Legislative Council

27/03/2001

Corporations (Commonwealth Powers) Bill Hansard Extract

Second Reading

The Hon. M. R. EGAN (Treasurer, Minister for State Development, and Vice-President of the Executive Council) [8.35 p.m.]: I move:

That this bill be now read a second time.

I seek leave to incorporate my second reading speech in *Hansard.*

Leave granted.

The Corporations (Commonwealth Powers) Bill forms part of a package of corporations bills that follow historic negotiations between the Commonwealth and the States to place the national scheme for corporate regulation on a secure constitutional foundation. The bill reflects the commitment of the New South Wales Government to achieving an effective, uniform system of corporate regulation across Australia.

To understand this bill and the package of Corporations Law bills, it is necessary to consider the history of corporate regulation in Australia over the past 20 years. In Australia, the development of an effective system of corporate regulation has been complicated by our Federal system of government. The States and Territories are sovereign entities possessing the powers and ability to make their own laws and for many years different requirements relating to corporate regulation existed in each State and Territory.

From July 1982, corporate regulation in Australia was based on a co-operative scheme between the States, the Northern Territory and the Commonwealth, where substantially uniform legislation applied to all jurisdictions. However, towards the end of the decade emerging problems in the operation of the co-operative scheme meant that the scheme was no longer an effective means of ensuring corporate regulation in a uniform and consistent manner suitable for a changing commercial environment. There were also concerns about the need for more effective national enforcement of the corporate regulatory regime. This lack of legislative and administrative uniformity, combined with different regulators in the States and Territories, was also hampering supervision of the share markets and thus investor protection.

To remedy these emerging problems, a new national scheme for the regulation of corporations, companies and securities was devised and commenced operation on 1 January 1991. The current national scheme is based on the substantive Commonwealth law which applies in the Australian Capital Territory, known as the Corporations Law. This law, as in force from time to time, is applied in each State and the Northern Territory. In New South Wales the relevant legislation is the *Corporations (New South Wales) Act* 1990.

In order to create a national scheme certain Commonwealth features were added to the arrangements, like the enforcement of Corporations Law offences by the Australian Securities and Investments Commission [ASIC], the Australian Federal Police [AFP] and the Commonwealth Director of Public Prosecutions. Also, the Federal Court was given power to hear matters arising under the Corporations Law of each State by a cross-vesting scheme contained in the corporations Acts of the Commonwealth and the States.

The current scheme is underpinned by heads of agreement which were agreed on 29 June 1990 and a supplementary agreement, the Corporations Agreement. The Corporations Agreement, which is an intergovernmental agreement was formally signed by the States, the Northern Territory and the Commonwealth in September 1997. The Corporations Agreement sets out the functions, objectives and voting arrangements relating to the administration of the Corporations Law by the Ministerial Council. The agreement establishes the Ministerial Council for Corporations [MINCO] which is constituted by the relevant Commonwealth, State and Territory Ministers responsible for the national scheme law, as the primary forum where all matters relating to corporations, securities and corporate governance are discussed and voted on.

The current scheme to all intents and purposes operates on a seamless, national footing. ASIC administers the Corporations Law through regional offices in each jurisdiction. The scheme has worked remarkably well. The parties to the Corporations Agreement have, in general, complied with its spirit and letter, and there has been

little discord between the States and the Commonwealth about the operation of the Corporations Law in Australia. However, recent legal challenges and decisions of the High Court of Australia have cast doubt on the constitutional framework that supports the Corporations Law. The difficulties associated with the current system of corporate regulation have been identified by the High Court in two significant cases.

The first case was decided in June 1999. In *Re Wakim: Ex parte McNally* the High Court held by majority that Chapter III of the Commonwealth Constitution does not permit State jurisdiction to be conferred on Federal courts. Effectively, this decision removed the jurisdiction of the Federal Court in most States and Territories to resolve corporations law matters—unless cases fall within the court's accrued jurisdiction or in certain other circumstances—and it denies litigants a choice of forum for the resolution of such disputes.

The second case was *The Queen v Hughes*, decided in May 2000. There the High Court held that the conferral of a power coupled with a duty on a Commonwealth officer or authority by a State law, must be referable to a Commonwealth head of power. This means that if a Commonwealth authority, such as the Director of Public Prosecutions or ASIC, has a duty under the Corporations Law, then that duty must be supported by a head of power in the Commonwealth Constitution. This decision casts doubt on the ability of Commonwealth agencies to exercise some functions under the Corporations Law.

These decisions of the High Court prompted the Standing Committee of Attorneys-General and the Ministerial Council for Corporations to meet to resolve the problems facing the national corporations law scheme. On 25 August 2000 in Melbourne, Commonwealth, State and Territory Ministers reached an historic agreement in principle to refer to the Commonwealth Parliament the power to enact the Corporations Law as a truly national law and to make amendments to that law subject to the terms of the Corporations Agreement.

Honourable members will recall that late last year, the Corporations (Commonwealth Powers) Bill 2000 was introduced, and the proposed Commonwealth Corporations Bill 2000 and the Australian Securities and Investments Commission Bill 2000 were tabled. The bill before the House replaces that bill. The former bill was tabled following extensive negotiations among the States and Commonwealth, culminating in a joint meeting of the Ministerial Council for Corporations and the Standing Committee of Attorneys-General in Sydney on 28 November. At that meeting, the State Ministers agreed unanimously on the terms of that bill, and supported its introduction into New South Wales Parliament.

Following the introduction of the bill, further negotiations took place, and on 21 December 2000, representatives of the Victorian, New South Wales and Commonwealth Governments met to resolve outstanding issues. Their discussions turned on the inclusion of specific provisions in the Corporations (Commonwealth Powers) Bill to proscribe the use of the referral for industrial relations purposes. It was agreed at that meeting that clauses 5 and 6 of the Corporations (Commonwealth Powers) Bill 2000 would be removed from the bill and that instead an objects clause would be included in the bill to provide that the proposed Act was not intended to enable the making of a law pursuant to the amendment reference with the sole or main underlying purpose or object of regulating industrial relations. The bill before the House gives effect to that agreement. The bill reflects the commitment of the New South Wales Government to ensuring that the uncertainty that now prevails in the business community over the future of corporate regulation in Australia is resolved as quickly as possible.

The Corporations (Commonwealth Powers) Bill firstly enables the Commonwealth Parliament to enact the proposed Corporations Bill and the Australian Securities and Investments Commission Bill, in the form of the bills which I have tabled in the New South Wales Parliament, as Commonwealth laws. Secondly, it also enables the Commonwealth to amend those laws, or regulations made under them, in the future, as long as the amendments are confined to the matters of corporate regulation, the formation of corporations, and the regulation of financial products and services, but only to the extent of making express amendments to the bills referred to the Commonwealth Parliament. This is called the "amendment reference". It should be noted that the omission of the old clauses 5 and 6 of the bill introduced late last year in no way affects the proper construction of the amendment reference, and in particular the concept of "corporate regulation".

The bill provides in clause 1 (3) that the Act is not intended to allow for laws to be made pursuant to the amendment reference with the sole or main underlying purpose or object of regulating industrial relations matters. This exclusion is to ensure that the Commonwealth cannot use the referred powers to legislate in the area of industrial relations, to override State laws such as the Industrial Relations Act 1996.

The bill provides that the reference of power is to terminate five years after the Commonwealth corporations legislation commences, or at an earlier time by proclamation. The term of the referral can also be extended beyond five years by proclamation. The States have agreed to give the referral for only five years because the referral of power by the States to the Commonwealth is not a permanent solution to the problems of the current scheme. At the request of Ministers, the Commonwealth has given a firm undertaking to examine long-term solutions to address the problems arising from the decisions of the High Court in Wakim and Hughes, including constitutional change. Those problems affect a number of intergovernmental legislative schemes. The States now look to the Commonwealth to explore options for constitutional amendment thoroughly and expeditiously, through the Standing Committee of Attorneys-General. It is anticipated that a decision will be made well before the expiry of the five-year period about the holding of a referendum on this matter.

The States can terminate the referral earlier by proclamation if, for example, the Commonwealth Parliament makes amendments to the Corporations Law which go beyond what was envisaged when the referral was made, such as in the area of the environment. The bill also provides for the termination of the power of the Commonwealth to amend the referred laws, by proclamation. However, if only the amendment reference is terminated, the effect of the Commonwealth Corporations Bill is that the State would cease to be part of the new scheme unless all of the States also revoke the reference, giving six months notice of their intention to do so. This underlines the importance of the Corporations Agreement, which will govern the scope of the referral.

The Corporations Agreement is an intergovernmental agreement and in formal terms is not legally binding. However, the States place great weight on it, and have agreed to refer powers in the terms of the bill before the House on the understanding that the Commonwealth will abide by both the spirit and the letter of the agreement. As I have indicated, the agreement will contain specific provisions to prevent the use of the referred powers for the purpose of regulating industrial relations, the environment or any other subject unanimously determined by the referring States. It will also ensure that the States are consulted about any amendments made to the Commonwealth Corporations Act, and where the Commonwealth does not have existing constitutional power, that the States will vote on whether to approve or oppose the amendments. In addition, the agreement preserves the rights of the States to make laws that modify the operation of the Corporations Act, in relation to their own activities, such as, for example, the regulation of State bodies corporate. The terms of the agreement are still being negotiated among governments, but it is anticipated that the remaining matters will be resolved in the near future.

I understand that the Prime Minister will write to State Premiers, asking them to arrange for bills in similar terms to the Corporations (Commonwealth Powers) Bill to be considered by State Parliaments around Australia. It is then envisaged that the Commonwealth Parliament will enact the Corporations Bill 2001 (Commonwealth) and the Australian Securities and Investments Commission Bill 2001 (Commonwealth), using the powers conferred on it by this bill and its counterparts in other States, so that the new scheme can commence as soon as possible.

Honourable members will appreciate that a number of consequential and transitional amendments to State legislation will need to be dealt with before the new scheme commences, and I anticipate that a separate bill for this purpose will be introduced before the commencement of the new scheme.

The Corporations (Commonwealth Powers) Bill, related State legislation, and the enactment by the Commonwealth Parliament of the Corporations Bill 2001 (Commonwealth) and the Australian Securities and Investments Commission Bill 2001 (Commonwealth) will, with the enactment of similar legislation in all other States, ensure that our national system of corporate regulation is placed on a sound constitutional foundation and reinforce Australia's reputation as a dynamic commercial centre in the Asia-Pacific region. I commend the bill.