

Proposed Statement on Mutual Assistance Between Business Regulatory Agencies

**Prepared by the Commonwealth Secretariat for consideration by the Meeting of Senior Officials
and possible report to Law Ministers**

BACKGROUND

1. At the meeting of Senior Officials of Commonwealth Law Ministries held in Singapore from 30 March to 2 April 1992 it was decided to recommend that it would be appropriate for Law Ministers to revisit the subject of mutual assistance between business regulatory agencies when they meet in 1993.

2. In this context it will be recalled that, following discussion of this matter in Christchurch, New Zealand in April 1990, Ministers identified the need for the extension of mutual assistance in the area of business regulation. In so doing they declared that "Voluntary co-operation needed to be reinforced by legislative provisions to enable powers of compulsion to be exercised in the fulfilment of requests in appropriate cases". They also invited the Secretariat to report to the 1993 Meeting on the progress made throughout the Commonwealth in developing this additional and important form of mutual assistance.

3. At the Singapore gathering of Senior Officials it was generally felt that it would not be appropriate, at least at present, to have recourse to a formalised Commonwealth Scheme in this area of concern. However it was agreed that it might well be timely for Ministers to take the opportunity of their 1993 Meeting to articulate, in greater detail than was possible in Christchurch, the general principles which they feel should guide the future development of law and practice in this area of mutual assistance. The product of such consideration by Ministers could, it was agreed, be included either in the final Communique or in a stand-alone statement which might be annexed to that Communique.

4. Senior Officials may care to consider the issue further at their meeting prior to the Law Ministers' Meeting. To assist in this task the attached draft statement has been prepared. It takes into account such international practice as has been developed in the area and the work of the International Organisation of Securities Commissions (IOSCO). Regard has also been had to the laws of those Commonwealth Countries which already permit the exercise of compulsory powers in aid of counterpart agencies abroad. The draft was circulated to Commonwealth Governments in September 1992.

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DRAFT STATEMENT

At the Meeting of Commonwealth Law Ministers held at Mauritius from 15-19 November 1993 note was taken of the considerable progress achieved towards the effective implementation of the Scheme relating to Mutual Assistance in Criminal Matters within the Commonwealth. Ministers recognised, however, that the increasing international activity in the securities, futures and investment markets brought with it a corresponding need for an enhanced level of international co-operation in this specialised area. Given the traditional availability to Business Regulatory Agencies of administrative and civil sanctions in addition to those of the criminal law, this need could not be adequately satisfied by exclusive reliance on the Commonwealth Scheme or other established mechanisms for the provision of mutual assistance in traditional criminal matters.

Ministers reiterated the view expressed in the Communique which concluded their April 1990 Meeting at Christchurch, New Zealand, that there was a need for the extension of mutual assistance in the area of business regulation. This was best achieved by provisions, which would be complementary to and compatible with those giving effect to the Harare Scheme, to enable a regulatory agency to respond to requests for assistance from a counterpart agency in another Commonwealth country and to use for that purpose appropriate powers available to it in a purely domestic context.

It was agreed that those Commonwealth countries contemplating the development of administrative structures and the enactment of legislation in this area should, subject to the general principles of their domestic legal systems, be guided by the following general principles and considerations:

1. That systems devised to respond to requests for assistance by counterpart regulatory authorities for the purpose of the exercise of their regulatory functions should be simple, quick and flexible and be capable of use with the minimum of formality.
2. Assistance would be provided subject to compliance by the requesting authority with appropriate conditions concerning the use, confidentiality and return of documents and information.
3. That the decision of whether or not to grant assistance in any case would be discretionary. In the exercise of this discretion the requested party could consider, among other matters, the seriousness of the alleged breach of the law, regulation or requirement; whether

the assistance could more appropriately be obtained by other means; issues of international law and comity; and the resource costs involved. Assistance would not normally be refused solely on the ground that the circumstances which gave rise to the request for assistance did not constitute a violation of the laws, regulations or requirements of the requested country. However, assistance could always be denied on grounds of public interest.

4. That in providing for the granting of assistance for the purpose of facilitating the performance of the functions of a requesting authority as provided under the laws, regulations and requirements of the requesting country, the law of the requested country should permit (subject to appropriate civil liberties and other safeguards) a regulatory agency in that country to use appropriate powers available to it in a domestic context. This would include in particular:

- (a) gaining access to, or supplying, information in its files;
- (b) obtaining information or documents from any person or entity subject to its jurisdiction; and
- (c) exercising appropriate powers of investigation or inspection.

5. That the law of the requested country should make it possible in appropriate cases to invoke sanctions or take other enforcement proceedings in cases in which a person or entity withheld information, documents or other assistance which the regulatory agency was entitled to obtain in the context of responding to a request for assistance.

6. There should be no legal impediment to the spontaneous provision by a regulatory agency (subject to appropriate safeguards) of information to a counterpart agency in another Commonwealth country where that information clearly gave rise to a suspicion of a breach of a legal provision, regulation or requirement of that counterpart agency. The decision of whether or not to provide such information in any particular case would be at the sole discretion of the agency in possession of it.

Ministers were confident that the introduction by relevant jurisdictions of mechanisms of co-operation which conformed to the above general principles and considerations would provide a sound and modern basis from which to combat fraud and other abuses, thus ensuring a more orderly international market place.