

# Deepening Clouds over the Corporations Law

by Marion Hetherington<sup>1</sup>

The High Court's decision in *Hughes* deepened the clouds that had already gathered over the validity of the Corporations Law system following *Wakim*. *The Australian* immediately urged Australia's governments to "rethink and rework corporate regulation" to meet the needs of the economy: "To support business confidence and investment, Australia needs a system of corporate regulation where nationwide laws are enforced and applied consistently" (*The Australian*, 4/4/00 pp 10 and 24). But in the ensuing three months what we have seen instead is a power struggle between the Commonwealth and the eastern states on the one hand, and the States of Western Australia and South Australia on the other.

On an almost daily basis we see the struggle played out in the press. It may have reached its high point last week when Peter Foss, the Western Australian Attorney-General, in a letter to the *Australian Financial Review* (AFR 11/8/00 p 79) complained of "incorrect and misleading" statements in AFR writer Chris Merritt in "Time to call recalcitrant States' bluff" (AFR 4 August p 33). And yet Mr Merritt's comments are not untypical of reports which have appeared in the national press since the May decision of the High Court in the *Hughes* case. There has been a broad chorus of demand from the east that the western states agree to wide terms of referral proposed by the Commonwealth, almost as if the Commonwealth had a *right* to such powers, notwithstanding the terms of the Australian Constitution, and the failure of the High Court to affirm as valid the 1991 legislation.

After the July SCAG meeting it was reported that the various Attorneys-General of the States and the Commonwealth are looking at a new option of referring the legislation of the Corporations Law itself as a means of temporarily shoring up the system whilst a long term solution to the problems identified in the *Wakim* and *Hughes* High Court decisions is found in the form of a wider referral or a referendum. Even that report has received a mixed response. With some few exceptions, most commentators persist in advocating that the states fall in with the Commonwealth's more extensive original referral solution.

Some of the more extreme views do indeed include calling the "bluff" of Western Australia and South Australia, or subjecting them to "payback" and a "bleak" future for failing to comply (AFR 4/8/00 p 33 and 17/7/00 p 5). There has already been one appeal to the Prime Minister to end the "thuggery" (AFR 26/7/00 page 5). And then there are those who suggest that the High Court is guilty of "extremism" (AFR 4/8/00 p 33), possible "petulance" (AFR 12/5/00 p 15), apparent failure to understand that "it is essential that effective schemes agreed to by elected governments ... should not be rendered useless because an unelected body, the High Court, finds them too complex" (AFR 26/5/00 p 31), or of interpreting the Constitution in a manner that is "at odds with the real world in which corporate Australia must operate" (AFR 5/5/00 p 57) .

But there is scant recognition of the undeniable validity of concerns expressed by Attorneys-General Trevor Griffin of South Australia and Peter Foss of Western Australia as to the efficacy of the Commonwealth's proposed referral proposals. More importantly, there is a widespread tacit denial of the legitimacy of the western states' concern that what they are being asked to do is to surrender powers granted to them by the Constitution in order to allow greater centralisation of financial and other control by the central government. In an article entitled "Federal strength can't flow from weak states" in *The Australian* (7/7/00 p 15) Richard Court, Premier of Western Australia describes a trend of the past hundred years away from the "original ideals" of the Constitution. He suggests an open debate

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and emphasises that Western Australians have long experienced concern about consolidation of financial and other powers in the central government. Mr Court identifies the High Court's *broad* interpretation of the Commonwealth's legislative powers since 1920 as one reason for the centralisation. In this context, the striking feature of the High Court's recent decisions relating to corporate law is that it has interpreted the Commonwealth's powers *narrowly* and consequently inhibited centralist aspirations. This may have added another emotional layer of response to *Wakim* and *Hughes* – the sense of disappointment of those who, emboldened by past wide interpretations of the High Court, believed, in spite of doubts, that the Corporations Law system would in the end be upheld by the High Court. And some of them seem now to be urging us along what seems to be the same course again – of proceeding with proposals on the assumption that they will be found valid, although there are serious reasons for doubt.

Slogging out the issues in this manner does not dispel the gloom. If anything the clouds deepen further. But this would surely not be happening if we had generally agreed criteria for determining when departure from the division of subjects under the Constitution is justified – that is, when it is appropriate that States should refer matters, or that the Constitution should be changed by referendum. I suggest that, as a preliminary matter, we should set about the task of formulating such criteria. I propose the creation of a special national committee, comprising constitutional and commercial experts approved by the Commonwealth and the States, and charged with the task of making recommendations on–

- (i) dealing with the immediate problems for the validity of existing legislation consequent upon the recent High Court decisions;
- (ii) future direction of the regulation of commercial and business law, including but not limited to, company law and those areas of financial regulation now or in the process of being integrated with it, and also those which should be similarly embraced as a matter of government policy; and,
- (iii) formulation of general criteria against which proposals for referral or referenda could be judged, with a view to encouraging a consensus as to how the nation should approach such matters when they arise in the future.

Each of these three areas requires careful treatment. Not one of them is amendable to a quick fix solution. Given the reasoning in *Hughes* and *Wakim*, even the simplest referral proposal intended as a short term measure has significant legal problems.

Considering the future direction of commercial law nationally as I suggest in a sense involves continuing the work of the Wallis committee. The Wallis report reanalysed along functional lines the elements of the commercial and financial system thought at that time to be within Commonwealth control. The Commonwealth Government's adoption and implementation of the report's recommendations caused the Corporations Law to become one element in a co-ordinated legislative set-up covering company and securities law and the financial system generally, with the regulatory bodies, ASIC, APRA and the RBA, occupying the broadly separate functional domains of, respectively, market integrity (including consumer protection and corporations), prudential regulation (of organisations managing the public's superannuation, insurance and deposit funds) and financial safety (including systemic stability, payment systems regulation and monetary policy). Commonwealth Government policy thus now identifies the financial system in those aspects that relate to market integrity, prudential management and financial safety as apt to be regulated in conjunction with company law by the Commonwealth. The next logical step would be to consider what other aspects of commercial life ought to be similarly embraced by government policy, so that we had a coherent government policy covering commerce.

Through the developments mentioned above, company law has become integrated into a Commonwealth regulatory system in a manner which is, in practical terms, well nigh irreversible. It is arguable that an outcome of this kind ought not to be achieved by a referral which would remain technically subject to rescission. Certainly, much of the concern of the Western States relates to what may be termed the creeping centralisation that can occur when powers given on a particular basis become imbedded in a larger system from which there is no *political* escape.

Having the proposed committee formulate general criteria against which proposals for referral or referenda could be judged provides a means of dealing with the political problem that arises regularly when the original division of subjects under the Australian Constitution does not seem to serve the country's modern purposes. This political problem is one which was created by the Constitution itself, and which we can realistically hope only to manage better but not to eliminate. The national committee is proposed as a constructive step in that direction.