one of the licensed boats fishing very close to Australian waters. Australian fishermen complain that fish bearing gillnet markings - indicating that they have been dropped out of nets when wounded are being caught in the Torres Strait waters.

- Catch reporting requirements were not always complied with, and, the absence of an inspector means the accuracy of the reporting cannot be checked. This difficulty with surveillance has meant that, as well as it being possible that the boats were violating the licence conditions, the catch cannot be properly evaluated for export taxes.
- One of the licence conditions is that no 'transhipment' take place. But difficulties with enforcing the licence conditions means that the possibility of 'transhipment' taking place cannot be ruled out.
- The crew on board the boats are meant to include a certain proportion of nationals. From the observations of the Commission it seems unlikely that this condition is being satisfied.

The PNG Constitution calls for the wise use of natural resources and the environment and demands that they be conserved and replenished in the interest of the people's development and held in trust for future generations. Unless further study is done which shows that the impact of driftnet fishing is not as harmful as current thinking indicates, there do not seem to be adequate reasons to justify PNG licensing this practice. The PNG Commission takes a clear stand against gill-net fishing as it is currently practiced - and raises the question of whether it could ever be practiced in an acceptable manner.

They also recommend that the bureaucracy controlling the fishing industry should be revamped. The Commission raises the question of whether imports of fish caught by driftnetting should be banned and whether there should be adequate labelling of fish products which would enable individuals to make their own choices as to whether to support the apparently cheaper products of drift-net fishing, or whether to support the long-term sustainability of fishing industries.

Perhaps the most important proposals to come out of the Report are those which endorse a major restructuring of fisheries and resource extraction operations. Such a move would mean that, as well as having dealt with the specific problems of driftnet fishing, the Commission will have supported an approach to such issues which will ensure the structural avoidance of such problems. □

New companies scheme commences

by Vincent Jewell

The new national companies scheme including the Corporations Law came into force on 1 January. This article discusses the lead up the new scheme and some of its features.

The new national companies scheme, with the Australian Securities Commission as regulator, finally began on 1 January 1991. The previous commencement dates, 1 January 1990 and 1 July 1990, came and went, but the agreement of the Attorneys-General of the Commonwealth, the States and the Northern Territory at Alice Springs in June 1990 resulted in the enactment by their respective Parliaments of the legislation for a comprehensive national companies scheme. The

legislation was based on the *Corporations Act* 1989 (Cth), part of which was held by the High Court to be unconstitutional (see [1990] *Reform* 3).

Details of the scheme

The legislation which has been enacted to implement the new national companies scheme consists of the *Corporations Law*, covering the incorporation and internal administration of companies, the securities industry, the futures industry and company takeovers, and legislation setting up the Australian Securities Commission. The Ministerial Council for Companies and Securities established under the formal agreement relating to the previous co-operative companies scheme will continue. However, the Council will be chaired by the federal minister: members of the Council will not take turns in occupying the chair as under the current scheme. The Ministerial Council will have only a consultative role on takeovers, securities, public fund raising and futures: the Commonwealth will be responsible for these matters. The Council will have a deliberative role in relation to other company law matters where the constitutional power of the Commonwealth to legislate is uncertain: on those matters, the Commonwealth will have four votes and a casting vote and each State and the Northern Territory one vote. However, the agreement of the Commonwealth will be required for the introduction of legislation implementing law reform proposals approved by the Ministerial Council.

Although the enactment of legislation by the Commonwealth, the States and the Northern Territory is similar to the existing co-operative scheme, the new companies legislation differs from the co-operative scheme in that it is designed to operate as far as possible as Commonwealth law. Thus, offences under the corporations law of each jurisdiction will be treated as if they are offences under Commonwealth law. Similarly, the law applicable to administrative decisions under the corporations law will be the federal law (*Administrative Appeals Tribunal Act 1975, Administrative Decisions (Judicial Review) Act 1977, Freedom of Information Act 1982, Ombudsman Act 1976, Privacy Act 1988*) rather than State administrative law remedies. The citation for companies law has also (mercifully) been simplified. Rather than monstrosities such as *'Companies (Western Australia) Code'* or even *'Companies (Acquisition of Shares) (New South Wales) Code'*, the corporations law of each jurisdiction may be referred to simply as the *'Corporations Law'*. This expression will refer to the corporations law of the relevant jurisdiction or two or more such laws as the case requires.

Civil jurisdiction under the *Corporations Law* will be conferred on the Supreme Courts of each State, the Australian Capital Territory and the Northern Territory and the Federal Court of Australia. There will be cross-vesting of civil jurisdiction between the State and Territory Supreme Courts and the Federal Court so that a single court will be able to deal with all litigation relating to a particular matter regardless of the State or Territory jurisdictions in which the various causes of action arose. Courts will have the discretion to transfer matters to other courts where it is in the interests of justice to do so. Criminal law jurisdiction will be exercisable by the relevant State, Australian Capital Territory and Northern Territory courts which will be cross-vested with jurisdiction to deal with offences under the *Corporations Law* of each other jurisdiction. The courts of a particular State or Territory will only have jurisdiction to deal with indictable offences against the *Corporations Law* of another State or Territory if the offence has been either committed outside Australia or committed, begun or completed in the State or Territory of the court but will have full cross-vested criminal jurisdiction without limitation as to locality in relation to summary offences under the *Corporations Law*, just as the courts may exercise summary jurisdiction under the *Judiciary Act* in respect of summary offences under Commonwealth law wherever committed.

The new formal agreement between the Commonwealth, the States and the Northern Territory had not been drafted when the new legislation came into effect on 1 January 1991. When the agreement has been drafted and signed, the federal Attorney-General, Mr Duffy, has said that the government intends to have it annexed to the corporations legislation. The formal agreement underpinning the previous co-operative scheme formed a schedule to the *National Companies and Securities Commission Act 1979*.

Coalition support

The Shadow Minister for Corporate Law Reform and Consumer Affairs, Mr Peter Costello, made it clear in his second reading speech to the Bill introduced into the Commonwealth Parliament to implement the new national companies scheme that the coalition supported the principle of uniform company law administered by a single agency, the Australian Securities Commission. However, the coalition was critical of the government's handling of the Bill, in particular its failure to allow for adequate debate of the legislation in the federal Parliament.

Close corporations

Mr Costello also queried the omission of the close corporations legislation from the corporations package. Mr Duffy said that close corporations were not one of the matters agreed upon by the ministers in Alice Springs but indicated that they would be dealt with under the new Ministerial Council arrangements.

Western Australia

The main obstacle to achieving complete national companies legislation by 1 January came from the Western Australian Parliament. The Opposition controlled the Western Australian Legislative Council and at first refused to pass the corporations legislation. Members of the Opposition had several concerns. As a matter of principle, they thought it wrong to separate legislative authority from executive authority: under the new companies scheme, the legislative authority of the States is used to enact legislation which will be administered by a Commonwealth authority and which will only be amended at the instigation of, or with the agreement of, the Commonwealth. They were also concerned that Western Australian business groups should have access to corporate decision makers in Western Australia rather than having to wait on Canberra, Sydney or Melbourne to make decisions in relation to Western Australian companies. Despite these concerns, the Western Australian Opposition eventually decided to pass the legislation because of the difficulties which companies operating in Western Australia and Western Australian stockbrokers would have faced if Western Australia had not become part of the national scheme. It would have been illegal for companies registered in Western Australia to trade in other States of Australia unless registered under *Corporations Law* Part 4.1 Division 1. This Division would have treated Western Australian companies as registrable Australian bodies and would have required an additional registration procedure to have been complied with before business could be carried on in the rest of Australia. In a letter to the *Australian Financial Review* published on 7 December 1990, the chairman of the Australian Securities Commission, Mr Hartnell, indicated that overseas companies that had already registered in Australian jurisdictions other than Western Australia would, in fact, be better off than Western Australian companies because they would be deemed to have complied with the registration procedures. Another difficulty which would have resulted from failure to pass the legislation lay in significant doubts about whether Western Australian members of the Australian Stock Exchange would be covered by the National Guarantee Fund administered by the Stock Exchange if Western Australia were not party to the national legislation. Companies not domiciled in Western Australia but conducting operations or activities in Western Australia would also have faced the extra costs and inconvenience of complying with the Western Australian legislation.

Insider Trading Bill

The Attorney General's Department has released an exposure draft of the Corporations (Insider Trading) Amendment Bill. The Bill is largely based on the Report of the House of Representatives Standing Committee on Legal and Constitutional Affairs entitled *Fair Shares for All: Insider Trading in Australia* tabled in federal Parliament on 28 November 1989. This Report was discussed in detail in [1990] *Reform* 3, 6—7. The main difference between the recommendations in the Report and the provisions of the Bill is in relation to penalties. The Standing Committee recommended that the penalties for insider trading should be twice the amount of profit realised or loss avoided or $100 000 in the case of a natural person and $500 000 in the case of a body corporate. The Bill does not adopt the penalty equivalent to double the profit realised or loss avoided. Two reasons are given. First, the ability of a person affected by the crime of insider trading to seek damages under *Corporations Law* s 1005 would be severely impaired because the insider's capacity to pay damages after having to pay such a penalty would usually be very limited. Secondly, *Corporations Law* s 1013 and *Proceeds of Crime Act 1987* (Cth) can be used to strip an offender of the profits of insider trading. There is another minor respect in which the Bill differs from the Report of the Standing Committee. The offence of insider trading focuses on the use of information which is not 'generally available'. Proposed s 1002B says that information is generally available if (a) it has been made known in a manner that would, or would be likely to, bring it to the attention of persons who commonly invest in securities of a kind whose price or value might be affected by the information and (b) since the information was made known, a reasonable period for it to be disseminated among such persons has elapsed. Concern had been expressed that this formulation might have the effect of penalising the sophisticated or diligent investor who is able to assess very quickly the importance of information released to the market. Such an investor should not have to wait a 'reasonable

time' before entering the market. Therefore, the Bill includes a defence that the person was in possession of the information solely because it was made known as mentioned in paragraph 1002B(a).

Reforms

Now that the national companies legislation is in force, the Commonwealth and the Ministerial Council can turn their attention to those areas of the law which require legislative reform. The areas which will remain on the corporate law reform agenda after Parliament has dealt with the Corporations (Insider Trading) Amendment Bill include loans to directors, directors' duties, directors' indemnities and liability insurance and, of course, the recommendations of the Australian Law Reform Commission in ALRC 45 for the reform of the law relating to corporate insolvency. This issue of *Reform* covers a recent speech discussing the Commission's recommendations for the reform of insolvency law. □