

‘The Role of the Courts following Referral of Power - Some Brief Comments’

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Introduction

1. My remarks are supplementary to the paper by Justice G F K Santow. I shall confine myself to a few thoughts about the role of courts under a Commonwealth Corporations Law. My thoughts are very much my own, not to be attributed to anyone else.
2. The most striking feature about Australian company and securities law reform over the last 40 years has been the inexorable march towards uniformity in a federal environment. The Europeans admire and even envy us for it, and the Americans puzzle about why we have chosen to eliminate competition amongst the States. But they are united in identifying uniformity as our singular achievement.

Uniformity of the legislative text

3. The modern movement towards uniformity of the text of legislation began with the Uniform Companies Act of 1961. It was enhanced by the work of the Standing Committee of Attorneys-General (Eggleston Committee) in the late 1960s, and was further encouraged by the Interstate Corporate Affairs Commission and the uniform Securities Industry Act of 1976.
4. It was achieved, for all practical purposes, by the introduction of the national co-operative companies and securities scheme in 1981/82, because that scheme provided a mechanism for national amendments which were effective in every State. The Corporations Law used the same mechanism. The mechanism to be used in the proposed Corporations Act, namely Commonwealth enactment after referral of State legislative power, has the same basic co-operative elements.

Uniformity of administration

5. Experience under the national co-operative companies and securities scheme demonstrated that uniformity of the text of legislation is a hollow achievement unless it is accompanied by uniformity of administration of the law. Perhaps the most important advance made by the Corporations Law in 1991 was the replacement of State Corporate Affairs Commissions with a single national Commission, supported eventually by a single national database.

'Uniformity' of interpretation and application

6. One further ingredient was needed for a system of national uniformity of company and securities law. There needed to be 'uniformity' of interpretation and application of the law. Of course, 'uniformity' is not quite the right concept here. Statutory provisions often have an open texture, and ideas must be allowed to evolve as cases present new factual applications. 'Uniformity' of interpretation should be taken to mean no more than consistency, and even that kind of 'uniformity' can only be a goal not ever fully attained.
7. It must be said that progress towards achieving uniformity in this sense has been slower and more tentative than progress towards uniformity of the statutory text and administration.

The evolving jurisdiction of Supreme Courts

8. In the 1950s the task of interpreting and applying statutory and general company law fell to the State Supreme Courts. There was no Federal Court of Australia. The State Courts were relatively insulated from one another. They relied on precedents from the Privy Council and the High Court of Australia, and the courts of England, and they gave less attention to decisions of the courts of other States, even decisions on appeal.
9. Because each step to date in the movement to uniformity of the text of the law has involved the exercise of State legislative power, the State Supreme Courts have retained their role as interpreters of the uniform law. However, their jurisdiction was initially limited by reference to home State boundaries. The national co-operative companies and securities scheme of the 1980s expanded the jurisdiction of State Supreme Courts to deal with matters connected with other States, but many technical problems remained. Orders of certain kinds could only be made by the Supreme Court of the State of incorporation of the relevant company (for

example, orders for winding up and the approval of a scheme of arrangement), and different systems of State administrative law governed judicial review of regulatory decisions. Those problems were overcome only when the Corporations Law established a system of cross-vesting in 1991, and "federalised" company law by applying the Commonwealth system of administrative law.

The Federal Court

10. During the late 1970s and 1980s the Federal Court of Australia came to exercise jurisdiction in company law matters through reliance on the emerging doctrine of accrued jurisdiction. But in the nature of things, the advent of the Federal Court could not be a strongly unifying influence on the interpretation of company law, but only another source of company law jurisprudence. This remained the case when the Federal Court acquired plenary jurisdiction under the Corporations Law in 1991, concurrently with the State Supreme Courts.

Improvements in the 1990s

11. The insularity of the various courts is slowly changing. Most importantly, in 1993 the High Court declared that uniformity of decision in the interpretation of the Corporations Law is a sufficiently important consideration to require that an intermediate appellate court (and all the more so a judge at first instance) should not depart from an interpretation based on the legislation by another Australian intermediate appellate court, unless convinced that the interpretation is plainly wrong: *ASC v Marlborough Gold Mines Ltd* (1993) 10 ACSR 230, 232. The implications of that decision are still being worked out by the advocates who appear before us in company matters, and by the courts themselves. The High Court's observations have led judges at first instance to pay closer attention to decisions of other Australian courts at first instance.
12. The jurisdictional problems of the courts that are involved in the interpretation of company and securities law were thought to have been overcome by the Corporations Law (except that State Supreme Courts were denied jurisdiction to review decisions of the Commission under the Administrative Decisions (Judicial Review) Act 1977 (Cth)). But, of course, *Wakim* told us that the system of cross-vesting was ineffective to vest jurisdiction in the Federal Court with respect to the Corporations Law of a State.

The proposed Commonwealth Corporations Act

13. I take it that under the new legislation the Federal Court of Australia and State Supreme Courts will be given plenary jurisdiction in more or less coextensive terms. There will be no *Wakim* problem for the Federal Court because jurisdiction will be conferred by and in respect of a Commonwealth law. The State Supreme Courts will be invested with federal jurisdiction to exercise the judicial power of the Commonwealth under the new law.
14. One hopes that the legislation will not contain any relevant jurisdictional limits on any of the Federal Court and the State Supreme Courts vis-a-vis the others, so as to ensure that the court before which a matter comes has the jurisdiction to deal with all aspects of it and that duplication of proceedings is avoided. Equally, one hopes that there is ample and flexible power for any of these courts to transfer proceedings to one of the other courts, in the exercise of its discretion.
15. As far as the State Supreme Courts are concerned, all that is needed is to continue their existing jurisdiction, subject to one point. When the Corporations Act 1989 (Cth) was amended earlier this year to give State Supreme Courts jurisdiction under the Administrative Decisions (Judicial Review) Act 1977 (Cth) (see s 51(2A)), a limitation was imposed requiring a State Supreme Court to transfer a judicial review proceeding to the Federal Court except in special circumstances (s 53(3)). This restricts the ability of State Supreme Courts to review, for procedural fairness or error of law, administrative decisions by bodies such as the Commission. Given the overall policy of conferring ample jurisdiction on all relevant courts, there appears to be no justification for restricting the State Supreme Courts in this way, and I hope that an equivalent of s 53(3) will not appear in the new legislation.
16. Broadly, the introduction of the new legislation will bring us to the point thought to have been reached by the Corporations Law - that is, a judicial system for the interpretation and application of company and securities law in which the Federal Court and the State Supreme Courts will operate concurrently in civil matters. But that is a fairly modest achievement on the road to national uniformity, compared with the absolute national uniformity of the text of legislation, and the general uniformity of administration by a single Commission (perhaps not yet

fully perfected in practice). What should the next steps be, assuming that national uniformity of interpretation and application of company and securities law is the agreed objective?

The next steps

17. In my view the goal will not be achieved by any step that limits or excludes the jurisdiction of any Court. Questions of company and securities law are bound to arise in the Federal Court and the State Supreme Courts whether or not they are invested with jurisdiction under the corporations statute. It would be productive of much uncertainty and expense to leave any of those courts in doubt about their jurisdiction to hear matters that have properly come before them.
18. That means, however, that the judges having jurisdiction to deal with company law matters will include some, in both the Federal and State spheres, who have no background or experience in that field of law. This could be an impediment to the achievement of a national approach to the interpretation and application of company and securities law.

The need for judicial expertise

19. In the time of Sir Frederick Jordan or even Sir Owen Dixon, it may have been possible for judges at first instance to maintain adequate expertise to deal effectively with all legal subjects. But in my view, if ever that was so it is certainly not the case now. Expertise has become a prerequisite of adjudication in many fields, from criminal law to taxation.
20. Specifically, company and securities law is one of those fields of law in which certain kinds of experience and expertise are an advantage to the judge at first instance, and a level of specialisation is needed in the judicial decision-making process.

Expertise in company and securities matters

21. I believe there are at least three aspects to this in company and securities area. First, it is necessary for the judge to have an understanding of the legislative and regulatory policies that specially apply to these matters, and the functions and operations of the regulator. For example, a judge inexperienced in the administration of company and securities law by the Commission might recoil against the depth and range of the Commission's discretions to grant

exemptions from or modify the law. A judge who understands the policies leading to the conferral of these discretions, and is familiar with their use, is likely to make better decisions in cases where the use of the discretions is in question. If decision-making is allocated to judges who have this kind of experience, the likelihood of uniformity of decisions is enhanced.

22. Secondly, transactions involving the application of company and securities law are sometimes complex in typical or characteristic ways. Familiarity with the typical transaction structures can be useful, especially where the matter for decision involves the exercise of a discretion - as it does, for example, in a decision to approve a scheme of arrangement.
23. Thirdly, an important role of the court that administers statutory company and securities law is supervision of the conduct of certain intermediaries, such as insolvency practitioners and securities dealers. In some respects the court's role is quasi-administrative. The development of views as to proper standards of conduct requires a level of specialisation. For example, coherent standards of conduct for voluntary administrators will only be fully developed by the courts (in a process which is now well under way, by virtue of the growing number of cases in this area) if the courts considering questions about the conduct of voluntary administrators have a level of specialisation on that question.

Some modest proposals

24. I believe that if we are to move to effective 'uniformity' of interpretation and application of company and securities law, we must allow specialisation to develop within the courts of plenary jurisdiction. One obvious way of doing so is to establish a corporations list in each relevant court. This has occurred in some of the State Supreme Courts, and presumably the Federal Court will restore its corporations lists, which operated in some States, when the new law commences.
25. Then it is necessary for the judges who administer corporations lists to establish and maintain contact with one another. This is why the recent establishment, by Santow J and others, of a national group of corporations list judges has been so important.
26. Immediate access to relevant judgments is also essential, and in this respect the establishment of

a web-site for corporations law judgments at the Centre for Corporate Law and Securities Regulation is also an important development.

27. The adoption of national uniform Corporations Law Rules has been important, partly because it denotes that company and securities law matters are to be treated separately and specially.
28. These are modest beginnings. We are well short of the emergence of a national corporations list, a phenomenon that may have to await the introduction of a national uniform judicial system. But once each relevant court has identified one or more specialist company law judges, and the specialists are put in touch with one another regularly on a national basis, any residual tendency towards insularity is unlikely to survive, and the likelihood of judicial disagreement should also be reduced.
29. The fact that various courts have concurrent plenary jurisdiction should then be no bar to the achievement of national uniformity of interpretation and application of company and securities law.

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