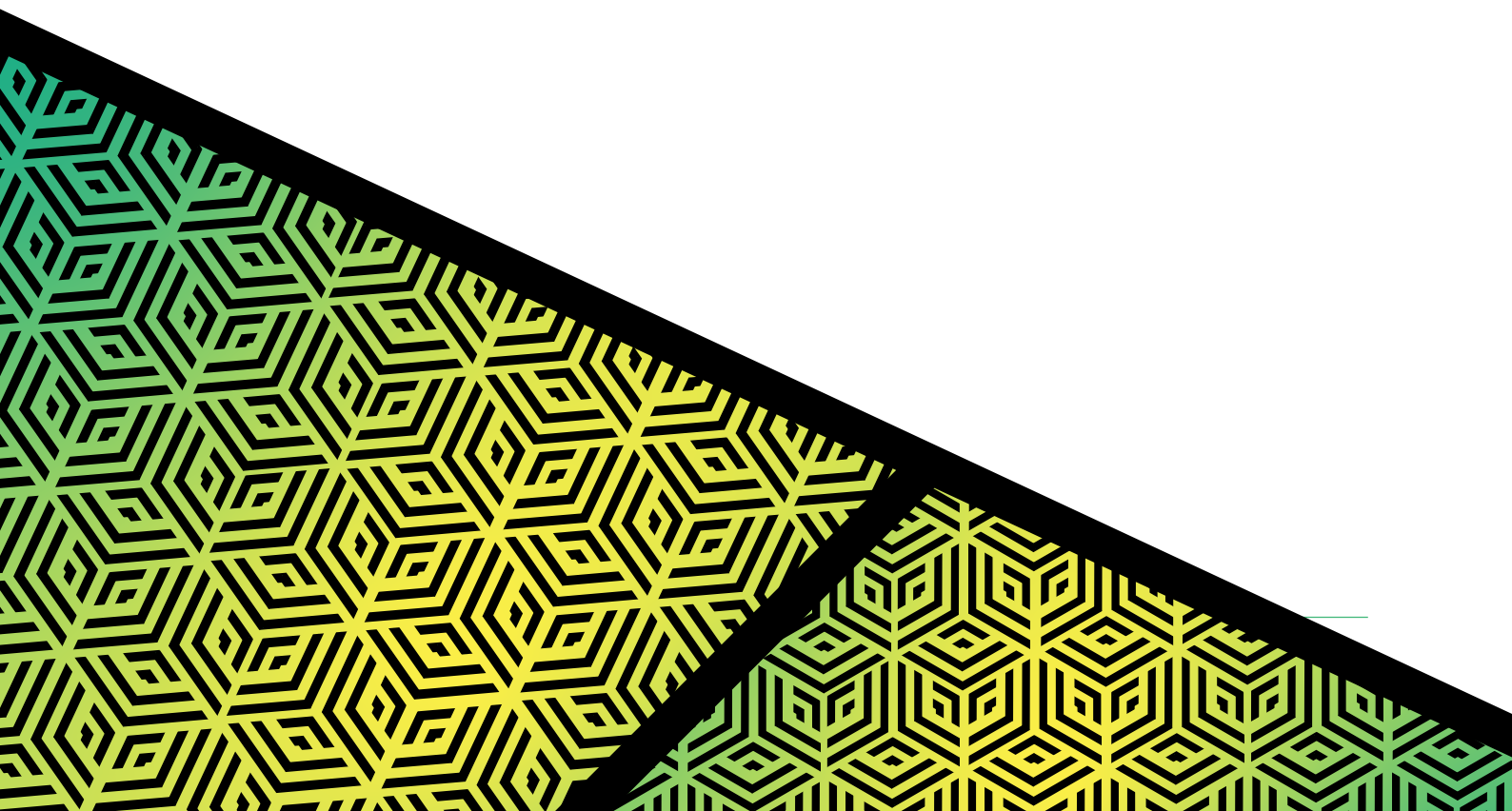
Australian Government
Australian Law Reform Commission

BACKGROUND PAPER FSL4

LEGISLATIVE FRAMEWORK FOR CORPORATIONS AND FINANCIAL SERVICES REGULATION

Historical Legislative Developments

November 2021



This summary of key historical legislative developments is the fourth in a series of background papers to be released by the Australian Law Reform Commission as part of its Review of the Legislative Framework for Corporations and Financial Services Regulation ('the Inquiry').

These background papers are intended to provide a high-level overview of topics of relevance to the Inquiry. Further background papers will be released throughout the duration of the Inquiry, addressing key principles and areas of research that underpin the development of recommendations.

The ALRC is required to publish three Interim Reports during the Inquiry, and these Reports will include specific questions and proposals for public comment. A formal call for submissions will be made on the release of each Interim Report. In the meantime, feedback on the background papers is welcome at any time by email to financial.services@alrc.gov.au.

The Australian Law Reform Commission (ALRC) was established on 1 January 1975 and operates in accordance with the *Australian Law Reform Commission Act 1996* (Cth).

The office of the ALRC is at Level 4, Harry Gibbs Commonwealth Law Courts Building, 119 North Quay, Brisbane QLD 4000.

Postal Address:

PO Box 12953,
George Street QLD 4003

Telephone: within Australia (07) 3248 1224

International: +61 7 3248 1224

Email: info@alrc.gov.au

Website: www.alrc.gov.au

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Introduction

1. This Background Paper summarises key historical legislative developments in two theoretically distinct (but overlapping) areas of regulation relevant to this Inquiry: corporations and financial services. The evolution of corporate and financial services regulation in Australia over time has resulted in greater uniformity across Australia, and increasing federalisation. Limits under the *Australian Constitution* on Commonwealth power to legislate in these areas has significantly shaped the development of the regulatory landscape in the time since Federation. A series of interconnecting reforms have drawn the regulation of these two areas closer together, with the effect that the central framework for financial services regulation is now found in Chapter 7 of the *Corporations Act 2001* (Cth) ('*Corporations Act*').

2. Australia's financial sector has itself evolved dramatically over the past several decades. The deregulation of the Australian economy in the 1980s, combined with a significant increase in global capital flowing into Australia, fostered innovation and greater competition in the financial services industry.[1] In 1996, Edey and Gray observed:

> Like other industrial countries, Australia has experienced major changes to its financial system in recent decades. The net effect has been a transformation in the Australian financial system from a relatively closed, oligopolistic structure in the 1950s and 1960s, based predominantly on traditional bank intermediation, to a more open and competitive system offering a much wider variety of services from an array of different providers. This process of financial system evolution, while driven largely by market forces, has been assisted by prevailing regulatory and supervisory arrangements.[2]

3. The current legislative framework for financial services was designed at the end of the 1990s, during which

> economic, political and social factors — including financial sector deregulation, changes to occupational superannuation arrangements, and expanding equity-market participation rates resulting from privatisations and demutualisations — had brought increasing numbers of middle-class households into the market for financial products and services. The funds management and financial advice industries began to grow. At the same time, innovation in the design of financial products resulted in the creation of new and sometimes complex financial arrangements and facilities, blurring the boundaries between traditional classes of products and creating opportunities for regulatory arbitrage.[3]

4. This Background Paper provides an overview of the structural development of Australian corporations and financial services regulation, from prior to Federation to the modern *Corporations Act.* It considers early steps toward greater uniformity, before moving to discuss the co-operative schemes and the development of national regulators. It then considers in detail the reforms that occurred in the 1990s and into the early 2000s, which resulted in the passage of the *Corporations Act* and the *Financial Services Reform Act 2001* (Cth) ('*FSR Act*'), before discussing the regulation of credit and its relationship with these regulatory frameworks. It concludes by discussing in detail the current

1 Stan Wallis et al, *Financial System Inquiry* (Final Report, 1997) 5. See also Malcolm Edey and Brian Gray, 'The Evolving Structure of the Australian Financial System' (Paper, Reserve Bank of Australia Conference, 1996).
2 Edey and Gray (n 1).
3 Pamela Hanrahan, 'Legal Framework for the Provision of Financial Advice and Sale of Financial Products to Australian Households' (Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry, Background Paper 7, April 2018) 5–6 (footnotes omitted).

constitutional framework that underpins these regulatory regimes and the implications of that framework, including its implications for potential reforms.

5. The history of corporate and financial services regulation in Australia is critical to the present Inquiry for several reasons. First, it explains how the architecture of Australian corporate and financial services regulation attained its current shape. While a focus on the constitutional framework may appear somewhat esoteric, it is critical to understanding the current legislative framework and why a number of problems that have been evident for decades seem to remain, notwithstanding frequent amendments to the *Corporations Act.* Secondly, it reveals the increasing scope of regulation over time, as the Australian economy has grown in sophistication. Thirdly, it reveals the parallel development and evolution of financial services regulation over the course of the twentieth century as the financial services industry itself continued to evolve and innovate.

6. The analysis in this Background Paper is particularly relevant to three topics to be discussed in Interim Report A in this Inquiry:

- the definition of 'financial product' which underpins the scope of application of key legislation;
- the 'freezing' of the *Acts Interpretation Act 1901* (Cth) ('*Acts Interpretation Act*') for the purposes of key legislation; and
- the location within the Commonwealth statute book of major aspects of corporate and financial services regulation (which will be the focus of Interim Report C in this Inquiry).

7. In this Background Paper, the terms 'corporate regulation', 'corporations legislation', and 'companies legislation' refer to the laws relating to the formation, conduct, governance, and dissolution of companies, and the regulation of companies. The words 'company' and 'corporation' are used interchangeably in this Paper. The terms 'financial services regulation' and 'financial services legislation' are used to refer to the laws relating to financial products and financial services and their regulation. There is some cross-over between both terms, particularly in relation to securities. The term 'financial regulation' is a broader term used to refer to the regulation of the financial system more broadly, including prudential regulation.

Australian company law prior to Federation

8. While companies have been part of commercial life in Australia since the earlier part of the nineteenth century,[4] it was not until after the passage of the *Companies Act 1862* (UK) that legislation providing for the incorporation of corporations was enacted.[5] Prior to this time, corporations in Australia existed either as unincorporated joint stock companies or as companies incorporated under specific legislation.[6] By 1874, most of the Australian colonies had adopted legislation based upon the 1862 Act in the UK,[7] with

4 Phillip Lipton, 'A History of Company Law in Colonial Australia: Economic Development and Legal Evolution' (2007) 31(3) *Melbourne University Law Review* 805, 808–14.
5 The *Companies Act 1862* (UK) was a 'consolidation of the companies legislation in England': Ibid 814.
6 Ibid 808–14.
7 With some innovations, although the extent of these is a matter of debate: Ibid 806–7, 818–22; Rob McQueen, 'Limited Liability Company Legislation — The Australian Experience' (1991) 1(1) *Australian Journal of Corporate Law* 22, 24; The Hon Justice RI Barrett, 'Towards Harmonised Company Legislation — "Are We There Yet"?' (2012) 40(2) *Federal Law Review* 141, 142.

Queensland the first to do so in 1863.[8] This legislation was not accompanied by dedicated regulatory structures,[9] with enforcement lying with either a Master of the Supreme Court, the Registrar-General or the Titles Office depending on the particular colony.[10]

9. Near the end of the nineteenth century, Victoria became a significant proponent of company law reform[11] following a mining boom in the 1880s and a market crash in the 1890s that culminated in the enactment of the *Companies Act 1896* (Vic).[12]

The constitutional framework established at Federation

10. In the debates leading up to Federation in 1901, there was discussion about whether the proposed Commonwealth Parliament should have broad powers over corporate regulation.[13] Ultimately, it was decided not to confer 'unqualified federal power' over corporate regulation on the Commonwealth Parliament.[14]

11. Instead, the 'corporations power' included in s 51(xx) of the *Australian Constitution* gave the Commonwealth Parliament power to make laws 'with respect to'

> foreign corporations, and trading or financial corporations formed within the limits of the Commonwealth.

12. At the time of Federation, commerce was generally state-centric, in that it was organised based upon the particular state in question. In the area of financial services, this was reflected in separate banks and insurers. Corporations incorporated in other states were treated as foreign corporations.[15] There was concern about granting broad power to the Commonwealth, and a desire on the part of the states to preserve the increasing revenue derived from corporations.[16] The constitutional framework that was adopted was the product of this context.

13. The scope of the corporations power has been the subject of significant litigation since Federation. Section 51(xx) is restricted to 'constitutional corporations': foreign,[17] trading[18] or financial[19] corporations. Critically, s 51(xx) does not confer power to legislate for the incorporation of corporations[20] — it is limited to constitutional corporations; namely, foreign corporations, and trading or financial corporations *formed* within the limits of the

8 Lipton (n 4) 814; Barrett (n 7) 141.
9 McQueen (n 7) 27.
10 Ibid 25.
11 Barrett (n 5) 144.
12 John Waugh, 'Company Law and the Crash of the 1890s in Victoria' (1992) 15(2) *UNSW Law Journal* 356, 356, 381, 386, 388; Lipton (n 4) 817, 824, 827.
13 Rob McQueen, 'An Examination of Australian Corporate Law and Regulation 1901-1961' (1992) 15(1) *UNSW Law Journal* 1, 10; Katie Watson, 'The Historical Development of Corporate Law in Australia: Politics and Possibilities' (2017) 32(2) *Australian Journal of Corporate Law* 122, 135–8.
14 McQueen (n 13) 10. For a discussion of the views at the Constitutional Convention as to the corporations power in s 51(xx) of the *Australian Constitution*, see Suzanne Corcoran, 'Corporate Law and the Australian Constitution: A History of Section 51(xx) of the Australian Constitution' (1994) 15(2) *The Journal of Legal History* 131, 135–7.
15 Barrett (n 7) 142–4.
16 McQueen (n 13) 10.
17 Corporations formed outside the limits of the Commonwealth: see *New South Wales v Commonwealth* (1990) 169 CLR 482, 498, 504; *Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia v Queensland Rail* (2015) 256 CLR 171.
18 Determined through consideration of whether the activities of a corporation involve 'trading': see *R v Trade Practices Tribunal; Ex parte St George County Council* (1974) 130 CLR 533; *R v Federal Court of Australia; Ex parte Western Australian National Football League (Inc)* (1979) 143 CLR 190; *Commonwealth v Tasmania* (1983) 158 CLR 1, 116–8, 179, 240, 293.
19 Corporations that engage in financial activities or which are intended to engage in such activities: see *State Superannuation Board v Trade Practices Commission* (1982) 150 CLR 282, 305.
20 See *New South Wales v Commonwealth* (n 17); *Huddart Parker and Co Pty Ltd v Moorehead* (1909) 8 CLR 330.

Commonwealth. The High Court of Australia ('High Court') has held that a law will be a law 'with respect to' a constitutional corporation if it makes the corporation an 'object of statutory command' through imposing a duty or liability or conferring a right or privilege on a constitutional corporation.[21]

14. Other heads of power relevant to the regulation of corporations and financial services include:

- s 51(i) — 'trade and commerce with other countries, and among the States';
- s 51(ii) — 'taxation; but so as not to discriminate between States or parts of States';
- s 51(v) — 'postal, telegraphic, telephonic, and other like services';
- s 51(xiii) — 'banking, other than State banking; also State banking extending beyond the limits of the State concerned, the incorporation of banks, and the issue of paper money';
- s 51(xiv) — 'insurance, other than State insurance; also State insurance extending beyond the limits of the State concerned';
- s 51(xvii) — 'bankruptcy and insolvency';
- s 51(xxxix) — 'matters incidental to the execution of any power vested by this Constitution in the Parliament or in either House thereof, or in the Government of the Commonwealth, or in the Federal Judicature, or in any department or officer of the Commonwealth';[22] and
- s 122 — 'The Parliament may make laws for the government of any territory surrendered by any State to and accepted by the Commonwealth, or of any territory placed by the Queen under the authority of and accepted by the Commonwealth, or otherwise acquired by the Commonwealth, and may allow the representation of such territory in either House of the Parliament to the extent and on the terms which it thinks fit'.

15. As a consequence, no comprehensive standalone Commonwealth companies legislation was passed in the years following Federation.

The Uniform Companies Acts

16. Following Federation, Victoria continued to be the most innovative Australian jurisdiction in terms of corporate law reform. A series of *Companies Acts* were passed in Victoria in 1910, 1915, 1929 and 1938.[23]

17. In 1958, the *Companies Act 1958* (Vic) was enacted. It contained a number of provisions that were 'innovative, progressive and in some cases controversial',[24] including the introduction of statutory directors' duties. The resultant 'great disparity' between company law in Victoria and other states and territories[25] coincided with an appetite for greater uniformity in company law across the different Australian jurisdictions.

21 *New South Wales v Commonwealth* (2006) 229 CLR 1 [179]–[181].
22 For example, the establishment of the now-defunct Australian Coastal Shipping Commission, a Commonwealth statutory corporation, was held to be incidental to the execution of powers conferred by ss 51(i) and 98 of the *Australian Constitution*: *Australian Coastal Shipping Commission v O'Reilly* (1962) 107 CLR 46, 54.
23 Barrett (n 7) 145.
24 Ibid 148.
25 HAJ Ford, 'Uniform Companies Legislation' (1962) 4(2) *University of Queensland Law Journal* 133, 134.

18. Nonetheless, following unsuccessful referenda in 1913 and 1919,[26] and Commonwealth reticence to enact a federal statute under existing heads of power,[27] the 'attainment of a uniform company statute … awaited the securing of agreement by various States and Territories to enact parallel legislation'.[28] While there was a recognition of the benefits of uniformity, there remained an inability to achieve this unless the states and territories themselves took action.

19. Legislation based on a draft Bill prepared following meetings between Commonwealth, state, and territory governments was enacted between 1961 and 1963.[29] While a 'remarkable achievement',[30] from the 'very beginning, there was only partial uniformity' as the legislation of each jurisdiction was 'not in fact identical'.[31]

20. Legislative changes following the recommendations of the Eggleston Committee in 1967 lessened the uniformity between the different jurisdictions. Further divergence came with enactment of the Securities Industry Acts in 1970. In Dr Austin's view, the fact the Uniform Companies Acts could not achieve total uniformity 'signalled the impossibility of national uniformity as long as each State was separately in charge of its law reform agenda'.[32]

Corporate and securities regulation in the 1970s

21. The work of the Eggleston Committee, together with allegations of misconduct during the minerals and markets boom of 1969–70, led New South Wales, Victoria, Western Australia and Queensland to enact the Securities Industry Acts.[33] The first of these was the *Securities Industry Act 1970* (NSW).[34] These Acts were 'not identical and this lack of consistency was criticised by the Rae Committee',[35] which had been set up to investigate the events of the minerals and markets boom. Revised legislation, marked by greater uniformity, was enacted by these states in 1975.[36] Futures regulation came later in the decade, with the enactment of the *Futures Market Act 1979* (NSW).[37]

22. During this period the state and territory corporate regulators evolved into 'Commissioners for Corporate Affairs' or 'Corporate Affairs Commissions'.[38] These agencies remained state and territory-based. The Eggleston Committee had recommended the establishment of a national companies commission,[39] and recommendations for a federal securities regulator were again made in 1974 by the Rae Committee.[40]

26 Barrett (n 7) 147.
27 Ford (n 25) 134.
28 HAJ Ford, 'Uniform Companies Legislation: Its Effect in Victoria' (1962) 3(4) *Melbourne University Law Review* 461, 462. See also Barrett (n 7) 148–52.
29 Geoffrey Sawer, 'Federal-State Co-operation in Law Reform: Lessons of the Australian Uniform Companies Act' (1963) 4(2) *Melbourne University Law Review* 238, 238.
30 Ibid 239.
31 Barrett (n 7) 152. See also RP Austin, 'Corporate Law Reform: Some Reflections on the Reform Experience of the Last 30 Years' (Paper, Corporate Law Teachers Association Conference, 7–9 February 2021) 7.
32 Austin (n 31) 7.
33 Ashley Black and Pamela Hanrahan, *Securities and Financial Services Law* (LexisNexis Butterworths, 10th ed, 2021) [1.42].
34 Ibid.
35 Ibid. See also R Baxt, HAJ Ford and GJ Samuel, *An Introduction to the Securities Industry Acts* (Butterworths, 1977) 26.
36 Baxt, Ford and Samuel (n 35) 26; Black and Hanrahan (n 33) [1.42].
37 Black and Hanrahan (n 33) [1.44]. Before this, futures were regulated through self-regulation of members of the exchange: see Remo Giuffre, 'Regulation of the Commodity Futures Market in Australia' (1982) 5(1) *UNSW Law Journal* 170, 174.
38 HAJ Ford, RP Austin and IM Ramsay, *Ford's Principles of Corporations Law* (Butterworths, 9th ed, 1999) [2.180].
39 Bernard Mees and Ian Ramsay, 'Corporate Regulators in Australia (1961–2000): From Companies' Registrars to ASIC' (2008) 43(3) *Australian Journal of Corporate Law* 212, 215.
40 Ibid 217.

23. The Whitlam Government had attempted to achieve uniformity in regulation through its Corporations and Securities Industry Bill and National Companies Bill, but neither of these were enacted before the dismissal of the Prime Minister in 1975.[41]

24. The governments of New South Wales, Victoria and Queensland did, however, come together in 1974 to form the Interstate Corporate Affairs Commission ('ICAC'). Despite this platform for cooperation between these states in relation to corporate regulation, regulatory powers remained vested in state corporate affairs commissions.[42] In the view of Mees and Ramsay, 'ICAC was misbegotten … and born largely powerless'.[43]

The advent of co-operative legislative schemes

The first co-operative scheme

25. In December 1978, an agreement was reached between the Commonwealth and the states and territories to establish a co-operative scheme for corporations and securities legislation. To implement this agreement, the Commonwealth and the states passed mirroring legislation,[44] leading to a Companies Code in each state that was consistent with the Commonwealth legislation.[45] This legislation 'was essentially a consolidation of the earlier companies legislation with some reforms drawn from the National Companies Bill'.[46]

26. This first co-operative scheme also included the enactment of the *Securities Industry Act 1980* (Cth), which was subsequently applied by state and territory legislation. This resulted in a series of Securities Industry Codes.[47] The Securities Industry Codes regulated the formation and operation of stock exchanges, the licensing and conduct of securities dealers and investment advisers, and imposed prohibitions on market misconduct.[48] Other aspects of securities regulation, such as the regulation of disclosure on public offerings, was found in the Companies Codes.[49] These Codes were followed by the *Futures Industry Act 1986* (Cth),[50] with mirroring state and territory Futures Industry Codes.[51]

27. By the latter part of the 1980s, there was a harmonised complex of statutory regimes, based upon regulation of companies, securities and futures. This coincided with the formation of the ASX in 1987, following a merger of separate state stock exchanges.[52]

28. Under the *Securities Industry Act 1980* (Cth), the definition of 'securities' included: products such as debentures, stocks, shares, bonds or notes; options contracts within the scope of the legislation; and prescribed interests. The definition of 'securities' did not include bills of exchange, futures contracts, promissory notes, or certificates of deposit

41 Ford, Austin and Ramsay (n 38) [2.190].
42 Mees and Ramsay (n 39) 216.
43 Ibid.
44 The Commonwealth legislation consisted of the *Companies Act 1981* (Cth) and the *Companies (Acquisition of Shares) Act 1981* (Cth), which were passed as laws of the Australian Capital Territory under s 122 of the *Australian Constitution*.
45 Ford, Austin and Ramsay (n 38) [2.210].
46 Ibid.
47 Robert Baxt, Christopher Maxwell and Selwyn Bajada, *Stock Markets and the Securities Industry: Law and Practice* (Butterworths, 3rd ed, 1988) 24.
48 R Baxt et al, *An Introduction to the Securities Industry Codes* (Butterworths, 2nd ed, 1982) 3.
49 Ibid 2.
50 Black and Hanrahan (n 33) [1.44].
51 Paul Latimer, 'Futures Market Regulation in Australia: What is it Trying to Achieve?' (1990) 13(2) *UNSW Law Journal* 370, 371.
52 Mees and Ramsay (n 39) 236.

issued by a bank, such that the regulatory regime did not apply to those products.[53] The *Futures Industry Act 1986* (Cth) adopted a 'wide definition' of a 'futures contract'.[54] It included commodities and adjustment agreements, together with futures options and prescribed exchange-traded options. Interest and currency swaps, and forward exchange and interest rate contracts to which banks or merchant banks were a party, were excluded, however.[55]

29. Perhaps most significantly, the co-operative scheme also established the National Companies and Securities Commission ('NCSC'), which was supervised by a council of ministers.[56] It was established by the *National Companies and Securities Commission Act 1979* (Cth) and 'for the most part acted as a national regulator of takeovers and markets'.[57] However, its investigative and enforcement powers were limited[58] and many routine functions of the NCSC were delegated to state regulators, which continued to operate.[59] Mees and Ramsay describe the NCSC as 'very much an expanded ICAC, rather than a fully national body'.[60] The Hon Justice Barrett has described the NCSC as follows:

> This was, in concept and on paper, a truly national regulator. But the state agencies continued and many of the functions of the national body were performed by those agencies as delegates under a structure that proved unwieldy and produced dispute and friction about demarcation and administrative matters.[61]

30. The NCSC's role in relation to broader securities and financial services regulation did expand with the economic reforms that occurred later in the 1980s, following the Hawke Government's adoption of the recommendations of the Campbell Committee. The Campbell Committee had been established by the predecessor Fraser Government, and tasked with an inquiry into the Australian financial system as regulated by the co-operative scheme.[62]

31. The Insurance and Superannuation Commission was also established in 1987.[63] Insurance, other than State insurance, had been regulated by Commonwealth legislation for some time through laws passed under s 51(xiv) of the *Australian Constitution*.[64] At the time the Commission was established, relevant legislation included:

- the *Insurance Act 1973* (Cth) and *Life Insurance Act 1945* (Cth), which regulated 'entrance into the insurance industry';[65] and
- the *Insurance (Agents and Brokers) Act 1984* (Cth), which regulated insurance intermediaries.

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53 *Securities Industry Act 1980* (Cth) s 4(1).
54 Explanatory Memorandum, Futures Industry Bill 1986 (Cth) [12].
55 *Futures Industry Act 1986* (Cth) s 4.
56 Ford, Austin and Ramsay (n 38) [2.210].
57 Black and Hanrahan (n 33) [1.47].
58 Mees and Ramsay (n 39) 227–8.
59 Ford, Austin and Ramsay (n 38) [2.210].
60 Mees and Ramsay (n 39) 227.
61 Barrett (n 7) 157.
62 Mees and Ramsay (n 39) 231.
63 Ibid 236.
64 Frank Marks and Audrey Balla, *Guidebook to Insurance Law in Australia* (CCH Australia, 3rd ed, 1988) 4–5.
65 Ibid. The *Life Insurance Act 1945* (Cth) was later replaced by the *Life Insurance Act 1995* (Cth). Insurance contracts were, and continue to be, governed by the *Insurance Contracts Act 1984* (Cth) and *Marine Insurance Act 1909* (Cth).

The Corporations Law

32. In 1988, following pressures on the existing co-operative scheme during the 1980s,[66] the Joint Select Committee on Corporations recommended that the Commonwealth enact 'comprehensive legislation covering company law, takeovers, and the securities and futures industries'.[67] The Hawke Government, believing that such legislation was likely to be constitutional,[68] enacted the *Corporations Act 1989* (Cth), the *Close Corporations Act 1989* (Cth), and the *Australian Securities Commission Act 1989* (Cth).

33. New South Wales, South Australia, and Western Australia challenged the constitutionality of the 1989 legislation. In *New South Wales v Commonwealth* ('the *Incorporation Case*'),[69] the High Court held that s 51(xx) of the *Australian Constitution* does not empower the Commonwealth Parliament to legislate for the incorporation of corporations. The Hon Justice Black and Professor Hanrahan have observed that the effect of that decision was that 'comprehensive nationwide companies and securities legislation was impossible without co-operation between the Commonwealth and the states'.[70]

34. The *Incorporation Case* led to an agreement between the Commonwealth and the states and territories reached in 1990 at Alice Springs. This established a new co-operative scheme, whereby the 1989 legislation was amended by the *Corporations Amendment Act 1990* (Cth) such that it applied in the Australian Capital Territory, with the states and Northern Territory then enacting legislation applying the 1989 legislation 'as if it were a law of the Commonwealth' so as to form what appeared to be a single national Corporations Law.[71]

35. As Austin explains, the new co-operative scheme:

> again [relied] on State as well as Commonwealth legislative power, but the new scheme would seek to clothe the regulatory system with Commonwealth features, including a truly national Commission, cross-vested jurisdiction for the Federal Court, and Commonwealth administrative law.[72]

36. A significant feature of the new scheme was the creation of the Australian Securities Commission ('ASC'),[73] the predecessor to the Australian Securities and Investments Commission ('ASIC'). For the first time, it was the sole regulator — it did not operate in conjunction with state and territory regulators,[74] and so could establish consistency nationally in its approach to regulation.[75] Among other developments, the ASC established a 'national companies database',[76] conducted a number of significant investigations, and placed a 'markedly new emphasis … on consumer protection and lodgement compliance'.[77]

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66 Austin (n 31) 12.
67 Corcoran (n 14) 150.
68 Black and Hanrahan (n 33) [1.48].
69 *New South Wales v Commonwealth* (n 17).
70 Black and Hanrahan (n 33) [1.48].
71 Ibid. Although, 'there were really eight Corporations Laws in force in Australia, one for the Australian Capital Territory, one for each of the six states and one for the Northern Territory': Ibid [1.49].
72 Austin (n 31) 13.
73 For a history of the ASC, see Mees and Ramsay (n 39) 240–251.
74 Black and Hanrahan (n 33) [1.48].
75 Mees and Ramsay (n 39) 239.
76 Ibid 243.
77 Ibid 244.

37. Another novel aspect of the Corporations Law was its use of cross-vesting in an attempt to enable the Federal Court of Australia ('Federal Court') and state courts to determine matters under the Corporations Law.[78] The purported conferral of state jurisdiction on the Federal Court[79] would ultimately prove fatal to the Corporations Law scheme.

Securities and futures regulation under the Corporations Law

38. With the establishment of the Corporations Law, regulation of securities and futures markets (and related intermediaries) was brought fully within the omnibus statute for corporate regulation. Other financial products, such as superannuation and insurance, remained wholly outside these regulatory statutes.[80] Securities regulation was situated in Chapter 7 of the Corporations Law and futures regulation was found in Chapter 8. The regulatory regime that applied depended on whether a financial product came within the definition of 'securities' or a 'futures contract'. [81] The division between both concepts was similar to that achieved under the predecessor scheme.

39. As the Corporations Law continued to operate into the 1990s, however, the utility of this distinction between securities and futures regulation began to break down:

> The current regulation of securities and futures markets has not adequately accommodated market developments or financial innovation. The definition of 'futures contract' is widely acknowledged as unsatisfactory and the distinction between securities and futures is challenged by innovative financial products which exhibit characteristics of both types of instruments.[82]

The reforms of the 1990s

40. The 1990s were a pivotal decade for corporate and financial services regulation in Australia. The reforms of the 1990s occurred through two interconnected channels: first, the increasing federalisation of corporations and securities regulation, together with the establishment of ASIC; and secondly, the construction of the contemporary system of Australian financial regulation following the Financial System Inquiry chaired by Stan Wallis ('Wallis Inquiry'). The enactment of these reforms was affected by the constraints of the constitutional framework, and the need to overcome constitutional limits on Commonwealth legislative competence had a strong influence on the shape of the legislative architecture.

41. Reforms to the Corporations Law during the 1990s included:

- the *Corporations Legislation Amendment Act 1991* (Cth) (insider trading);
- the *Corporate Law Reform Act 1992* (Cth) (benefits to directors of public companies and related parties, voluntary administration, insolvent trading, and voidable transactions);
- the *Corporate Law Reform Act 1994* (Cth) (indemnification of directors and disclosure);

78 Black and Hanrahan (n 33) [1.50].
79 See Cheryl Saunders, 'In the Shadow of Re Wakim' (1999) 17(8) *Company and Securities Law Journal* 507, 507.
80 Department of the Treasury (Cth), *Financial Markets and Investment Products* (Corporate Law Economic Reform Program, Proposals for Reform: Paper No 6, 1997) 22.
81 See *Corporations Law* ss 72, 92.
82 Department of the Treasury (Cth) (n 80) 34.

- the *First Corporate Law Simplification Act 1995* (Cth) (simplified drafting, share buy-backs, proprietary companies, and simplified company registers);
- the *Company Law Review Act 1998* (Cth) (simplified drafting, incorporation, particular corporate structures, meetings, par value shares, and reductions in capital); and
- the *Managed Investments Act 1998* (Cth) (collective investment schemes).[83]

42. A particularly significant change was brought about by the *Financial Sector Reform (Amendments and Transitional Provisions) Act 1998* (Cth), which enacted significant consumer protection reforms. These are discussed in [57] below.

The role of law reform and advisory bodies

43. Corporate law reforms in the 1990s were marked by the significant role played by law reform and advisory bodies, both generalist and specialist.

44. The first of these was the Corporations and Securities Advisory Committee ('CASAC'). The original such body, the Companies and Securities Law Review Committee ('CSLRC') had been established in 1978 in the context of the first co-operative scheme.[84] Following the establishment of the Corporations Law, the CSLRC was eventually replaced by CASAC.[85]

45. In 2002, with the enactment of the *FSR Act*, CASAC became the Corporations and Markets Advisory Committee ('CAMAC').[86] It continued to produce a range of reports,[87] until it was defunded in 2014 and formally abolished in 2018.[88] Like its predecessor, CAMAC 'provided a source of independent advice to the responsible Minister on the administration of the relevant laws or changes to them'.[89] It focused on 'substantive questions of law'.[90]

46. While CASAC worked on substantive law reform in the 1990s, the Corporate Law Simplification Program, established within the Attorney-General's Department (Cth) was engaged in 'clarifying and simplifying the way the law was expressed'.[91]

47. The *First Corporate Law Simplification Act 1995* (Cth) was a product of the work of the Corporate Law Simplification Program.[92]

48. In 1996, the Australian Government replaced the Corporate Law Simplification Program with the Corporate Law Economic Reform Program ('CLERP'), which was overseen by the Department of the Treasury (Cth) ('Treasury').[93]

49. The ALRC also had a role in the corporate law reforms of the 1990s, collaborating with CASAC on the law reform report that led to the enactment of the *Managed Investments*

83 Ford, Austin and Ramsay (n 38) [2.291].
84 Ian Ramsay, 'A History of the Corporations and Markets Advisory Committee and Its Predecessors' in Pamela Hanrahan and Ashley Black (eds), *Contemporary Issues in Corporate and Competition Law: Essays in Honour of Professor Robert Baxt AO* (LexisNexis Butterworths, 2019) 56, 57.
85 Ibid 59.
86 Ibid 60.
87 See Ibid 69–70.
88 Ibid 67–69.
89 Ibid 60.
90 Austin (n 31) 15.
91 Ibid.
92 Ian Govey, 'Corporate Law Simplification Program: Progress to Date, Objectives, and Forward Plans' (Speech, Sydney, 28 March 1996). See also Explanatory Memorandum, First Corporate Law Simplification Bill 1995 (Cth) [1.3].
93 Austin (n 31) 15.

Act 1998 (Cth).[94] Corporate insolvency law reforms enacted in the 1990s were also the product of an ALRC report.[95]

The Wallis Inquiry

50. Concurrently with its reforms to corporate law, the Australian Government established the Wallis Inquiry in 1996. In establishing the Inquiry, the then-Treasurer, the Hon Peter Costello MP, explained:

> The Inquiry is charged with providing a stocktake of the results arising from the financial deregulation of the Australian financial system since the early 1980s. The forces driving further change will be analysed, in particular, technological development. Recommendations will be made on the nature of the regulatory arrangements that will best ensure an efficient, responsive, competitive and flexible financial system to underpin stronger economic performance, consistent with financial stability, prudence, integrity and fairness.[96]

51. By 1996, it had been observed that:

> Financial markets have been transformed over the past two decades by three key developments. Firstly, the dismantling of barriers to international capital flows and the process of globalisation have resulted in a massively increased volume of cross-border financial transactions. Secondly, the functional integration of hitherto discrete areas of financial activity has led to the emergence of financial conglomerates combining traditional banking with securities operations and other non-bank business. Finally, financial innovation has produced a vast new market in derivative products that simply did not exist 15 years ago.[97]

52. When it reported in 1997, the Wallis Inquiry made 115 recommendations. Among those most relevant for present purposes were recommendations:

- to establish a single Commonwealth agency for each of conduct regulation and prudential regulation in the financial system[98] (described by some commentators as a 'functionally-based model' of financial regulation, rather than an 'institutional' or 'integrated' model);[99]
- to impose prudential regulation on deposit taking, insurance, and superannuation;[100]
- to establish a single regulator for prudential regulation that is separate from the Reserve Bank of Australia,[101] with the Reserve Bank to retain responsibility for monetary policy, systemic stability, and payments system regulation;[102]
- to establish a single regulator for 'corporations, financial market integrity and consumer protection' through combining the functions of the Australian Securities Commission, the Insurance and Superannuation Commission and the Australian Payments System Council;[103]

94 Australian Law Reform Commission and Companies and Securities Advisory Committee, *Collective Investments: Other People's Money* (ALRC Report No 65, 1993). Both the ALRC and CASAC also collaborated on a report relating to superannuation: Australian Law Reform Commission and Companies and Securities Advisory Committee, *Collective Investments: Superannuation* (ALRC Report No 59, 1992).
95 Australian Law Reform Commission, *General Insolvency Inquiry* (Report No 45, 1988).
96 Wallis et al (n 1) vii.
97 Richard Dale, 'Regulating the New Financial Markets' (Paper, Reserve Bank of Australia Conference, 1996).
98 Wallis et al (n 1) recs 1, 31–2.
99 For a discussion of functionally-based, institutional, and integrated models, see Andrew Godwin and Ian Ramsay, 'Twin Peaks — The Legal and Regulatory Anatomy of Australia's System of Financial Regulation' (2015) 26(4) *Journal of Banking and Finance Law and Practice* 240, 240.
100 Wallis et al (n 1) rec 30.
101 Ibid recs 31–32. 31–2.
102 Ibid 26.
103 Ibid rec 1.

- that the single regulator for corporations, financial market integrity, and consumer protection 'should administer all consumer protection laws for financial services';[104]
- to adopt 'a single regime to license advisers providing investment advice and dealing in financial markets';[105]
- to introduce 'a single set of requirements for investment sales and advice';[106]
- to introduce 'consistent and comparable' disclosure requirements;[107]
- to 'replace existing separate *Corporations Law* regulation of securities and futures contracts' with 'a broad definition of "financial products" subject to generic requirements and supplemented by specific regulation for particular classes of products';[108] and
- that the states and territories should retain responsibility for consumer credit laws, subject to a review of the Uniform Consumer Credit Code after it had been in operation for two years.[109]

Implementation of Twin Peaks: The creation of APRA and ASIC

53. A central recommendation of the Wallis Inquiry was the separation of prudential and conduct regulation through the 'Twin Peaks' model.[110] The distinction between prudential and conduct regulation is significant. Prudential regulation is concerned with 'financial safety', while conduct regulation is concerned with 'the conduct and disclosure obligations of issuers and financial intermediaries, and the integrity of financial markets'.[111] Due to evolution in the concept of prudential regulation over time, however, there has been more of a blurring between the two forms of regulation.[112]

54. The Australian implementation of the model has been summarised by Dr Godwin, Professor Ramsay and Dr Schmulow as follows:

> The Twin Peaks model was pioneered in Australia following recommendations by the Wallis Inquiry, which was established in 1996 to review the financial system. The model separates financial regulation into two broad functions: market conduct regulation (which includes consumer protection) and prudential regulation. Each of these functions is vested in a separate regulator. In Australia, market conduct regulation is vested in the Australian Securities and Investments Commission (ASIC) and prudential regulation is vested in the Australian Prudential Regulation Authority (APRA). The central bank, the Reserve Bank of Australia (RBA), remains responsible for monetary policy and financial stability, including ensuring a safe and reliable payments system.[113]

104 Ibid rec 3.
105 Ibid rec 13.
106 Ibid rec 15.
107 Ibid rec 8.
108 Ibid rec 19.
109 Ibid rec 6. See further [90] below.
110 For a description of the Wallis Inquiry's consideration of the Twin Peaks model, see Michael Taylor, 'The Three Episodes of Twin Peaks' in Andrew Godwin and Andrew Schmulow (eds), *The Cambridge Handbook of Twin Peaks Financial Regulation* (Cambridge University Press, 2021) 17, 17, 24.
111 Pamela Hanrahan, 'Twin Peaks after Hayne: Tensions and Trade-Offs in Regulatory Architecture' (2019) 13(2–3) *Law and Financial Markets Review* 124, 124.
112 See Gail Pearson, 'Twin Peaks and Boiling Frogs: Consumer Protection in One or Two Ponds?' in Andrew Godwin and Andrew Schmulow (eds), *The Cambridge Handbook of Twin Peaks Financial Regulation* (Cambridge University Press, 2021) 305; M Scott Donald, 'Regulating Superannuation in the Shadows of the Twin Peaks' (2020) 31(1) *Journal of Banking and Finance Law and Practice* 51; Cindy Davies, Samuel Walpole and Gail Pearson, 'Australia's Licensing Regimes for Financial Services, Credit, and Superannuation: Three Tracks toward the Twin Peaks' (2021) 38(5) *Company and Securities Law Journal* 332.
113 Andrew Godwin, Ian Ramsay and Andrew Schmulow, 'Twin Peaks in Australia: The Never-Ending Trek?' in Andrew Godwin and Andrew Schmulow (eds), *The Cambridge Handbook of Twin Peaks Financial Regulation* (Cambridge University Press, 2021) 71, 71.

55. Under the model, the Australian Competition and Consumer Commission ('ACCC') retained responsibility for the regulation of competition in the financial system.[114] A key aspect of the reforms involved the abolition of the Insurance and Superannuation Commission and its functions being split between the Australian Prudential Regulatory Authority ('APRA') and ASIC.

56. APRA was established by the *Australian Prudential Regulatory Authority Act 1998* (Cth). Dr Carmichael has explained that:

> In total, nine existing agencies were combined to form APRA. At APRA's core were the banking regulators previously located in the RBA, and the insurance and pension regulators previously located in the Insurance and Superannuation Commission (ISC).[115]

57. Through the enactment of the *Financial Sector Reform (Amendments and Transitional Provisions) Act 1998* (Cth), the ASC was transformed into ASIC through amendments to the *Australian Securities Commission Act 1989* (Cth). The Act itself was renamed the *Australian Securities and Investments Commission Act 1989* (Cth). As the then-Treasurer explained in his Second Reading Speech:

> Responsibility for consumer protection and market integrity vested in a single entity will enable ASIC to adopt a functional and objective-based regulatory approach, thereby promoting competitive neutrality and permitting better comparability by consumers of different financial products and services. The amalgamation of consumer protection functions in a single regulator is supported by industry and consumer groups. There will, of course, be close co-operation between ASIC and the Australian Competition and Consumer Commission.
>
> The functions relating to insurance and superannuation were previously exercised by the Insurance and Superannuation Commissioner, a position which will be abolished with the commencement of this bill. The consumer protection functions relating to aspects of banking and the payments system were previously exercised by the Australian Payments System Council, which is also to be disbanded.[116]

58. Importantly, the reforms establishing APRA and ASIC did not effect significant change in the substantive law applying to the financial system. This was to come later through the work of CLERP.[117]

59. Implementing the 'Twin Peaks' model has not been without difficulties,[118] including in establishing boundaries between prudential and conduct regulation.[119] This has been particularly acute in relation to superannuation.[120]

Reforms to consumer protection legislation

60. The establishment of ASIC as the single regulator for consumer protection in relation to financial services necessitated reforms to the federal consumer protection legislation. Prior to the transformation of the ASC into ASIC in 1998, the ACCC had enforced the applicable general consumer protection provisions of the *Trade Practices Act 1974* (Cth) in relation to financial products and services.

114 Jeffrey Carmichael, 'Reflections on Twenty Years of Regulation under Twin Peaks' in Andrew Godwin and Andrew Schmulow (eds), *The Cambridge Handbook of Twin Peaks Financial Regulation* (Cambridge University Press, 2021) 32, 35.
115 Ibid.
116 Commonwealth, *Parliamentary Debates*, House of Representatives, 26 March 1998, 1653 (The Hon Peter Costello MP).
117 Ibid.
118 See Carmichael (n 114) 39–44.
119 Ibid 50; Pearson (n 112).
120 See Donald (n 112); Davies, Walpole and Pearson (n 112) 336–40.

61. ASIC became responsible for the consumer protection provisions that were inserted into the *Australian Securities and Investments Commission Act 1989* (Cth) as Part 2 Div 2 of that Act.[121] The *Trade Practices Act 1974* (Cth) was amended to provide that the cognate consumer protection provisions it contained did not apply to a 'financial product' or 'financial service' within the meaning of the *Australian Securities and Investments Commission Act 1989* (Cth).[122]

62. The consumer protection provisions inserted into the *Australian Securities and Investments Commission Act 1989* (Cth) were carried over into Part 2 Div 2 of the *Australian and Investments Commission Act 2001* (Cth) ('*ASIC Act*') when it was enacted, and the provisions excluding financial products and services from the *Trade Practices Act 1974* (Cth) have been carried over into the *Australian Consumer Law*, contained in Schedule 2 to the *Competition and Consumer Act 2010* (Cth).[123]

Proposals for financial product and services regulatory reform — CLERP6

CLERP6 Proposals Paper

63. Following the Wallis Inquiry, CLERP was tasked with dealing with the Wallis Inquiry's recommendations relating to the substantive law governing the regulation of financial products and services.[124] In December 1997, CLERP released a Proposals Paper that aimed to 'identify the objectives of financial market regulation and propose a flexible, forward looking regulatory regime to satisfy those objectives'.[125]

64. In the Proposals Paper, CLERP observed that the 'current regulatory framework has been criticised for failing to keep pace with market developments and modern commercial practices'.[126] It also noted the change that had occurred in the financial system since the Corporations Law framework was developed, due to technological developments, globalisation, increased competition, and increased retail investment.[127]

65. CLERP indicated that its proposed new regulatory regime was based upon:

- providing comparable regulation of all financial products, including securities, derivatives, superannuation, life and general insurance and bank-deposit products;
- licensing financial markets and providing consistent and comparable regulation for similar financial products;
- licensing all financial intermediaries and imposing harmonised statutory obligations designed to protect retail investors; and
- ensuring that 'promoters' or issuers of financial products provide comprehensible disclosure documents which assist investors to make informed decisions.[128]

66. The Proposals Paper made nine proposals, including for the:

- introduction of a uniform and integrated regulatory framework for financial instruments to provide 'consistent regulation of functionally similar markets and products';[129]

121 Those provisions were inserted by the *Financial Sector Reform (Consequential Amendments) Act 1998* (Cth) sch 2.
122 Ibid sch 2 pt 2 items 26, 27.
123 *Competition and Consumer Act 2010* (Cth) s 131A.
124 Department of the Treasury (Cth) (n 80) 8.
125 Ibid.
126 Ibid 7.
127 Ibid.
128 Ibid 10.
129 Ibid Proposal 1.

- introduction of a new regulatory framework under which persons would be 'prohibited from conducting a market in financial instruments or providing financial intermediary services unless they hold an appropriately endorsed financial markets licence';[130]
- introduction of a requirement to hold a licence to operate a market;[131]
- introduction of a requirement to hold a licence to 'operate a clearing and settlement facility where the clearing and settlement services are not conducted by a licensed market operator';[132]
- introduction of a single licensing regime for 'financial market dealers and advisers';[133]
- imposition of statutory obligations on 'intermediaries in relation to their dealings with retail investors', including requirements relating to risks and benefits disclosure, pressure sales, and complaints and dispute resolution;[134]
- development of a 'consistent and comparable disclosure regime for all financial instruments';[135]
- harmonisation of the market misconduct provisions of the Corporations Law, including those relating to insider trading and market manipulation, together with harmonisation of the rules relating to misconduct by financial advisers and dealers;[136] and
- division of responsibility for components of the new regulatory regime between the Treasurer and the corporations and markets regulator (for which it provided two options).[137]

CLERP6 Consultation Paper

67. In March 1999, CLERP released a Consultation Paper that built upon the Proposals Paper from 1997, in preparation for the intended release of draft legislation in mid-1999.[138] The Consultation Paper addressed the uniform regulation of financial products, licensing of financial service providers, financial service provider conduct and disclosure, financial product disclosure, codes of conduct, licensing of financial product markets, licensing of clearing and settlement facilities, compensation arrangements, transfer of securities, and misconduct.[139]

68. Black and Hanrahan have identified 'two particular significant matters' addressed in the Consultation Paper:

> First, it proposed a broad, functional definition of 'financial product'. Second, it extended the reach of the reform proposals specifically into wholesale markets.[140]

69. The definition of 'financial product' that was put forward in the Consultation Paper involved a '[b]road functional definition outlining the key features of all financial products',

130 Ibid Proposal 2.
131 Ibid Proposal 3.
132 Ibid Proposal 4.
133 Ibid Proposal 5.
134 Ibid Proposal 6.
135 Ibid Proposal 7.
136 Ibid Proposal 8.
137 Ibid Proposal 9.
138 Department of the Treasury (Cth), *Financial Products, Service Providers and Markets — An Integrated Framework* (Corporate Law Economic Reform Program, Implementing CLERP 6: Consultation Paper, 1999) 1.
139 Ibid 3–7.
140 Black and Hanrahan (n 33) [1.58].

together with lists of specific inclusions and exclusions, and a power to include and exclude particular products by regulation.[141]

Corporate law reform — CLERP Act 1999 (Cth)

70. CLERP was far from limited to reform of the legislative framework for financial product and services regulation. It also sought to reform corporate regulation, resulting in the *Corporate Law Economic Reform Program Act 1999* (Cth) ('*CLERP Act*').[142] Austin has explained that:

> The CLERP Act restated and purportedly simplified the statutory provisions regarding the duties of directors and officers, related party transactions, oppression and derivative actions, takeovers, prospectuses and civil liability. The changes were substantive, particularly in the takeovers and prospectus areas. They were important particularly because, although there have been further statutory amendments, the shape of our modern statutory corporate law in these areas was basically settled by the CLERP Act.[143]

Constitutional impediments to federalisation

71. While significant reform to both corporate and financial regulation and the regulators had taken place over the course of the 1990s, the underlying framework remained that of the Corporations Law. This included the purported cross-vesting of state jurisdiction in the Federal Court.

72. Following nearly a century of steps designed to overcome constitutional limitations in order to achieve federalisation of corporations and financial services regulation, and with significant reforms to financial services regulation on the horizon, the question of the constitutionality of the Corporations Law once again came to the fore. As can be seen from the timeline set out in Appendix A, these constitutional issues arose during, and temporarily stalled, the reform process initiated by the Wallis Inquiry.

Constitutional challenges

Re Wakim

73. In an appeal arising from a bankruptcy matter, a majority of the High Court in *Re Wakim; Ex parte McNally*[144] ('*Re Wakim*') in June 1999 held that the *Australian Constitution* prohibited the conferral of state jurisdiction on a federal court. This brought about a 'demolition'[145] of this critical part of the cross-vesting scheme. The cross-vesting scheme upon which the Corporations Law relied was invalid.

R v Hughes

74. After *Re Wakim*, further 'constitutional uncertainty dogged' the Corporations Law.[146] R v *Hughes*, which was decided by the High Court in May 2000, concerned a challenge to whether it was constitutionally permissible for the Commonwealth Director of Public Prosecutions ('CDPP') to prosecute a person for an offence against the *Corporations Law*

141 Department of the Treasury (Cth) (n 138) 10.
142 For a summary of the changes made by the 'CLERP Act', see HAJ Ford, RP Austin and IM Ramsay, *An Introduction to the CLERP Act 1999: Australia's New Company Law* (Butterworths, 2000) [1.2].
143 Austin (n 31) 16.
144 *Re Wakim; Ex parte McNally* (1999) 198 CLR 511.
145 See The Hon Chief Justice JLB Allsop AO, *The Role and Future of the Federal Court within the Australian Judicial System* (Paper, 40th Anniversary of the Federal Court of Australia Conference, Sydney, 8 September 2017).
146 LexisNexis, *Australian Corporations Law Legislation*, 'Introduction to the 2001 National Corporations Legislation' [1.030].

(WA) in relation to offering overseas investment prescribed interests.[147] While the High Court upheld the federal law permitting the CDPP to perform functions conferred under West Australian law on the basis that it was supported by the trade and commerce and external affairs powers in ss 51(i) and (xxix) of the *Australian Constitution*,[148] there was resultant uncertainty as to the power of ASIC and the CDPP to exercise other powers under the Corporations Law enacted by each state.

75. Justice Kirby observed that:

> The accused's arguments thus present a challenge to the scheme adopted for the regulation of corporations in Australia, of which the *Corporations Law* is the centrepiece. Unless the offences provided in the *Corporations Law* are valid and may be the subject of prosecution in Western Australia by the Commonwealth DPP, the legislative and administrative scheme for the regulation of corporations in Australia would collapse. Without enforceability, the *Corporations Law* would be no more than a pious aspiration.[149]

76. Justice Kirby emphasised the 'national importance of the legislation under scrutiny'[150] and how the *Incorporation Case* had resulted in 'the grotesque complications that exist in the regulation of corporations under Australian law'.[151] His Honour also hoped that the High Court's decisions 'together with the great national importance of the subject matter of the legislation [would] encourage its early reconsideration and the adoption of a simpler constitutional foundation'.[152]

State referrals as a solution

77. Following *Re Wakim* and *R v Hughes*, the 'uncertainty over the constitutional validity of the Corporations Law was a matter of significant concern for the Australian business community'.[153]

78. Although the High Court decisions did not themselves invalidate the Corporations Law, many thought they raised sufficient doubt about its validity, such that a more certain constitutional footing was required.[154] Several options were put forward to address the uncertainty, including:

- constitutional amendment by way of a referendum to grant the Commonwealth the necessary power to legislate;
- the unilateral enactment of a Commonwealth corporations law in reliance on the Commonwealth's existing power; or
- a referral of 'matters' from the states to the Commonwealth pursuant to s 51(xxxvii) of the *Australian Constitution*, granting the Commonwealth power to legislate in relation to those matters.[155]

147 *R v Hughes* (2000) 202 CLR 535.
148 Ibid [42] (Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ).
149 Ibid [51] (Kirby J).
150 Ibid [53].
151 Ibid [58].
152 *R v Hughes* (n 147) [60].
153 Black and Hanrahan (n 33) [1.50].
154 Ian Govey and Hilary Manson, 'Measures to Address Wakim and Hughes: How the Reference of Powers Will Work' (2001) 12(4) *Public Law Review* 254, 257–8.
155 For a discussion of the relative merits of each of these options, see ibid 258–60.

79. On 25 August 2000, the states unanimously agreed to the Commonwealth's preferred option of a referral pursuant to s 51 (xxxvii) of the *Australian Constitution*.[156] Section 51(xxxvii) provides that the Commonwealth Parliament may legislate with respect to

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

80. The current constitutional framework produced by s 51(xxxvii) of the *Australian Constitution* and the state referrals, and the implications of that framework for potential reform of the corporations and financial services legislation, are discussed further below.[157]

The legislative framework for corporations and financial services

81. Following the state referrals, the *Corporations Act* and *ASIC Act* were enacted by the Commonwealth Parliament and assented to on 28 June 2001. They commenced operation on 15 July 2001. The *Corporations Act* therefore became the latest of several attempts to provide for uniform, national regulation of corporations by the Commonwealth.

82. Section 3 of the *Corporations Act* sets out the constitutional basis for the operation of the Act, which in summary is based on the matters referred by the states pursuant to s 51(xxxvii) of the *Australian Constitution* and any other power that the Commonwealth Parliament has under s 51 of the *Australian Constitution*. Section 4 of the *ASIC Act* performs the same role as s 3 of the *Corporations Act*.

Financial Services Reform Act 2001 (Cth)

83. Following the release of the CLERP6 Consultation Paper in March 1999,[158] an Exposure Draft of the Financial Services Reform Bill 2000 (Cth) ('FSR Bill') was released in February 2000. This was after *Re Wakim* but prior to the handing down of the decision in *R v Hughes*, the subsequent state referrals, and the passage of the *Corporations Act.*

84. The FSR Bill largely implemented the recommendations of the Wallis Inquiry and the proposals of CLERP6. While originally intended to amend the Corporations Law and the *Australian Securities and Investments Commission Act 1989* (Cth), the government subsequently delayed its introduction to Parliament as it considered the implications of *Re Wakim* and *R v Hughes*.[159]

156 The Hon Joe Hockey MP and Hon Daryl Williams MP, *Historic Agreement on Corporations Law* (Media Release, 25 August 2000).
157 See [106]–[181] below.
158 See [67] above.
159 Department of the Parliamentary Library (Cth), *Bills Digest* (Digest No 26 of 2001–02, 21 August 2001) 3; Revised Explanatory Memorandum, Financial Services Reform Bill 2001 (Cth) [2.22].

85. The Revised Explanatory Memorandum to the FSR Bill observed that it was 'the culmination of an extensive reform program examining current regulatory requirements applying to the financial services industry'.[160] The FSR Bill would implement the recommendations of the Wallis Inquiry and would

> put in place a competitively neutral regulatory system which benefits participants in the industry by providing more uniform regulation, reducing administrative and compliance costs, and removing unnecessary distinctions between products. In addition, it will give consumers a more consistent framework of consumer protection in which to make their financial decisions. The Bill will therefore facilitate innovation and promote business, while at the same time ensuring adequate levels of consumer protection and market integrity.[161]

86. The FSR Bill was ultimately enacted by the Commonwealth and was assented to on 27 September 2001. It took effect from 11 March 2002 as the *FSR Act*. The *FSR Act* introduced the current Chapter 7 regime into the *Corporations Act* and amended Part 2 Div 2 of the *ASIC Act* to, among other things, amend the defined terms 'financial product' and 'financial service'.

The current framework for financial services regulation

87. The current framework in Chapter 7 of the *Corporations Act* remains that introduced by the *FSR Act* in 2001. That said, Chapter 7 has evolved significantly over the past 20 years. Commonwealth regulation for consumer credit has also subsequently been introduced, as is discussed below.[162]

88. There have also been a number of significant inquiries that have influenced subsequent amendments to the legislative framework for the regulation of corporations and financial services in Australia. These include the work of the Ripoll Committee following the Global Financial Crisis,[163] the Murray Inquiry in 2014,[164] the ASIC Enforcement Review in 2017,[165] and, perhaps most significantly, the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry. One of the more significant regulatory developments arising out of that Royal Commission has been the changes to the regulation of superannuation.[166]

The (mostly) separate regulation of 'credit'

89. Statutory regulation of the provision of credit has existed for centuries.[167] Despite, or perhaps because of, this history of statutory regulation, credit in Australia has generally been regulated separately from other regulated products.

160 Revised Explanatory Memorandum, Financial Services Reform Bill 2001 (Cth) (n 149) [1.1].
161 Ibid [1.5].
162 See [96]–[99].
163 The Ripoll Report led to the introduction of the *Future of Financial Advice Reforms*: see Samuel Walpole, M Scott Donald and Rosemary Teele Langford, 'Regulating for Loyalty in the Financial Services Industry' (2021) 38(5) *Company and Securities Law Journal* 355, 362–4.
164 See Black and Hanrahan (n 33) [1.65].
165 See Ibid [1.66].
166 See Donald (n 112); Davies, Walpole and Pearson (n 112).
167 For discussion see, eg, The Hon Justice PDT Applegarth AM, *Credit and Unconscionability — The Rise and Fall of Statutes* (WA Lee Equity Lecture, 19 November 2020).

Uniform Consumer Credit Code

90. For most of the twentieth century, consumer credit regulation was subject to separate regulatory frameworks in each of the states and territories.[168] On 30 July 1993, the Australian states and territories agreed to implement uniform regulation of consumer credit.[169] This was given effect by each state and territory adopting, or enacting equivalent legislation, to the *Consumer Credit Act 1994* (Qld). This Act contained a code which was adopted nationally in 1994 as the Uniform Consumer Credit Code ('UCCC').[170] The UCCC commenced in all states and territories on 1 November 1996, with the exception of Tasmania where some providers were not regulated by the UCCC until March 1997.[171]

91. In 1997, the Wallis Inquiry considered whether responsibility for credit regulation, like other areas of financial services, should be transferred to the Commonwealth. The Wallis Inquiry noted its 'sympathy with calls to shift the jurisdiction of credit laws to the Commonwealth'[172] but, given the UCCC had only been in operation for five months, recommended that:

> The States and Territories should retain responsibility for the *Uniform Consumer Credit Code* (UCCC) and related laws and focus efforts on improving its cost effectiveness and nationwide uniformity. After it has operated for two years, the UCCC should be subject to a comprehensive and independent review to consider what improvements are necessary and whether a transfer to the Commonwealth would be appropriate.[173]

The exclusion of 'credit' from Chapter 7 of the Corporations Act

92. As discussed above,[174] in 1999, the CLERP6 Consultation Paper proposed a 'functional definition' of the term 'financial product'.[175] The definition it proposed included 'a facility or arrangement through which a person … obtains credit'.[176] The Consultation Paper noted that while that aspect of the definition would capture one-off credit arrangements, 'the licensing and conduct and disclosure provisions will not apply to such arrangements unless the service provider is in the business of providing, or advising on, credit'.[177]

93. In line with Recommendation 6 of the Wallis Inquiry, consumer credit covered by the UCCC was to be excluded from the definition of financial product and the regime outlined in the CLERP6 Consultation Paper.[178] While the UCCC only applied to credit for private, domestic or household purposes, the regime proposed in the CLERP6 Consultation Paper would capture all other credit, including credit provided for investment purposes.[179] A number of perceived advantages to bringing credit within the framework of the proposed regime for financial products and services were also set out in the CLERP6 Consultation Paper.[180]

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168 Wallis et al (n 1) 254.
169 See Australian Uniform Credit Laws Agreement (30 July 1993).
170 *Consumer Credit Act 1995* (ACT); *Consumer Credit (New South Wales) Act 1995* (NSW); *Consumer Credit (Northern Territory) Act 1995* (NT); *Consumer Credit (South Australia) Act 1995* (SA); *Consumer Credit (Tasmania) Act 1996* (Tas); *Consumer Credit (Victoria) Act 1995* (Vic); *Consumer Credit (Western Australia) Act 1995* (WA).
171 Wallis et al (n 1) 254.
172 Ibid 257.
173 Ibid rec 6.
174 See [68]–[69] above.
175 Department of the Treasury (Cth) (n 138) 10.
176 Ibid.
177 Ibid 12.
178 Ibid.
179 Department of the Treasury (Cth) (n 138).
180 Ibid 126.

94. Ultimately, this approach was not adopted when the *FSR Act* was enacted in 2001. Credit was excluded from the definition of 'financial product' inserted by the *FSR Act* for the purposes of Chapter 7 of the *Corporations Act*. According to the Treasury in 2000, credit was excluded from the *Corporations Act* definition of 'financial product' in light of concerns that:

- during consultation, submissions 'suggested that a compelling case had not been established' and opposed the application of the regime to non-UCCC credit; and
- creating a Commonwealth regime that regulated non-consumer credit alongside the state-based UCCC regime for consumer credit 'would create complexity and opportunities for regulatory arbitrage'.[181]

95. On the other hand, credit continued to be included within the definition of 'financial product' in the *ASIC Act.*[182] This meant that while credit products and related services were excluded from the licensing, conduct and disclosure regime contained in Chapter 7 of the *Corporations Act*, credit was subject to the consumer protection provisions in Part 2 Div 2 of the *ASIC Act*.

Enactment of the National Consumer Credit Protection Act 2009 (Cth)

96. Like the Uniform Companies Acts earlier in the century,[183] the UCCC ultimately came to be criticised for non-uniformity: 'Despite the purpose of the UCCC being to ensure consistent regulation across borders, there was, in reality, no guaranteed consistency between jurisdictions'.[184] This risk had been adverted to by the Wallis Inquiry.[185]

97. In May 2008, a Productivity Commission report recommended that regulatory responsibility for consumer credit should be transferred to the Commonwealth.[186] On 3 June 2008, the Treasury released a Green Paper that recorded that the Council of Australian Governments (COAG) had 'agreed in principle to the Commonwealth assuming responsibility for regulating mortgage credit and advice, including persons and corporations engaged in mortgage broking activities, for the purpose of protecting consumers.'[187] The Green Paper noted that the Commonwealth's 'preferred implementation strategy' was to 'examine whether it had constitutional power to regulate comprehensively in the area of mortgage credit and advice' and that if there were doubt, the Commonwealth would 'explore a referral of power to cover the shortfall in power.'[188]

98. On 3 July 2008, COAG agreed that the Commonwealth would take over responsibility for regulating, among other things, mortgage broking, margin lending, and non-deposit lending institutions and consumer credit.[189] It was anticipated that the new regime would 'introduce licensing, conduct, advice and disclosure requirements'.[190]

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181 Department of the Treasury (Cth), *Financial Services Reform Bill: Commentary on the Draft Provisions* (Corporate Law Economic Reform Program, 2000) [1.26].
182 *Australian Securities and Investments Commission Act 2001* (Cth) ss 12BAA, 12BAB.
183 See [16]–[20] above.
184 Department of Parliamentary Services (Cth), *Bills Digest* (Digest No 30 of 2009–10, 15 September 2009) 3.
185 Wallis et al (n 1) 254–5.
186 Productivity Commission, *Review of Australia's Consumer Policy Framework* (Inquiry Report No 45, 2008) rec 5.2.
187 Department of the Treasury (Cth), *Financial Services and Credit Reform: Improving, Simplifying and Standardising Financial Services and Credit Regulation* (Green Paper, 2008) 1.
188 Ibid 16.
189 Council of Australian Governments, *Communique 3 July 2008* (Attorney-General's Department (Cth)) 3.
190 Ibid.

99. The Commonwealth Parliament subsequently enacted the *National Consumer Credit Protection Act 2009* (Cth) ('*NCCP Act*'), which was assented to on 15 December 2009. Like the *Corporations Act*, the enactment of the *NCCP Act* depended on a referral of matters from the states to the Commonwealth, discussed in greater detail below.[191]

The continued separation of 'credit'

100. The enactment of the *NCCP Act* reflected a continued legislative preference for the separation of consumer credit regulation from the regulation of other financial products and services.

101. Although it was not canvassed as an option in the Green Paper, it is apparent that the Commonwealth considered incorporating credit regulation into the existing Chapter 7 regime in the *Corporations Act*.[192] From a Regulatory Impact Statement prepared in September 2008 and attached to the Explanatory Memorandum to the National Consumer Credit Protection Bill 2009 (Cth), it appears that incorporating credit into the Chapter 7 regime was at that time the option recommended to the Australian Government.[193] Some consultees also appeared to favour amalgamating credit regulation with the existing Chapter 7 regime. For example, MinterEllison, in a submission to the Senate Economics Legislation Committee's Inquiry into the National Consumer Credit Protection Bill 2009 (Cth), commented that:

> we are not convinced that there is sufficient justification to establish a separate licensing regime under a separate statute. Given the nature of the proposed credit licensing regime, there does not seem any reason not to regulate credit through the Australian financial services licence (AFSL) regime in Chapter 7 of the *Corporations Act 2001* (FSR).[194]

102. The *NCCP Act* is the product of the approach ultimately adopted by the Commonwealth. It does contain a number of provisions bespoke to consumer credit, such as the responsible lending laws. However, the overall structural similarity between the separate financial services and credit licensing regimes, despite some differences in obligations, has continued to be identified.[195] At the same time, other obligations that arise under the *NCCP Act*, such as the best interests obligations of mortgage brokers, appear similar to those of financial advisers under the financial services licensing regime but may be quite different in their actual content.[196]

Exceptions to separation

103. While the enactment of the *NCCP Act* maintained the separation of credit from the Chapter 7 regime, there have been exceptions.

104. The first exception relates to margin lending, which was brought within Chapter 7 of the *Corporations Act* with the enactment of the *Corporations Legislation Amendment (Financial Services Modernisation) Act 2009* (Cth), pursuant to the COAG Agreement

191 See [117]–[125] below.
192 Department of the Treasury (Cth), Submission No 56 to Senate Economics Legislation Committee, Parliament of Australia, *National Consumer Credit Protection Bill 2009 and Related Bills* (2009) 13; Explanatory Memorandum, National Consumer Credit Protection Bill 2009 (Cth) [9.94]–[9.114].
193 Explanatory Memorandum, National Consumer Credit Protection Bill 2009 (Cth)' (n 205) 322 and 390–391.
194 MinterEllison, Submission No 10 to Senate Economics Legislation Committee, Parliament of Australia, *National Consumer Credit Protection Bill 2009 and Related Bills* (17 July 2009) 1.
195 See Davies, Walpole and Pearson (n 112).
196 Walpole, Donald and Teele Langford (n 163) 366–70.

that also led to the enactment of the *NCCP Act*. Prior to this reform, margin lending was not a 'financial product' within the meaning of Chapter 7, and was not subject to ASIC supervision under that regime.[197] Nor was margin lending within the scope of the UCCC, although the consumer protection provisions of the *ASIC Act* did apply to it.[198] It was considered appropriate to bring margin lending within Chapter 7 as 'margin loans are a form of credit widely used to finance acquisitions of investment-related financial products'.[199]

105. The second exception relates to the design and distribution obligations that were inserted into the *Corporations Act* as Part 7.8A in April 2019, and product intervention powers granted to ASIC in Part 7.9A at the same time.[200] Both of these Parts apply to a 'financial product' within the meaning of Part 2 Div 2 of the *ASIC Act* (rather than Part 7.1 Div 3 of the *Corporations Act*), thus encompassing credit products. [201]

The current constitutional framework

106. As discussed above,[202] two decisions of the High Court raised issues that questioned the constitutional foundation of the national Corporations Law scheme.[203] To resolve this uncertainty, the states made a referral of matters to the Commonwealth pursuant to s 51(xxxvii) of the *Australian Constitution*. This section discusses that referral, the subsequent 'credit' referral in 2009–2010, and their implications.

107. When making a reference to the Commonwealth, the states refer 'matters' over which they have legislative capacity, and not state legislative power itself.[204] A state's parliament must pass legislation in order to refer matters to the Commonwealth.[205] A state may also 'adopt' a law pursuant to s 51(xxxvii) after a Commonwealth law has been passed.[206]

The corporations and financial services referral

108. The corporations and financial services referral was given effect by uniform legislation passed by each state parliament that commenced on various dates in 2001, collectively described as the 'Corporations Referral Legislation'.[207] Each state's legislation remains in force and each state is a 'referring State' as that term is defined in s 4 of the *Corporations Act*.

109. The operative provisions of the Corporations Referral Legislation make two references of matters to the Commonwealth. These are defined as the 'initial reference' and the 'amendment reference'.

197 Department of the Treasury (Cth), Supplementary Submission No 56 to Senate Economics Legislation Committee, Parliament of Australia *National Consumer Credit Protection Bill 2009 and Related Bills* (2009) 2.
198 Ibid.
199 Ibid 3.
200 See *Treasury Laws Amendment (Design and Distribution Obligations and Product Intervention Powers) Act 2019* (Cth).
201 *Corporations Act 2001* (Cth) ss 994A, 1023B.
202 See [73]–[76] above.
203 Govey and Manson (n 154) 255.
204 Andrew Lynch, 'After a Referral: The Amendment and Termination of Commonwealth Laws Relying on s 51(xxxvii)' (2010) 32(3) *Sydney Law Review* 363, 371.
205 *R v Public Vehicles Licensing Appeal Tribunal (Tas); Ex parte Australian National Airways Pty Ltd* (1964) 113 CLR 207, 226.
206 Lynch (n 216) 371.
207 *Corporations (Commonwealth Powers Act) 2001* (NSW); *Corporations (Commonwealth Powers Act) 2001* (Qld); *Corporations (Commonwealth Powers Act) 2001* (SA); *Corporations (Commonwealth Powers Act) 2001* (Tas); *Corporations (Commonwealth Powers Act) 2001* (Vic); *Corporations (Commonwealth Powers Act) 2001* (WA).

110. Under the initial reference, the following matters are referred to the Parliament of the Commonwealth (defined terms in **bold**):

> the matters to which the **referred provisions** relate, but only to the extent of making laws with respect to those matters by including the **referred provisions** in Acts enacted in the terms, or substantially in the terms, of the **tabled text** (including laws containing provisions that authorise the making of **Corporations instruments** that affect the operation of the **Corporations legislation**, otherwise than by **express amendment**).[208]

111. Under the amendment reference, the following matters are referred to the Parliament of the Commonwealth (defined terms in **bold**):

> the matters of the formation of corporations, corporate regulation and the regulation of financial products and services, but only to the extent of the making of laws with respect to those matters by making **express amendments** of the **Corporations legislation** (including laws inserting or amending provisions that authorise the making of **Corporations instruments** that affect the operation of the **Corporations legislation**, otherwise than by **express amendment**).[209]

112. The 'tabled text' upon which the references were premised was the text of the Corporations Bill 2001 (Cth) and Australian Securities and Investments Commission Bill 2001 (Cth) as tabled in the Legislative Assembly of New South Wales.

113. Other key terms in bold are defined as follows:

- 'referred provisions' means 'the tabled text to the extent to which that text deals with matters that are included in the legislative powers of the Parliament of the State';
- 'Corporations legislation' means 'Commonwealth Acts enacted in the terms, or substantially in the terms, of the tabled text as in force from time to time'; and
- 'express amendment' means:

  > the direct amendment of the text of the Corporations legislation (whether by insertion, omission, repeal, substitution or relocation of words or matter) by Commonwealth Acts, but does not include the enactment by a Commonwealth Act of a provision that has or will have substantive effect otherwise than as part of the text of the Corporations legislation.[210]

114. Both the initial reference and the amendment reference contemplate that delegated legislation ('Corporations instruments') may affect the operation of the referred Acts 'otherwise than by express amendment'. The phrase 'otherwise than by express amendment' recognises that delegated legislation may, for example, exempt persons from the operation of the legislation (or particular provisions of it) and 'notionally amend' the legislation so as to change its operation. The role of delegated legislation made under the *Corporations Act*, and in particular 'notional amendments' by delegated legislation, will be discussed in Interim Report A.

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208 *Corporations (Commonwealth Powers Act) 2001* (NSW) s 4(1)(a); *Corporations (Commonwealth Powers Act) 2001* (Qld) s 4(1)(a); *Corporations (Commonwealth Powers Act) 2001* (SA) s 4(1)(a); *Corporations (Commonwealth Powers Act) 2001* (Tas) s 5(1)(a); *Corporations (Commonwealth Powers Act) 2001* (Vic) s 4(1)(a); *Corporations (Commonwealth Powers Act) 2001* (WA) s 4(1)(a).

209 *Corporations (Commonwealth Powers Act) 2001* (NSW) s 4(1)(b); *Corporations (Commonwealth Powers Act) 2001* (Qld) s 4(1)(b); *Corporations (Commonwealth Powers Act) 2001* (SA) s 4(1)(b); *Corporations (Commonwealth Powers Act) 2001* (Tas) s 5(1)(b); *Corporations (Commonwealth Powers Act) 2001* (Vic) s 4(1)(b); *Corporations (Commonwealth Powers Act) 2001* (WA) s 4(1)(b).

210 *Corporations (Commonwealth Powers Act) 2001* (NSW) s 3; *Corporations (Commonwealth Powers Act) 2001* (Qld) s 3; *Corporations (Commonwealth Powers Act) 2001* (SA) s 3; *Corporations (Commonwealth Powers Act) 2001* (Tas) s 4; *Corporations (Commonwealth Powers Act) 2001* (Vic) s 3; *Corporations (Commonwealth Powers Act) 2001* (WA) s 3.

115. On 6 December 2002, the Commonwealth, states and Northern Territory entered into the Corporations Agreement 2002, which provides a framework for cooperation between the parties about the amendment and administration of the corporations and financial services legislation.[211]

116. The Corporations Agreement provides, for example, that the Commonwealth will not introduce a Bill to repeal or amend the *Corporations Act* (or other specified Acts, including the *ASIC Act*) without first consulting, and obtaining the approval of, the forum established under the Corporations Agreement. Clause 507 of the Corporations Agreement, however, sets out several broad exemptions to the consultation and approval processes, including amendments in respect of 'financial products and services' and any other subject-matters agreed by the forum. The Commonwealth is also required to release exposure draft legislation[212] and notify the forum about other legislation that would 'alter the effect, scope or operation' of the relevant Acts.[213]

The credit referral

117. The Commonwealth's legislative competence to enact the *NCCP Act* came about by a referral of power from the states and territories, similar to what had occurred before the *Corporations Act* was passed.

118. On 7 December 2009, the Commonwealth, states and territories entered into the National Credit Law Agreement 2009. Like the Corporations Agreement, the National Credit Law Agreement provides a framework for cooperation between the Commonwealth, states and territories for the enactment and administration of credit legislation.

119. Tasmania was the first state to pass legislation referring credit regulation to the Commonwealth, with the *Credit (Commonwealth Powers) Act 2009* (Tas) commencing on 17 November 2009. Tasmania's legislation referred the draft text of what was to become the *NCCP Act* and the ability to amend that text. Other states, however, sought a differently scoped amendment reference to that agreed by Tasmania and to instead 'adopt' the *NCCP Act*.[214]

120. Section 4(1) of the *Credit (Commonwealth Powers) Act 2009* (Tas) provides as follows (defined terms in **bold**):

> (1) The following matters are referred to the Parliament of the Commonwealth:
>
> (a) the matters to which the **initial referred provisions** relate, but only to the extent of the making of laws with respect to those matters by including the initial referred provisions in Acts enacted in the terms, or substantially in the terms, of the **tabled text**;
>
> (b) any **referred credit matter**, but only to the extent of the making of laws with respect to such a matter by making **express amendments** of the **National Credit Legislation**.

211 See Bradley Selway, 'Hughes Case and the Referral of Powers' (2001) 12(4) *Public Law Review* 288 for an account of the negotiations between the Commonwealth and States that led to the agreement. The Australian Capital Territory became a party to the agreement on 13 October 2005.
212 The Corporations Agreement 2002 (Compilation as at July 2017 prepared by the Department of the Treasury (Cth)) cl 509.
213 Ibid cl 516.
214 Explanatory Memorandum, National Consumer Credit Protection Amendment Bill 2010 (Cth) 6.

121. The key terms in bold are defined as follows:

- 'tabled text' means the text of the National Consumer Credit Protection Bill 2009 and National Consumer Credit Protection (Transitional and Consequential Provisions) Bill 2009 as tabled in the Tasmanian House of Assembly;
- 'initial referred provisions' means 'the tabled text to the extent to which that text deals with matters that are included in the legislative powers of the Parliament of the State';
- 'National Credit legislation' means 'Commonwealth Acts enacted in the terms, or substantially in the terms, of the tabled text …';
- 'referred credit matter' means a matter relating to either of:

  (a) credit, being credit the provision of which would be covered by the expression 'provision of credit to which this Code applies' in the initial National Credit Code;

  (b) consumer leases, being consumer leases each of which would be covered by the expression 'consumer lease to which Part 11 applies' in the initial National Credit Code;

- 'express amendment' means:

  the direct amendment of the text of the National Credit legislation (whether by insertion, omission, repeal, substitution or relocation of words or matter) by another Commonwealth Act or by an instrument under a Commonwealth Act, but does not include the enactment by a Commonwealth Act of a provision that has or will have substantive effect otherwise than as part of the text of the National Credit legislation.

122. To accommodate the difference in referral legislation between Tasmania and other states, the *NCCP Act* was amended in minor respects by the *National Consumer Credit Protection Amendment Act 2010* (Cth), which commenced on 3 March 2010.

123. Other states' referral legislation uniformly commenced on 1 July 2010 and, most relevantly, provides as follows (defined terms highlighted bold):

> 4 Adoption of **National Credit legislation**
>
> The **relevant version of the National Credit legislation** is adopted within the meaning of section 51(xxxvii) of the Constitution of the Commonwealth. …
>
> 6 Reference of matters
>
> (1) Subject to section 7, any **referred credit matter** is referred to the Parliament of the Commonwealth but only to the extent of the making of laws with respect to such a matter by making **express amendments** of the National Credit legislation …
>
> 7 Matters excluded from reference
>
> (1) A matter referred by section 6(1) does not include—
>
> (a) the matter of making provision with respect to the imposition or payment of State taxes, duties, charges or other imposts, however described; or
>
> (b) the matter of making provision with respect to the general system for the recording of estates or interests in land and related information; or
>
> (c) the matter of providing for the priority of interests in real property; or

(d) the matter of making a law that excludes or limits the operation of a **State law**, to the extent that State law makes provision with respect to the creation, holding, transfer, assignment, disposal or **forfeiture** of a **State statutory right**. …[215]

124. Key terms in bold are:

- 'National Credit legislation', which refers to the *NCCP Act* and the *National Consumer Credit Protection (Transitional and Consequential Provisions) Act 2009* (Cth) as in force from time to time;
- 'relevant version of the National Credit legislation', which refers to the *NCCP Act* as originally enacted and as amended by the *National Consumer Credit Protection Amendment Act 2010* (Cth);
- 'referred credit matter', which is defined in substantively the same terms as the Tasmanian legislation; and
- 'express amendment', which has the same meaning as in the Tasmanian legislation.

125. These Acts are collectively described as the 'Credit Referral Legislation'. The evident intention behind the differences in referral legislation as between the *Corporations Act* and the *NCCP Act* is to attempt to limit the scope of the Commonwealth's ability to amend the *NCCP Act* by expressly stipulating (in s 7 quoted above) matters that the referral does not cover. These were described as 'carve outs' from the amendment reference.[216]

The different framework underpinning the Australian Consumer Law

126. Like the *Corporations Act*, *ASIC Act* and *NCCP Act*, the *Australian Consumer Law* is a product of cooperation between the states, territories and Commonwealth. The *Australian Consumer Law* is also subject to an intergovernmental agreement, first entered into on 2 July 2009 and replaced by the second Intergovernmental Agreement for the Australian Consumer Law dated 30 August 2019. The constitutional framework underpinning the *Australian Consumer Law*, however, is different from that supporting the *Corporations Act* and *ASIC Act*.

127. The *Australian Consumer Law* is described as an 'application law, which is applied and enforced as a law of each jurisdiction in Australia'.[217] This means that although the *Australian Consumer Law* is contained in a Commonwealth Act, each jurisdiction (including the Commonwealth) has passed legislation to apply the law as a law of that jurisdiction.[218] This is similar to the co-operative scheme that underpinned the Corporations Law, discussed above.[219]

128. As an application law, the *Australian Consumer Law* differs from the *Corporations Act* and *ASIC Act* (which are supported by a referral of matters) in two main respects. First, as a law of the Commonwealth, the *Australian Consumer Law* applies to the conduct of corporations and those associated with them, and as a law of each state and territory,

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215 *Credit (Commonwealth Powers) Act 2010* (NSW); *Credit (Commonwealth Powers) Act 2010* (Qld); *Credit (Commonwealth Powers) Act 2010* (SA); *Credit (Commonwealth Powers) Act 2010* (Vic); *Credit (Commonwealth Powers) Act 2010* (WA).

216 Explanatory Memorandum, National Consumer Credit Protection Amendment Bill 2010 (Cth) [1.7]; *Commonwealth, Parliamentary Debates*, House of Representatives, 10 February 2010, 927 (The Hon Chris Bowen MP).

217 Australian Government, *The Australian Consumer Law: A Framework Overview* (2013) 10.

218 *Competition and Consumer Act 2010* (Cth) pt XI; *Fair Trading (Australian Consumer Law) Act 1992* (ACT); *Fair Trading Act 1987* (NSW); *Consumer Affairs and Fair Trading Act 1990* (NT); *Fair Trading Act 1989* (Qld); *Fair Trading Act 1987* (SA); *Australian Consumer Law (Tasmania) Act 2010* (Tas); *Australian Consumer Law and Fair Trading Act 2012* (Vic); *Fair Trading Act 2010* (WA).

219 See [25] above.

the *Australian Consumer Law* applies to the conduct of corporations *and* individuals.[220] In contrast, the *Corporations Act* and *ASIC Act* are solely laws of the Commonwealth. Secondly, the *Australian Consumer Law* is jointly administered by the ACCC (a Commonwealth agency) and each of the state and territory consumer agencies.[221] The *Corporations Act* and *ASIC Act* are administered only by ASIC.

129. The reasons for the different legislative framework and administrative approach to the *Australian Consumer Law* are not immediately apparent, and are not recorded in available explanatory materials. Three factors may partly explain differences between the *Australian Consumer Law* and the corporations and financial services legislation.

130. First, as discussed above, the *Corporations Act* was the latest of several attempts to implement national, uniform regulation of corporations over several decades. Over that time, significant administrative duties had shifted from state-based agencies to the NCSC and subsequently the ASC (succeeded by ASIC) as the sole regulatory body. This meant that each state's capacity to administer the law had diminished, reducing the impetus for shared regulatory responsibility. A similar history did not precede the introduction of the *Australian Consumer Law*.

131. Secondly, given regulatory responsibility was to be divided between Commonwealth, state, and territory agencies, the *Australian Consumer Law* is not susceptible to the same uncertainty that arose in respect of the Corporations Law following *R v Hughes.* This is so because the ACCC need not enforce (or exercise powers under) state laws, with those laws being enforced by the respective state agencies.

132. Thirdly, the *Australian Consumer Law* Intergovernmental Agreement contains more significant limitations on the Commonwealth's ability to amend the *Australian Consumer Law* than the *Corporations Act* under the Corporations Agreement 2002. As discussed above, the Corporations Agreement contains processes for approval by the states and territories, but also contains significant carve-outs from the need for approval. The *Australian Consumer Law* Intergovernmental Agreement, however, contains (both in its first and second iterations) only a limited ability for the Commonwealth to make 'minor or inconsequential amendments' (as defined) to the *Australian Consumer Law* without agreement from at least four other parties to the agreement.[222] This is further limited by giving the parties to the agreement the ability to object to amendments being 'minor or inconsequential', thereby triggering the approval process.[223]

133. Though it is not entirely clear, these different approval mechanisms may also be relevant to why the states did not make a referral of matters to the Commonwealth in the case of the *Australian Consumer Law*. This is because in *Thomas v Mowbray* (decided in 2007, and discussed further below), both Kirby and Hayne JJ would have invalidated a provision of the Act in question that purported to prevent the Commonwealth from amending the Act without the approval of a majority of states and territories, including at least four states.[224] That requirement was in similar terms to the requirement contained in the *Australian Consumer Law* Intergovernmental Agreement.

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220 Australian Government (n 217) 10.
221 Ibid 12.
222 Intergovernmental Agreement for the Australian Consumer Law (Compilation as at 30 August 2019) cll 14–19.
223 Ibid cl 14.
224 *Thomas v Mowbray* (2007) 233 CLR 307 [211]–[214] (Kirby J), [456]–[457] (Hayne J). See also Lynch (n 204) 381.

Determining the 'scope' of matters referred by a state

134. For a Commonwealth law that relies on a referral of matters under s 51(xxxvii) of the *Australian Constitution* to be valid, that law and subsequent amendments must necessarily be within the scope of the matters referred (or, in the terms used by the *Australian Constitution*, a law 'with respect to [the] matters referred').[225]

135. Generally speaking, referrals by states have fallen into one of two categories:

- a 'subject matter' referral, by which state legislation describes the matters that it refers to the Commonwealth; or
- a 'text-based' referral, by which state legislation 'refers' the matters addressed by draft Commonwealth legislation which may be annexed to the state legislation or identified by being tabled in a state parliament, accompanied by a further reference permitting the Commonwealth to amend that identified text.[226]

136. Both Professor Lynch and Greg Calcutt SC have noted a trend on the part of the states to prefer text-based referrals, and have observed that the drafting of the amendment reference has been the most challenging issue in each case.[227] Lynch has noted:

> The central – but by no means exclusive – puzzle is how the referral can be made in such a way that the Commonwealth enjoys the necessary capacity to maintain and enhance the law's operation through amendment without this flexibility being exploited to the detriment of state power.[228]

137. Put slightly differently, the question is how a state can, by the terms of its referral legislation, constrain the Commonwealth's power to amend legislation after a referral is made.

138. To date, the interpretation of legislation that refers matters to the Commonwealth has received little judicial attention. In *Thomas v Mowbray*,[229] Kirby J and Hayne J provided contrasting approaches to interpreting an amendment reference in almost identical terms to that granted to the Commonwealth under the Corporations Referral Legislation.

139. *Thomas v Mowbray* concerned challenges to the validity of Part 5.3 Div 104 of the Schedule to the *Criminal Code Act 1995* (Cth) ('*Criminal Code*'). Most relevantly for present purposes, the plaintiff argued that Div 104 was invalid because it was not supported by the Commonwealth's power in s 51(xxxvii) of the *Australian Constitution* and the relevant state referral legislation.

140. The referral legislation passed by each state uniformly contained a 'text-based' referral and amendment reference relating to acts of terrorism. One of the questions in *Thomas v Mowbray*, considered only by Kirby J and Hayne J, was therefore whether the amending legislation that introduced Div 104 into Part 5.3 of the *Criminal Code* was within the scope of the amendment reference under the *Terrorism (Commonwealth Powers) Act 2003* (Vic) ('Referring Act').

225 *Thomas v Mowbray* (n 224) [447].
226 Treasury (Cth), Submission No 56 to Senate Economics Legislation Committee, *National Consumer Credit Protection Bill 2009 and Related Bills (Cth)* (n 192) 11; Lynch (n 204) 369.
227 Lynch (n 204) 364; Greg Calcutt, 'A Commentary on the Mechanics of Referring Matters under s 51(xxxvii) of the Constitution' (2011) 6(1) *Public Policy* 89, 91.
228 Lynch (n 204) 372.
229 *Thomas v Mowbray* (n 224).

141. Section 4 of the Referring Act provides:

> (1) The following matters are referred to the Parliament of the Commonwealth:
>
> (a) the matters to which the referred provisions relate, but only to the extent of the making of laws with respect to those matters by including the referred provisions in the terms, or substantially in the terms, of the text set out in Schedule 1; and
>
> (b) the matter of terrorist acts, and actions relating to terrorist acts, but only to the extent of the making of laws with respect to that matter by making express amendments of the terrorism legislation or the criminal responsibility legislation.

142. Like the equivalent Corporations Referral Legislation, s 4(3) of the Referring Act provides that 'the operation of each paragraph in subsection (1) is not affected by the other paragraph' and subsection (4) notes that the Commonwealth may amend the legislation in reliance on any of its other legislative powers.

143. The definition of 'express amendment' in the Referring Act is substantively the same as in the Corporations Referral Legislation:

> *express amendment* of the terrorism legislation or the criminal responsibility legislation means the direct amendment of the text of the legislation (whether by insertion, omission, repeal, substitution or relocation of words or matter) by Commonwealth Acts, but does not include the enactment by a Commonwealth Act of a provision that has or will have substantive effect otherwise than as part of the text of the legislation.[230]

144. The plaintiff in *Thomas v Mowbray* argued that Part 5.3 Div 104 of the *Criminal Code*, which related to what were known as 'control orders', introduced 'an entirely new regime' into the *Criminal Code* and was not an 'express amendment' within the terms of the Referring Act.[231] The Commonwealth, by contrast, submitted that s 4(1)(b) of the Referring Act enabled the Commonwealth to 'make laws with respect to a defined subject matter', but that power

> was qualified by the requirement that the law had to be enacted in a particular form – as part of the original Act identified as the provisions whose text was set out in Sch 1 to the Referring Act.[232]

Justice Kirby in Thomas v Mowbray

145. In Kirby J's view, context was important when interpreting the Referring Act. Justice Kirby expressly distinguished the Victorian Corporations Referral Legislation from the Referring Act on the basis that the text of the referred legislation was 'contained within' the Referring Act as a schedule, whereas the Corporations Referral Legislation 'referred to' text that had been tabled in the New South Wales Parliament.[233]

146. The form of the referred text was relevant, according to Kirby J, because the defined term 'terrorism legislation' was used in both the amendment reference and in the definition of 'express amendment'. In Kirby J's view, the phrase 'express amendment' is qualified 'not only by *matters* referred in s 4(1)(b) but also by the form of the *legislation* defined

230 Ibid [187].
231 Ibid [449].
232 Ibid [448].
233 Ibid [190]–[197].

in s 4(1)(b), by reference to which only express amendments may be made'.[234] As a result, the words of the amendment reference took on 'a more confined meaning' in the Referring Act than in the Corporations Referral Legislation.[235]

147. Lynch notes that Kirby J also appeared to favour a narrow construction of referrals under s 51(xxxvii) of the *Australian Constitution* because they necessarily enlarge Commonwealth powers and diminish state power, in contrast to how the scope of the enumerated powers in s 51 are viewed by the Court.[236] Justice Kirby also cited the interpretative 'principle of legality' since the terrorism legislation arguably curtailed fundamental rights. In Kirby J's view, this further justified a narrow reading of the referral legislation underpinning the terrorism legislation.[237]

148. The context surrounding the Referring Act and Part 5.3 of the *Criminal Code* meant that an express amendment, according to Kirby J,

> must be a 'direct amendment' of the 'terrorism legislation' as so defined. Although this may include the 'insertion' of text, that term should be construed ejusdem generis with the preceding words 'direct amendment', read together with the requirement that the amendment be to the 'terrorism legislation'. This requires that a more restrictive meaning be given to the term 'insertion'.[238]

149. Ultimately, Kirby J concluded that the impugned amendments 'did not amount to a direct amendment' but rather 'an addition to the scope and function of Pt 5.3 of the [*Criminal Code*] by federal law alone'.[239] As a result, Div 104 of Part 5.3 of the *Criminal Code* went beyond the Commonwealth's power and was invalid.

150. Lynch has commented that:

> While [Kirby J's] narrow reading of the power to 'amend' might be seen as convincing on a contextual level, it clearly suffers from a near fatal weakness. It constrains the Commonwealth's power to amend, but does so without a referable standard. Giving the power to insert 'words or matter' into referred text a 'more restrictive meaning', leaves us with uncertainty as to the scope of the amending reference with all the potential this carries for legislative paralysis and instability.[240]

151. Before considering Hayne J's approach, it can be observed here that each state's Corporations Referral Legislation referred to the text as tabled in the New South Wales Parliament. While Kirby J's primary focus appeared to be on the difference between referring to a separate text versus appending that text in a schedule, his Honour's reasons also suggest that the fact text was 'tabled in the Parliament of another State' was relevant.[241] Justice Kirby stated that the 'context in which' the Referring Act was enacted

> is decidedly different from that which existed when the Corporations Referral was enacted. In the latter case, the Victorian Parliament was content to define 'Corporations Legislation' by reference to provisions that were tabled in the Parliament of another State. By way of contrast, the present Referring Act specifically included the 'terrorism legislation' as a Schedule to the Act. It could not have been more particular or more explicit. …

234 Ibid [196] (original emphasis).
235 Ibid [196].
236 Lynch (n 204) 374; *Thomas v Mowbray* (n 224) [206].
237 *Thomas v Mowbray* (n 224) [199].
238 Ibid [204].
239 Ibid [205].
240 Lynch (n 204) 377.
241 *Thomas v Mowbray* (n 224) [195].

> In a constitutional referral of powers in the Australian federation, it is one thing to provide for the making of 'express amendments' to identified legislation contained in the Schedule to the enactment constituting that referral. It is another thing altogether to provide in the referral for the making of 'express amendments' to legislation not contained in the enactment constituting the referral, but rather, in documents tabled in another Parliament at some other time.[242]

152. In other words, according to Kirby J, the meaning of referral legislation can vary according to the mechanism by which a specific referred text is identified in that legislation. On this reasoning, it is possible that the scope of the five other states' Corporations Referral Legislation differs from that of New South Wales, being the only State in whose parliament the referred text was tabled.

Justice Hayne in Thomas v Mowbray

153. In contrast to Kirby J, Hayne J took the view that the Referring Act contained 'two distinct and different references of power: one made by s 4(1)(a) by reference to the scheduled text; the other made by s 4(1)(b)'.[243] This reading, according to Hayne J, is consistent with s 4(3), which provides that the operation of each of paragraphs (a) and (b) is not affected by the other.

154. Justice Hayne noted that the two parts of the definition of 'express amendment' appeared to be 'contradictory':

> The first part contemplates direct amendment by insertion, omission, repeal, substitution or relocation of words or matter; the second part limits that by excluding enactment of a provision that has or will have 'substantive effect otherwise than as part of the text of the legislation'.[244]

155. Unlike Kirby J, Hayne J accepted the Commonwealth's submission that so long as an insertion to the legislation could be described as a law with respect to the matter referred, and that law was enacted in the form of the scheduled text, then the 'contrariety' could be resolved. Justice Hayne observed that

> By contrast, if the plaintiff is right to submit that no change may be made to legislation enacted in the form of the scheduled text if that change introduces a new provision having 'substantive effect', the definition of express amendment cannot be given sensible meaning. On the hypothesis advanced by the plaintiff, the qualification to the definition of express amendment [being the requirement that it not have 'substantive effect otherwise than as part of the text of the legislation'] would swallow the body of the definition and, no less importantly, s 4(1)(b) would not constitute the reference of a second, and separate subject matter.[245]

156. Put differently, accepting the plaintiff's argument would render the amendment reference inoperable, and be contrary to s 4(3) which provided that each of s 4(1)(a) (the initial reference) and s 4(1)(b) (the amendment reference) were not affected by the other.

242 Ibid [195], [197].
243 Ibid [451].
244 Ibid [453].
245 Ibid [454].

157. Lynch has commented that while Hayne J's approach removes the contrariety, 'one may be forgiven for finding it a strangely formalistic result',[246] but that the 'strong appeal of the more literal interpretation of Hayne J' is the avoidance of the uncertainty produced by Kirby J's interpretation.[247] The result is 'formalistic', according to Lynch, because

> the Referring Act firstly provides a set text of provisions which the referred power is to support as a Commonwealth enactment, before proceeding to grant an unlimited discretion to otherwise legislate on the 'matter of terrorist acts' accompanied by a requirement only that this must occur 'as part of the text' specifically referred.[248]

158. Justice Hayne's interpretation may also be seen as a pragmatic view that gives the definition sensible meaning while imposing, as recognised by Lynch, a 'manner and form' requirement that amendments be made to the particular piece of legislation as enacted in reliance on the referral.

Implications for reform

159. The constitutional arrangements underpinning the corporations and financial services legislation have both historical and practical significance when it comes to reform of that legislation.

160. The Terms of Reference for this Inquiry ask the ALRC to consider how the provisions contained in Chapter 7 of the *Corporations Act* could be reframed or restructured. There may be limits on how the Commonwealth could presently amend or re-enact Chapter 7 of the *Corporations Act*, and potentially integrate parts of the *ASIC Act* and parts (or the whole) of the *NCCP Act*, in reliance on the current referrals under s 51(xxxvii) of the *Australian Constitution*. Some potential ways that the current law could be restructured, and challenges presented by the current constitutional framework, are discussed under the headings below.

161. As the judgments of Kirby J and Hayne J in *Thomas v Mowbray* demonstrate, there is considerable scope for uncertainty when interpreting state referral legislation and much may turn on the precise nature of any amendments.

162. It should be noted that both the Corporations Agreement 2002 and the National Credit Law Agreement 2009 provide mechanisms for consultation and cooperation between the Commonwealth, states, and territories about legislative change. Following these mechanisms to effect any reforms would not, however, guarantee the constitutional validity of those reforms because it is the agreement of a state's parliament by enacting legislation, and not merely agreement by a state's executive, that is required for the purposes of s 51(xxxvii) of the *Australian Constitution*.[249]

246 Lynch (n 204) 376.
247 Ibid 377.
248 Ibid 376.
249 *R v Public Vehicles Licensing Appeal Tribunal (Tas); Ex Parte Australian National Airways Pty Ltd* (n 205) 226.

Repeal and partial repeal by the Commonwealth

163. According to Lynch, it seems clear that the Commonwealth has the power to repeal any law enacted by it in reliance on a state referral.[250] Any referral that purported to prevent the Commonwealth from repealing a law would invalidly curtail the Commonwealth's legislative power.[251]

164. The extent to which the Commonwealth may partially repeal legislation enacted in reliance on a referral is less clear. Lynch notes that partial repeal may result in legislation that is outside the scope of the text referred by a state, given that a reference usually refers to legislation being in 'the terms, or substantially in the terms' of the referred text.[252] So although the Commonwealth must retain the power to repeal a law, according to Lynch,

> qualms may legitimately exist were it to act selectively through partial repeal so as to produce a law substantially distinct from that to which the states gave their initial imprimatur.[253]

Could Chapter 7 of the Corporations Act be integrated with Part 2 Division 2 of the ASIC Act? Or vice versa?

165. The *FSR Act* was enacted by the Commonwealth, at least in part, in reliance on the amendment reference contained in the Corporations Referral Legislation. The amendment reference referred 'the matters of the formation of corporations, corporate regulation and the regulation of financial products and services' so long as only the text of the *Corporations Act* or the *ASIC Act* was altered by 'express amendment' (as defined in the referral legislation).[254]

166. The *FSR Act* both introduced Chapter 7 into the *Corporations Act* and amended Part 2 Div 2 of the *ASIC Act*. Repealing part of the *ASIC Act*, and re-enacting it in substantially the same form within the *Corporations Act* may satisfy the definition of 'express amendment'. One potential issue may be the extent to which the amendments produced legislation that deviated from the initial text of the *Corporations Act* referred by the states. Of course, given the extensive amendments to the *Corporations Act* and *ASIC Act* since 2001, it may be arguable that the text already is substantially different and, to date, no issue has been taken. Nevertheless, a reformed constitutional framework may usefully provide greater certainty for future amendments.

167. Another way of achieving some level of integration and implementing a new structure may be the use of a schedule to either the *Corporations Act* or *ASIC Act* containing (for example) the 'financial services laws', in a similar way to the *Australian Consumer Law*. Even assuming that this would be possible within the terms of the current referral,

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250 Lynch (n 204) 381.
251 Ibid.
252 Ibid.
253 Ibid.
254 It should be noted here that the amendment reference and the definition of 'express amendment' would not appear to prevent the use of legislative instruments that 'notionally amend' the text of the legislation. The amendment reference expressly permits 'provisions that authorise the making of [legislative instruments] that affect the operation of the Corporations legislation, otherwise than by express amendments'. This is essentially reiterated, for the avoidance of doubt, in s 4(4)(b) of the Corporations Referral Legislation. A legislative instrument does not fall within the definition of 'express amendment', which only contemplates amendment by Commonwealth Acts. Legislative instruments have force by virtue of the instrument and only for so long as the instrument is in force, and do not have effect as an amendment to legislative text. Therefore a 'notional amendment' only ever 'affects the operation' of the law and does not amend the legislative text.

enacting only one part of the law in a schedule would risk compromising the intelligibility (and navigability) of the legislation.

Could Chapter 7 of the Corporations Act and Part 2 Division 2 of the ASIC Act be integrated in new, standalone legislation?

168. Given the qualified definition of 'express amendment', which requires that any amendment be made only to the text of the *Corporations Act* and *ASIC Act*, it would not seem possible for the Commonwealth to enact new, standalone legislation in reliance on s 51(xxxvii) of the *Australian Constitution* and the Corporations Referral Legislation. Another way to achieve a similar outcome may be by way of a schedule to the *Corporations Act* or *ASIC Act*, as noted above.

Could part, or the whole, of the NCCP Act be integrated with Chapter 7 of the Corporations Act?

169. Three main issues arise when considering whether the *NCCP Act* could be integrated with the *Corporations Act* or *ASIC Act* in reliance on the current referrals to the Commonwealth.

170. First, given the qualified definition of 'express amendment' in both the Corporations Referral Legislation and the Credit Referral Legislation, it would not seem possible to enact standalone legislation to integrate the three Acts.

171. To the extent there is overlap between the subject matters of the corporations and credit referrals, some level of consolidation may be achieved by re-enacting Chapter 7 of the *Corporations Act* (or parts of it) and incorporating parts of the *ASIC Act* and *NCCP Act* in the *Corporations Act* or *ASIC Act*.

172. Second, while the Corporations Referral Legislation has been relied on to legislate with respect to 'credit' products and services as in the *ASIC Act*, it is less clear that the terms of the referral would capture all matters currently regulated by the *NCCP Act*. As noted above, the Explanatory Memorandum to the National Consumer Credit Protection Bill 2009 suggests that Government contemplated that consumer credit regulation might be incorporated within Chapter 7 of the *Corporations Act.* Explanatory materials do not, however, contain any commentary about the Constitutional basis for doing so without a specific referral in respect of credit.

173. Further, the *NCCP Act* regulates consumer leases, which form a distinct category within the definition of 'referred credit matter' in the Credit Referral Legislation. This suggests that consumer leases may not meet a natural description of 'credit' within the first limb of the credit referral. On the other hand, it could also be argued that some of the matters included within the definition of 'credit facility' in the *ASIC Act*, such as taking a lease over real or personal property, also may not meet a natural description of 'credit' but are nonetheless regulated in that way.[255]

255 *Australian Securities and Investments Commission Act* (n 182) s 12BAA(7)(k); *Australian Securities and Investments Commission Regulations 2001* (Cth) reg 2B.

174. Third, if the *NCCP Act* were only partially repealed in order to be re-enacted within the *Corporations Act* or *ASIC Act*, then a question may arise as to whether the partially repealed *NCCP Act* was 'substantially in the terms' of the initial text referred by Tasmania and adopted by the other states (as discussed above).

Could the Commonwealth rely on its legislative powers in s 51 of the Australian Constitution, other than s 51(xxxvii), to reform the corporations and financial services legislation?

175. As each of the *Corporations Act*, *ASIC Act*, and *NCCP Act* specifies, the application of those Acts is based upon *both* the Commonwealth's legislative powers in s 51 of the *Australian Constitution* (other than its power under s 51(xxxvii)), and the legislative power the Commonwealth has because of a reference or an adoption under s 51(xxxvii) of the *Australian Constitution*.[256] The question remains whether the Commonwealth could legislate comprehensively in relation to corporations and financial services without relying on any referral.

176. Since the *Incorporation Case*[257] in 1990, the Commonwealth's corporations power in s 51(xx) of the *Australian Constitution* has been held not to include a power to enact legislation concerning the formation of corporations. The decision in the *Work Choices Case*[258] raises the possibility that the Commonwealth's corporations power may be interpreted much more broadly today, though it does not suggest that the power would extend as far as regulating the formation of corporations. Even if the corporations power could support parts of the corporations and financial services laws, it may not be a complete solution as much of the present law is directed to both individuals and corporations.

177. In a 2018 paper, the Hon Robert French AC (formerly Chief Justice of the High Court) raised the question as to whether the Commonwealth may seek to

> enact legislation pursuant to an intergovernmental agreement on a topic outside any of the subject-matter heads of legislative power, outside the ambulatory referral provision and outside the framework of the conditional financial assistance power.[259]

178. To do so, according to French, the Commonwealth 'would have to resort to the incidental power'.[260] The incidental power is contained in s 51(xxxix) of the *Australian Constitution*, and may be used to legislate 'in aid of an exercise of the executive power' in s 61 of the *Australian Constitution*.[261]

179. Putting the question slightly differently, French also asked:

> is an intergovernmental agreement made in pursuance of a national objective able to be implemented absent any other power, in reliance upon the incidental power?[262]

256 *Corporations Act* (n 201) s 3; *Australian Securities and Investments Commission Act* (n 182) s 4; *National Consumer Credit Protection Act 2009* (Cth) s 18.
257 *New South Wales v Commonwealth* (n 17).
258 *New South Wales v Commonwealth* (n 21).
259 Robert French, 'Executive and Legislative Power in the Implementation of Intergovernmental Agreements' (2018) 41 *Melbourne University Law Review* 1383, 1393.
260 Ibid.
261 *R v Hughes* (2000) 202 CLR 535 [39].
262 French AC (n 259) 1398.

180. An affirmative answer to that question, according to French, is supported by the High Court's decision in *R v Hughes*[263] and a negative answer is not required by three other more recent decisions.[264] French appears to suggest that the nationhood aspect of the Commonwealth's executive power, combined with the incidental power in s 51(xxxix), may permit the Commonwealth to legislate on matters the subject of intergovernmental agreements with the states. French concluded, however, that the incidental power's 'relationship in this connection to the implementation of intergovernmental agreements remains to be explored'.[265] Further, it is apparent from French CJ's own reasons in *Pape v Federal Commissioner of Taxation* that there are limits, as yet clearly defined, on the incidental power in s 51(xxxix) of the *Australian Constitution*.[266]

181. Any attempt by the Commonwealth to legislate on the basis of intergovernmental agreements that relate to a specific referral of matters, but in reliance on the incidental power, may be seen as a transparent attempt to circumvent the mechanism provided by s 51(xxxvii) of the *Australian Constitution*. Justice Kirby perhaps contemplated this possibility when in *Thomas v Mowbray* he declined

> to interpret the provisions of s 51(xxxvii) of the *Constitution* to permit the parliamentary reference of constitutional power to be achieved without any relevant parliamentary involvement, as by the use of communiqués by heads of government alone.[267]

'Freezing' of the Acts Interpretation Act

182. The *Acts Interpretation Act* applies to the interpretation of Commonwealth legislation generally. In the case of the *Corporations Act* and *ASIC Act*, a point-in-time version of the *Acts Interpretation Act* applies as though it were 'frozen' on 1 January 2005. This 'freezing' is apparently a consequence of the state referrals outlined above. However, for the reasons outlined below, the stated rationale does not convincingly justify why the *Acts Interpretation Act* should be 'frozen' at a point in time for those Acts.

The 'freezing' provisions

183. Upon commencement, s 5C of the *Corporations Act* and s 5A of the *ASIC Act* both provided:

> (1) The *Acts Interpretation Act 1901* as in force on 1 November 2000 applies to this Act.
>
> (2) Amendments of the *Acts Interpretation Act 1901* made after 1 November 2000 do not apply to this Act.

184. Section 5C of the *Corporations Act* and s 5A of the *ASIC Act* were repealed and the following wording, which remains in force, was substituted by the *Legislative Instruments (Transitional Provisions and Consequential Amendments) Act 2003* (Cth):

> (1) Until the date of commencement of section 4 of the Legislative Instruments (Transitional and Consequential Amendments) Act 2003 (the **Legislative Instruments**

263 *R v Hughes* (n 261).
264 French AC (n 259) 1398 citing *Pape v Federal Commissioner of Taxation* (2009) 238 CLR 1, *Williams v Commonwealth* (2012) 248 CLR 156 and *Williams v Commonwealth* (2014) 252 CLR 416.
265 Ibid 1400.
266 *Pape v Federal Commissioner of Taxation* (2009) 238 CLR 1 [9]–[10]. See also Cheryl Saunders, 'Intergovernmental Agreements and the Executive Power' (2005) 16 *Public Law Review* 294.
267 *Thomas v Mowbray* (n 224) [215].

commencement day), the Acts Interpretation Act 1901 as in force on 1 November 2000 applies to this Act.

(2) On and after the Legislative Instruments commencement day, the Acts Interpretation Act 1901 as in force on that day applies to this Act.

(3) Amendments of the Acts Interpretation Act 1901 made after the Legislative Instruments commencement day do not apply to this Act.

185. The 'Legislative Instruments commencement day' was 1 January 2005. Therefore, the *Acts Interpretation Act* as in force on 1 January 2005 applies to the *Corporations Act*.[268]

186. The Explanatory Memorandum to the Corporations Bill 2001 (Cth) stated:

> The scope of what is referred by a State Parliament is determined by that Parliament. As the scope of the matters referred is in part determined by reference to a particular text, Bill clause 5C provides that the text referred is to be interpreted in accordance with the Acts Interpretation Act 1901 of the Commonwealth as in force on 1 November 2000. This is intended to preclude any argument that the matters referred differ from State to State (as a result of differences in the relevant interpretation legislation) or that the scope of the reference may change as a result of amendments of the Acts Interpretation Act 1901. While the Bill applies the Acts Interpretation Act 1901 as at 1 November 2000, it is envisaged that changes to that Act could be applied to the interpretation of the legislation by an appropriate amendment of clause 5C in reliance on the amendment reference…[269]

187. The 2003 legislation amending s 5C of the *Corporations Act* was explained as follows:

> This item repeals section 5C of the Corporations Act 2001, which freezes the Acts Interpretation Act in its application to the Corporations Act as at 1 November 2000. This was needed to prevent any unintended amendments to the Corporations Act (brought about by changes to the Acts Interpretation Act) in recognition of the agreement between the States and the Commonwealth in relation to the Corporations Act.[270]
>
> The proposed amendment will insert a new section 5C in the Corporations Act to provide that the Acts Interpretation Act as amended by this Bill will apply to the Corporations Act as at the date of commencement of this Bill, but any later amendments to the Acts Interpretation Act will not apply.[271]

188. Those amendments accommodated the introduction of the *Legislative Instruments Act 2003* (Cth) (now the *Legislation Act 2003* (Cth)), which reformed the framework governing Commonwealth legislative instruments and, together with related legislation, made consequential amendments to the *Acts Interpretation Act*.

189. Excluding amendments made to the *Acts Interpretation Act* by the 2003 legislation, only two other minor amendments to the *Acts Interpretation Act* took effect between 1 November 2000 (the initial 'freezing' date for the purposes of the *Corporations Act* and

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268 *Legislative Instruments (Transitional Provisions and Consequently Amendments) Act 2003* (Cth) s 2.

269 Explanatory Memorandum, Corporations Bill 2001 (Cth) [5.47].

270 It is not entirely clear what is meant by the phrase 'in recognition of the agreement between the States and the Commonwealth in relation to the Corporations Act'. While the Corporations Agreement 2002 contains provisions that require some level of cooperation and consultation between the Commonwealth, States and Territories when amending the corporations legislation, it does not directly touch upon matters of interpretation.

271 Explanatory Memorandum, Legislative Instruments (Transitional Provisions and Consequential Amendments) Bill 2003 (Cth) 9. The amendment to s 5A of the *ASIC Act* was explained in identical terms.

ASIC Act) and 1 January 2005.[272] It appears, therefore, that changing the effective date in s 5C of the *Corporations Act* and s 5A of the *ASIC Act* to 1 January 2005 did not frustrate the apparent purpose behind those sections as introduced.

Apparent rationale for 'freezing' the Acts Interpretation Act

190. The apparent rationale for 'freezing' the *Acts Interpretation Act* for the purposes of the *Corporations Act* and *ASIC Act* could be questioned for three reasons.

191. First, ensuring that the interpretation of the referred text would not differ between states does not require that the *Acts Interpretation Act* be 'frozen', only that the *Acts Interpretation Act* uniformly apply, which would be the position in any event.

192. Second, it is unclear how the Commonwealth *Acts Interpretation Act* would be relevant to interpreting the matters referred by the state referral legislation, which presumably would be subject to each state's own interpretation legislation. While the matters referred are repeated in the *Corporations Act* itself (which is subject to the *Acts Interpretation Act*), it is the state legislation that effects the referral and is relevant to determining the scope of that referral (as illustrated by *Thomas v Mowbray*). Likewise, the predecessor national Corporations Law scheme applied as state law and would therefore have been subject to state interpretation legislation. National uniformity of interpretation was achieved by inserting an extensive number of interpretation provisions into the *Corporations Law* itself, replicating much of the *Acts Interpretation Act*.[273]

193. Third, while it makes sense that the states would wish to be certain that the text initially enacted by the Commonwealth had the same meaning as the text referred by them, this is achieved by the 'substantially in the same form' requirement. Once enacted, the 'initial reference' is essentially spent (at least on Hayne J's approach in *Thomas v Mowbray*), and any amendments rely on the 'amendment reference'. The only possible relevance is if, as Kirby J suggested in *Thomas v Mowbray*, the 'initial reference' has implications for the 'amendment reference' and regard needs to be had to the text as referred by the states. But even that does not seem to require that the *Acts Interpretation Act* be frozen (for the ongoing purpose of interpreting the *Corporations Act*) because the text referred by the states would be interpreted as at the time they referred it, which would not be informed by later changes to the Commonwealth *Acts Interpretation Act* — only the enacted legislation itself would be informed by later changes to the Commonwealth *Acts Interpretation Act*.

194. As discussed in the next section, the *Corporations Act* and *ASIC Act* are not the only Commonwealth legislation subject to a 'frozen' *Acts Interpretation Act*. The analysis below suggests that 'freezing' is related to the form of referral made for the purposes of s 51(xxxvii) of the *Australian Constitution*, specifically whether the referral is text-based. In the case of the *Corporations Act*, 'freezing' was thought necessary to ensure a uniform approach to interpreting each state's referral legislation and to preserve the meaning of the text as referred by the states.[274] However, it was nonetheless acknowledged that the 'freezing' provision could itself be amended, as occurred in 2003.

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272 These were the correction of a typographical error in subsection 4(6) by the *Statute Law Revision Act 2002* (Cth) and the addition of s 27A relating to documents used to commence proceedings, which took effect in relation to proceedings commenced after 7 July 2003.

273 See, *Corporations Law 1989* (Cth), ss 109A–109Z.

274 See [186]–[187].

195. In contrast to the *Corporations Act* and *ASIC Act*, the *NCCP Act* does not contain a provision 'freezing' the *Acts Interpretation Act*. This might be explained on the basis that five of the six states 'adopted' the Commonwealth legislation and granted a limited amendment reference. This does not, however, explain why a provision 'freezing' the *Acts Interpretation Act* was unnecessary at least when the *NCCP Act* was first passed, given Tasmania's referral was 'text-based' and the Explanatory Memorandum expressly contemplated referrals from all states without comment on their form.

Other Commonwealth legislation

196. In addition to the *Corporations Act* and *ASIC Act*, six other in force Commonwealth Acts contain provisions that have the effect of 'freezing' the *Acts Interpretation Act* at a point in time. Each of these are founded, at least in part, on a referral of matters under s 51(xxxvii) of the *Australian Constitution.* The table in Appendix B contains a list of those Acts and the relevant provisions.

197. There are currently seven Commonwealth Acts in force that are supported, at least in part, by a referral of matters under s 51(xxxvii) of the *Australian Constitution* but are *not* subject to a 'frozen' *Acts Interpretation Act*. The table in Appendix C contains a list of those Acts.

198. To summarise:

- there are currently 15 Commonwealth Acts underpinned by a referral from one or more states;
- six entire Commonwealth Acts (including the *Corporations Act* and *ASIC Act*) are subject to five different point-in-time versions of the *Acts Interpretation Act*;
- the *Water Act 2007* (Cth) is subject to a point-in-time version of the *Acts Interpretation Act* for specified parts, and the rest of the Act is subject to the current *Acts Interpretation Act*;
- Part 5.3 of the *Criminal Code* is subject to a point-in-time version of the *Acts Interpretation Act,* with the exception of ss 2D, 2E and 2F of the *Acts Interpretation Act* which apply to Part 5.3 as per the current *Acts Interpretation Act*. The rest of the *Criminal Code* (that is, excluding Part 5.3) is subject to the current *Acts Interpretation Act*; and
- the state referral legislation underlying these eight Acts all employ 'text-based' referrals.

199. Of the seven Commonwealth Acts in force that are supported by a referral but *not* subject to a 'frozen' *Acts Interpretation Act*, two are based on subject matter referrals, four are text-based referrals, and one (the *NCCP Act*) is text-based in the case of Tasmania and 'adopted' by all other states.

200. The provisions 'freezing' the *Acts Interpretation Act* for the purposes of the *Water Act 2007* (Cth) and the *Criminal Code* are explained in similar terms to the *Corporations Act*. The Revised Explanatory Memorandum to the Water Amendment Bill 2008 (Cth), which introduced the current s 5 of the *Water Act 2007* (Cth), stated:

> New section 5 provides that the text referred is to be interpreted in accordance with the *Acts Interpretation Act 1901* of the Commonwealth as in force on the day on which Schedule 1 to the *Water Amendment Act 2008* commences. This is intended to preclude any possible

argument that the scope of the reference may change as a result of amendments to the *Acts Interpretation Act 1901.* [275]

201. Similarly, the Explanatory Memorandum to the Criminal Code (Terrorism) Amendment Bill 2002 (Cth) explained s 100.5 in almost identical terms to the Explanatory Memorandum for the Corporations Bill 2001:

> The scope of what is referred by a State Parliament is determined by that Parliament. As the scope of the matters referred is in part determined by reference to a particular text, proposed section 100.5 provides that the text referred is to be interpreted in accordance with the *Acts Interpretation Act 1901* of the Commonwealth as in force on the day on which Schedule 1 of the Bill commences. This is intended to preclude any argument that the matters referred differ from State to State (as a result of differences in the local interpretation legislation) or that the scope of the reference may change as a result of amendments of the *Acts Interpretation Act 1901*. While the Bill applies the *Acts Interpretation Act 1901* as at the date of commencement of Schedule 1, it is envisaged that changes to that Act could be applied to the interpretation of the legislation by an appropriate amendment of section 100.5 in reliance on the amendment reference.[276]

Implications and potential for reform

202. The absence of commentary, both by the academy and in case law, on s 5C of the *Corporations Act* and its equivalent in s 5A of the *ASIC Act*, may suggest that the provisions have not led to any substantive problems in interpreting or applying the law. This is not to say, however, that it is desirable to retain the provisions, which clearly complicate the process of interpreting the legislation, by requiring a reader to identify that the legislation is *not*, as would ordinarily be the case, governed by the current *Acts Interpretation Act* and then, if necessary, to locate and have regard to the applicable point-in-time version.

203. Several other potential complications are caused by 'freezing' the *Acts Interpretation Act*.

204. First, it is not entirely clear whether legislative instruments made by ASIC under the *Corporations Act* should be interpreted in accordance with the *Acts Interpretation Act* as in force on 1 January 2005 or the *Acts Interpretation Act* as in force at a later time. Section 5C of the *Corporations Act* and s 5A of the *ASIC Act* provide that the 'frozen' *Acts Interpretation Act* applies to 'this Act'. 'This Act' is defined:

- for the purposes of the *ASIC Act*, as including regulations made under the *ASIC Act*;[277] and
- for the purposes of the *Corporations Act*, as including regulations made under the *Corporations Act*, the Insolvency Practice Rules and the Passport Rules. Both the Insolvency Practice Rules and the Passport Rules are legislative instruments made by the Minister.[278]

205. It therefore seems clear that the *Corporations Act*, *ASIC Act*, regulations under those Acts, and at least the Insolvency Practice Rules and Passport Rules (which are legislative instruments), would be subject to the 'frozen' *Acts Interpretation Act* because they are expressly included within the definition of 'this Act'. The position is less clear, however,

275 Revised Explanatory Memorandum, Water Amendment Bill 2008 (Cth) [173].
276 Explanatory Memorandum, Criminal Code Amendment (Terrorism) Bill 2003 (Cth) [10].
277 *Australian Securities and Investments Commission Act* (n 182) s 5.
278 *Corporations Act* (n 201) s1211, sch 2 s 105–1.

in relation to other legislative instruments made by ASIC (including those that 'notionally amend' the Act). Section 13 of the *Legislation Act 2003* (Cth) provides that 'unless the contrary intention appears':

- the *Acts Interpretation Act* applies to instruments made under an Act as though each provision were a section of an Act;
- expressions used in instruments have the same meaning as in the enabling legislation; and
- any instrument is to be read and construed subject to the enabling legislation and so as not to exceed the person's power to make the instrument.

206. The *Corporations Act* does not expressly displace s 13 of the *Legislation Act 2003* (Cth).

207. Arguably, s 5C of the *Corporations Act* and the inclusive definition of 'this Act' may demonstrate an intention to displace s 13 of the *Legislation Act 2003* (Cth). This argument would proceed on the basis that the inclusive definition of 'this Act' enlarges the term's ordinary meaning and does so in a non-exhaustive way, with the result that legislative instruments made under the *Corporations Act* fall within the meaning of 'this Act'. This would mean that the *Acts Interpretation Act* as currently in force would not apply to legislative instruments made under the *Corporations Act*, and such legislative instruments would instead be subject to the 'frozen' *Acts Interpretation Act*. This result would also be consistent with the requirement that an instrument be read and construed subject to the enabling legislation and so as not to exceed the power to make the instrument, because construing an instrument in accordance with the current *Acts Interpretation Act* may take it 'outside of power'.

208. On the other hand, however, while some types of legislative instruments have been included within the definition of 'this Act' in the *Corporations Act*, the more general category of 'legislative instruments' (as defined by s 8 of the *Legislation Act 2003* (Cth)) has not been. Further, legislative instruments are separate from the Act under which they are made, and although the power to make them derives from the Act, the instruments themselves take effect independently of the empowering Act. This means that legislative instruments may not fit comfortably within the ordinary meaning of 'this Act' in the *Corporations Act*.

209. Secondly, ASIC is empowered by s 102 of the *ASIC Act* and other provisions to delegate its functions and powers by writing under its common seal. ASIC relies heavily on delegations in order to ensure that its staff (or others) can perform functions and exercise powers that are vested in ASIC. The *Acts Interpretation Act* was amended, with effect from 27 December 2011, to include s 34AB which provides, in effect, that where an Act confers power on a person or body to delegate a function, duty or power, and the functions, duties or powers of that person or body are added to or amended, then the delegation in force immediately before the addition or amendment is taken to incorporate those changes and remain in effect.[279] ASIC is unable to rely on s 34AB of the *Acts Interpretation Act* because s 34AB was not included in the *Acts Interpretation Act* as at 1 January 2005, with the result that ASIC is required to amend its delegations each time any functions or powers of ASIC are added to or amended.

279 Section 34AB was introduced by the *Acts Interpretation Amendment Act 2011* (Cth).

210. Thirdly, where a term is defined in both the *Acts Interpretation Act* and the *Corporations Act,* amendments to both Acts are needed to achieve consistency. For example, in 2011 the definition of 'document' in the *Acts Interpretation Act* was amended so as to remove an apparent inconsistency in its drafting and to make it 'consistent with more modern Interpretation Acts, for example, section 38 of the Victorian *Interpretation of Legislation Act 1984*.'[280] Until that amendment, the definition of 'document' in the *Corporations Act* was the same as the *Acts Interpretation Act* definition. It was not until 16 December 2020, however, that the definition of 'document' in the *Corporations Act* was amended by the *Corporations Amendment (Corporate Insolvency Reforms) Act 2020* (Cth) and is now identical to the *Acts Interpretation Act* definition introduced in 2011. In the context of other insolvency reforms and the COVID-19 pandemic, this amendment was made 'to ensure that the reforms apply to all information, including information that is not in a paper or material form'.[281]

211. By way of further example, the definition of 'de facto partner' was first introduced into the *Acts Interpretation Act* with effect from 4 December 2008.[282] The *Corporations Act* was also amended, with effect from 10 December 2008, to repeal the definition of 'de facto spouse,' amend certain other definitions and to define the term 'spouse' to include 'a de facto partner … within the meaning of the *Acts Interpretation Act 1901*'.[283]

212. These examples further illustrate that, regardless of the 'freezing' provisions, the Commonwealth Parliament can make changes to the *Corporations Act* equivalent to any changes made to the *Acts Interpretation Act*. The Commonwealth's ability to do so appears to undermine any purpose behind 'freezing' the *Acts Interpretation Act*. The only apparent practical difference between amending the *Corporations Act* and amending the *Acts Interpretation Act* is that amendments to the *Corporations Act* are subject to the requirements of the intergovernmental Corporations Agreement 2002, whereas amendments to the *Acts Interpretation Act* more generally are not. As discussed above, clause 506 of the Corporations Agreement provides that the Commonwealth will not introduce a Bill to repeal or amend the *Corporations Act* (or other specified Acts, including the *ASIC Act*) without first consulting, and obtaining the approval of, the forum established under the Agreement. The Commonwealth is also required to release exposure draft legislation[284] and notify the forum about other legislation that would 'alter the effect, scope or operation' of the relevant Acts.[285] Clause 507 of the Corporations Agreement also sets out several broad exemptions from the consultation and approval processes in clause 506, including matters relating to 'financial products and services' and any other subject-matters agreed by the forum.

213. Fourthly, s 15AD of the *Acts Interpretation Act* provides that examples of a provision's operation are not exhaustive and, since 2011, has provided that examples may extend the operation of the provision. By contrast, s 15AD as in force on 1 January 2005, and therefore applicable to the *Corporations Act* and *ASIC Act*,[286] provided that if an

280 Explanatory Memorandum, Acts Interpretation Amendment Bill 2011 (Cth) 5.
281 Explanatory Memorandum, Corporations Amendment (Corporate Insolvency Reforms) Bill 2020 (Cth) [5.6].
282 *Same-Sex Relationships (Equal Treatment in Commonwealth Laws—Superannuation) Act 2008* (Cth) sch 2 pt 1.
283 Ibid sch 14 pt 3.
284 The Corporations Agreement 2002 (Compilation as at July 2017 prepared by the Department of the Treasury (Cth)) cl 509.
285 Ibid cl 516.
286 *Corporations Act* (n 201) s 5C; *Australian Securities and Investments Commission Act* (n 182) s 5A.

example was inconsistent with a provision, then the provision prevailed. The Explanatory Memorandum explained the amendment of s 15AD as follows:

> If Parliament has enacted an example in a Commonwealth Act, this shows an intention that the example should be covered whether or not it strictly falls within the scope of the provision. However, the amended provision [s 15AD] will state that the example 'may extend the operation of the provision' so that a court can assess whether this is in fact appropriate when interpreting a particular provision that includes an example.[287]

214. More generally, the Explanatory Memorandum to the Acts Interpretation Amendment Bill 2011 (Cth) notes that although the *Acts Interpretation Act* had been amended numerous times since its introduction in 1901, the 2011 amendments were 'the first time the Act ha[d] been comprehensively amended to address concerns regarding its structure, application to modern technology and language'.[288] These same perceived benefits do not, however, automatically apply for readers of the *Corporations Act* and *ASIC Act*.

215. Fifthly, legislative drafters and the members of the Treasury responsible for administering the *Corporations Act* and *ASIC Act* must also have regard to the 'frozen' *Acts Interpretation Act* when considering amendments. This arguably adds unnecessary complication to what is already a complex task.

216. These observations also serve to highlight the anomaly that two of the three key pieces of legislation administered by ASIC are subject to a 'frozen' *Acts Interpretation Act*, while the *NCCP Act* is not. Similarly, although the *ASIC Act* contains consumer protection provisions that are intended to mirror provisions contained in the *Australian Consumer Law*, the former is subject to a 'frozen' *Acts Interpretation Act* while the latter is not.

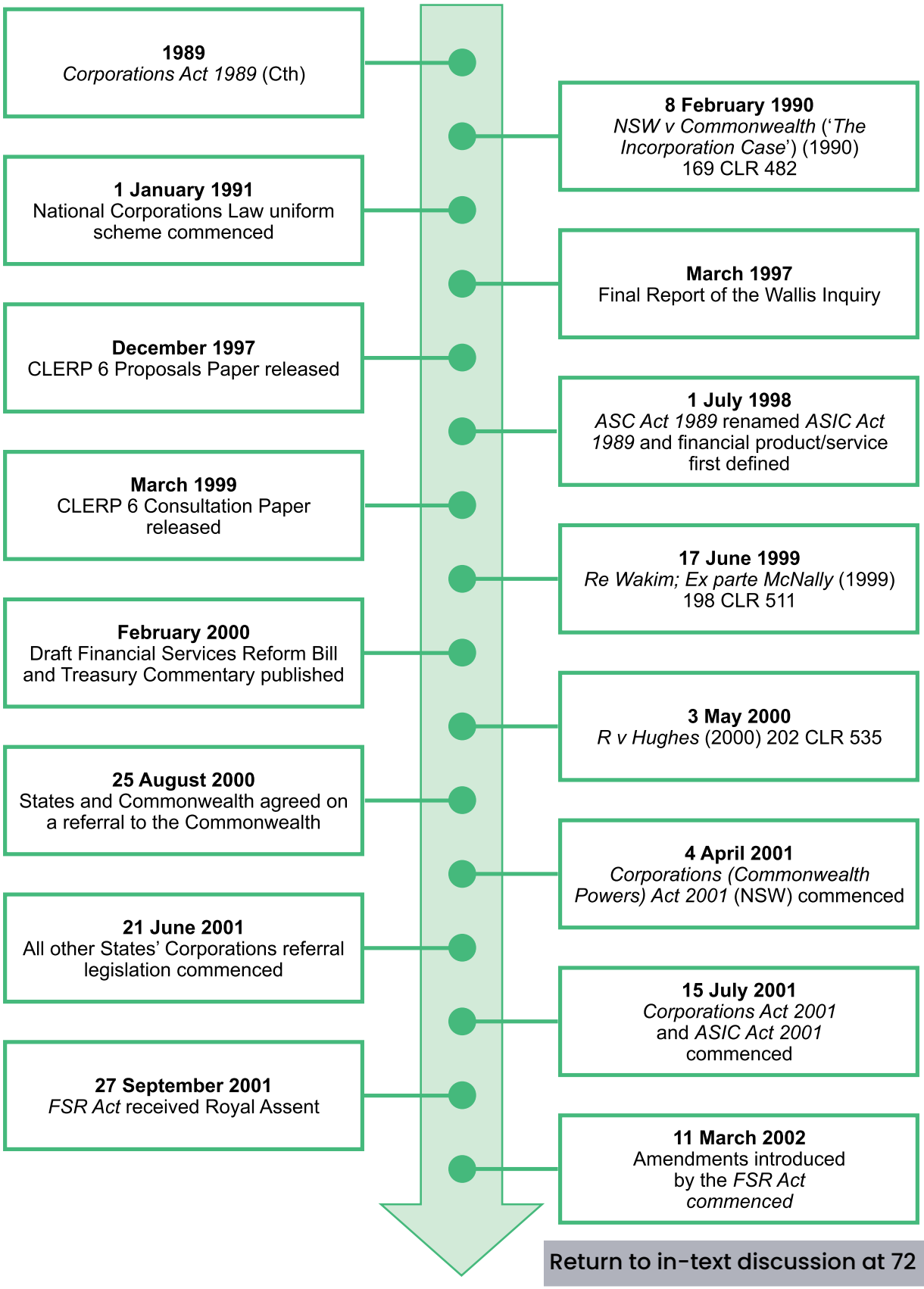
217. In *Thomas v Mowbray*, though Kirby J and Hayne J were focused on interpreting the amendment reference as opposed to the initial reference, neither felt it necessary to refer expressly to the *Acts Interpretation Act* as 'frozen' for the purposes of that Commonwealth legislation. Furthermore, Kirby J's approach suggests that minor differences in state referral legislation may produce different interpretations of state referral legislation, regardless of the interpretive provisions that may apply. This casts further doubt on the apparent rationale for 'freezing' the *Acts Interpretation Act*.

218. The ALRC's Interim Report A will discuss the potential for reforming s 5C of the *Corporations Act* and s 5A of the *ASIC Act*.

287 Explanatory Memorandum, Acts Interpretation Amendment Bill 2011 (Cth) 19.
288 Ibid 1.

Appendices

Appendix A: Timeline of key events



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Appendix B: Commonwealth Acts subject to a 'frozen' Acts Interpretation Act

	Commonwealth Act and provision	Summary of 'freezing' provision	Example state referral Act
1.	*Mutual Recognition Act 1992* s 4(2)	The *Acts Interpretation Act* as in force at the date on which this Act received the Royal Assent (21 December 1992) applies to this Act.	*Mutual Recognition (Victoria) Act 1993* (Vic)
2.	*Trans-Tasman Mutual Recognition Act 1997* S 4(5)	The *Acts Interpretation Act* as in force at the date on which this Act received the Royal Assent (7 December 1997) applies to this Act.	*Trans-Tasman Mutual Recognition (Victoria) Act 1998* (Vic)
3.	*Criminal Code Act 1995* s 100.5	For the purposes of Part 5.3, the *Acts Interpretation Act* applies as in force on the day on which Schedule 1 to the *Criminal Code Amendment (Terrorism) Act 2003* commenced (29 May 2003). Despite that, ss 2D, 2E and 2F *Acts Interpretation Act* apply to Part 5.3 (see s 100.5(3), added after commencement).	*Terrorism (Commonwealth Powers) Act 2003* (Vic)
4.	*Water Act 2007* s 5	The *Acts Interpretation Act* as in force on the day on which Schedule 1 to the *Water Amendment Act 2008* commenced (15 December 2008) applies to Parts 1A, 2A, 4, 4A, 10A and 11A.	*Water (Commonwealth Powers) Act 2008* (Vic)
5.	*Fair Work Act 2009* s 40A	The *Acts Interpretation Act* as in force on 25 June 2009 applies to this Act.	*Fair Work (Commonwealth Powers) Act 2009* (Vic)
6.	*Personal Property Securities Act 2009* s 11	The *Acts Interpretation Act* as in force at the start of the day on which this Act received the Royal Assent (14 December 2009) applies to this Act.	*Personal Property Securities (Commonwealth Powers) Act 2009* (Vic)

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Appendix C: Commonwealth Acts supported by a referral but not subject to a 'frozen' Acts Interpretation Act

	Commonwealth Act	Type of referral: subject matter, text-based or 'adoption'?	Example state referral Act
1.	*Australian National Airlines Act 1945*	Subject matter	*Commonwealth Powers (Air Transport) Act 1950* (Qld) *Commonwealth Powers (Air Transport) Act 1952* (Tas) • Only Queensland and Tasmania have passed referral legislation
2.	*Family Law Act 1975*	Subject matter	*Commonwealth Powers (De Facto Relationships) Act 2004* (Vic) *Commonwealth Powers (Family Law-Children) Act 1986* (Vic)
3.	*Proceeds of Crime Act 2002*	Text-based in the case of NSW Adopted by South Australia	*Unexplained Wealth (Commonwealth Powers) Act 2018* (NSW) *Unexplained Wealth (Commonwealth Powers) Act 2021* (SA) • NSW and South Australia have passed referral legislation
4.	*National Consumer Credit Protection Act 2009*	Text-based in the case of Tasmania Adopted by other States	*Credit (Commonwealth Powers) Act 2009* (Tas) *Credit (Commonwealth Powers) Act 2010* (NSW)
5.	*National Vocational Education and Training Regulator Act 2011*	Text-based	*Vocational Education and Training (Commonwealth Powers) Act 2010* (NSW)
6.	*Business Names Registration Act 2011*	Text-based	*Business Names (Commonwealth Powers) Act 2011* (NSW)
7.	*National Redress Scheme for Institutional Child Sexual Abuse Act 2018*	Text-based	*National Redress Scheme for Institutional Child Sexual Abuse (Commonwealth Powers) Act 2018* (NSW)

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