CORPORATIONS (COMMONWEALTH POWERS) BILL 2001

Cognate Debate

On motion by Mr McGinty (Attorney General), resolved -

> That leave be granted for the Corporations (Commonwealth Powers) Bill 2001 to be debated cognately with the Corporations (Ancillary Provisions) Bill 2001, the Corporations (Administrative Actions) Bill 2001, and the Corporations (Consequential Amendments) Bill 2001, and that the Corporations (Commonwealth Powers) Bill 2001 be the principal Bill.

Second Reading

Resumed from 26 June.

MRS EDWARDES (Kingsley) [1.04 pm]: I support the legislation, but with the same reluctance that the Liberal Party supported the original corporations Bills in 1990. The reason for that reluctance is the perennial argument about federal-state relations and whether we support the referral of powers to the Commonwealth Government. The Attorney General will get off a lot less lightly in this debate than did the minister responsible in 1990.

Mr McGinty: That is correct.

Mrs EDWARDES: I remember having to come back to this place between Christmas and new year to pass the legislation so that it could be enacted prior to 1 January 1991.

We as a Parliament now have an opportunity to reflect on what we did then, what it means now and whether it has been effective. If members refer back to the 1990 debate, they will see that we talked about the complexity of the community, the need for reformation of our laws - particularly in the corporate area - and the need for cooperation between the States and the Commonwealth. We must now ask what benefit that measure has afforded this State. I do not think anyone would doubt that, if we were not part of the national scheme, businesses and industry would have been severely disadvantaged.

We must address the benefits that might accrue to the State as a result of enacting this legislation. We have experienced financial disasters in this State, not the least of which was the recent HIH Insurance collapse. One was bemused when federal Minister Hockey suggested that the Commonwealth Government should take over responsibility for workers compensation in Australia. The Minister for Labour Relations and I were of like mind in quickly responding, "No way!" We responded that way not only because of the question of referral of a power by this State but also because the Commonwealth Government has not demonstrated that it can provide the State with the information it needs. Until September last year we were still getting reports that HIH Insurance was able to carry on providing workers compensation coverage in this State. For the minister to suggest that the Commonwealth Government should take over responsibility for workers compensation is a laugh.

I do not think anyone in this House believes that Western Australia would be better run by Canberra. None of us believes that the people of Western Australia would enjoy a better life if all the decision making were left to Canberra. I am sure the Minister for Health believes that he runs the hospital system - he employs the nurses, doctors and so on - even though it presents huge problems from time to time. The Commonwealth Government does not run that system, nor does it run the education system. We accept that Western Australia is beholden to the Commonwealth Government for considerable sums of money in playing what it perceives to be its role. It does not matter whether the Commonwealth Government is Liberal-National or Labor, it will always seek to take powers from the States. We should never blindly hand over state powers to the Commonwealth Government.

I have mentioned the HIH Insurance disaster, but we have also witnessed the collapse of One.Tel, Harris Scarfe Ltd and Impulse Airlines. How did the Commonwealth Government assist this State with regard to the finance brokers scandal? What enforcement powers did the commonwealth regulatory bodies exercise to assist us with that debacle? It was stated in 1990 that those bodies would provide assistance.

Although ours is the largest State geographically and as a result we face huge problems with distance, communication and so on, we are not one of the big States in terms of power. Power is obviously interpreted as votes. Whenever the Commonwealth Government is considering where to locate regulatory or enforcement bodies, Western Australia is usually the last location on the list. We are too far away for those in the east to be concerned about carrying out those roles here.

I raise this issue because it is an opportune time to do so and not only because I chaired the Select Committee on Parliamentary Procedures for Uniform Legislation Agreements. In 1992, when the coalition was in opposition, we debated legislation dealing with the financial institutions scheme. We were being asked to refer powers

through model legislation being enacted in Queensland. That legislation caused some problems, one of which was that enactment would make the Queensland Supreme Court our Supreme Court. The select committee was established to determine how we as a Parliament would retain our sovereignty and responsibility for uniform legislation whatever the model presented. I bring this issue to the attention of the House because it provides a solid basis from which members can reflect on the past and understand what we are considering, how we should go about it and what tests should be applied.

One of the tests was recommendation 1, which reads -

> That the primary consideration in decisions on participation in intergovernment agreements and uniform legislative schemes should be whether Western Australia will be better served by the enactment of uniform law than by Western Australian legislation specifically drafted to address Western Australian needs and requirements.

We should always use that as one of our tests. On page 26 of the report, Professor Campbell Sharman is quoted as saying -

> It seems to me that Parliaments should reassert their responsibility to investigate this (uniform) legislation as it applies in their particular jurisdictions. Of course, they must be cognisant of the fact there may be virtues in uniformity.

With corporations law, we can see that there are some values in having uniform legislation, particularly for the business sector. He went on to say -

> The right of Parliament to look at these matters should be reasserted . . .

One of the many recommendations that came out of this committee related to new procedures that were put in place before this Parliament. For the next eight years the Standing Committee on Uniform Legislation and Intergovernmental Agreements of this House existed. That has now changed under the new standing orders to being a joint standing committee on uniform legislation and delegated legislation. One of the most important roles of this Parliament is to ensure that we follow through on intergovernmental agreements that are being entered into by the Government of the State - whichever Government it may be - and that the legislation that comes before this Parliament and/or elsewhere is checked to ensure that we always retain our sovereignty for the benefit of Western Australia however we go about joining in a mutual or national scheme or intergovernmental agreement.

I reflect on the 1992 intergovernmental agreement on the environment and the new Environment Protection and Biodiversity Conservation Act, which went through the federal Parliament last year. There are enormous problems for this State. Sometimes when intergovernmental agreements are entered into, as was done in 1992, and they are reasserted, as was done when we were in government, the problems do not necessarily show up at first blush. It means that we always need to reassert our role and responsibility to constantly question whether we still wish to remain a part of national schemes. We must ask what is the benefit, and ensure through the ministerial council on corporations that Western Australia's interests are being looked after. Having been a member of that council for three years, I know that sometimes the agenda can get bogged down. The debate over the past couple of years has been in light of where we will go following the Hughes and Wakim cases - that is still to be resolved - and how we decide whether there will be further amendments or whether, as was being debated, there will be a requirement to have a constitutional amendment.

As the Attorney General is a member of that council, one of his roles will be to ensure that Western Australia's interests are being looked after. I understand that of the States and the Northern Territory, only New South Wales is still to pass the legislation.

Mr McGinty: I thought they had done it.

Mrs EDWARDES: The Attorney may have better information than I. However, I understand the legislation is likely to go through the Parliament today, in which case, all States and the Northern Territory will have legislation in place by 1 July. We are prepared to support the legislation with reluctance because we must ensure that Western Australia is being looked after. All the promises that were given back in 1990-91 have not eventuated. The last incident involved HIH Insurance and workers compensation and the fact that the regulatory and enforcement system for finance brokers did not look after the interests of Western Australians.

MS QUIRK (Girrawheen) [1.16 pm]: I am pleased to speak in support of this Bill. Both the Wakim and Hughes decisions have had far-reaching and unanticipated legal and constitutional impacts on a range of matters. The finding that the Australian Constitution does not permit a State to confer jurisdiction onto federal courts and tribunals is a highly significant one and has caused much disruption to these cooperative schemes. It is important that we guarantee a secure and certain scheme of corporate regulation. It is necessary that we have a

fully effective national Corporations Law in place, to not only promote business efficiency but also enable national enforcement of a corporate regulatory regime in a robust manner.

The cooperative scheme under the Corporations Law had been in place for approximately a decade before this difficulty was discovered. However, as some in the House will recall - the member for Kingsley made note of this - initially securing the cooperation of all States under the cooperative scheme was not easy. A very recalcitrant Western Australia was dragged screaming and shouting into the scheme at the eleventh hour. This was despite the sensitivities of the late 1980s, when corporate law enforcement was in a shambles and insufficient regard had been taken of some of the more dubious practices of the corporate world. There was at that time a consensus that a more stringent approach to corporate law regulation needed to be adopted to ensure that massive corporate malfeasance was a thing of the past. Nevertheless, it is timely to canvas whether under this cooperative scheme the Commonwealth is holding up its end of the bargain. Is the Commonwealth really fair dinkum about corporate law enforcement?

The debate that accompanies the introduction of this legislation gives us the opportunity to critically evaluate the performance of the Australian Securities and Investments Commission. In its 1999-2000 annual report, ASIC describes it role as -

> We are one of three Commonwealth government bodies that regulate the financial system.

The other two are the Reserve Bank, which regulates monetary policy, and the Australian Prudential Regulation Authority, which promotes the safety and soundness of deposit-taking institutions, life and general insurance companies, and larger superannuation funds. ASIC's report also states -

> We protect markets and consumers from manipulation, deception and unfair practices. We regulate advising, selling and disclosure of all financial products and services to consumers, except credit. We are also the Corporations Law watchdog, promoting honesty and fairness in companies and in the market.

That self-description by ASIC is very important. Certainly that is my assumption of what ASIC is required to do; that is, to act as a corporate watchdog. It is good that my expectations of what it is supposed to do are in accord with ASIC's view of its role. Having said that ASIC is the corporate watchdog, one asks whether it is doing a good job. Can the Commonwealth be proud of the standard and level of corporate vigilance that has occurred in recent years? Is there any room for improvement? Can we be confident that corporations in Australia are more likely than not to be acting with probity and propriety? Has ASIC become a captive of the very corporations that it is supposed to regulate? Has the right balance been struck between facilitating legitimate corporate enterprise and protecting investors?

The first observation that must be made is that participation in the market has increased markedly in recent years. Floats such as that of Telstra Corporation Ltd have allowed many people previously unfamiliar with the securities market to now dabble in shares. I accept that the principle of caveat emptor applies; nevertheless, ASIC must be mindful that less experienced people, who often have fewer resources to lose, are now involved in the market. I note that ASIC has played an effective role in educating those investors. However, if the integrity of the market is at risk generally, those steps are of little utility in the long run.

The enforcement and corporate oversight functions of ASIC are less than fully effective. The escalation in the number of small investors has coincided with a diminution in resources devoted to enforcement and application of criminal sanctions. I will examine some personal observations from my dealings with ASIC over the years. It is my view that there is a real tension within ASIC between those sections wanting to promote and facilitate business enterprise and to cut through red tape, and the investigative arm of the agency, which is charged with insuring that corporate laws are fully complied with. I am the first to acknowledge and accept that a criminal investigation is not always the right way to go. Nevertheless, in some cases it is the only appropriate way. I also accept that criminal investigations can be lengthy, complex and expensive, and may not necessarily preserve assets at the end of the day. In the time that it takes for a jury to decide these matters, which in some cases may take many years, assets may have been lost. I acknowledge that in those cases there must be rigorous examination of whether criminal proceedings are the way to go. I also acknowledge that ASIC has had some ongoing successes. Nevertheless, it is my assertion that criminal charges seem to be the last resort for ASIC, and the market knows this. Accordingly, the deterrence value that could be derived from ASIC's conducting an investigation in which criminal charges are a real prospect are severely diminished. Questions must be asked about this shift in focus. For example, if enhanced intelligence capacity existed, one wonders whether corporate collapses such as One.Tel Ltd and HIH Insurance - I accept the latter was principally the responsibility of the Australian Prudential Regulation Authority - might have been averted or at least detected in a more timely fashion.

I have grave concerns about the capacity of ASIC to avert infiltration of organised crime into the securities market under its present approach. In the United States, the penetration by the Mafia into Wall Street is a major concern. The participation of those criminals in share ramping, extortion, market manipulation and money laundering is well documented. There is no reason the same could not occur here. There is reason to believe that a similar infiltration could be well advanced in this State and this country before it is detected. If I were a consiglieri - I thank the member for Ballajura for advice on pronunciation - for organised criminals in this country, I would advise them not to get into drugs, with the attendant risk of close scrutiny by mainstream law enforcement, but to concentrate on infiltrating the securities market, in which the prospects of detection are more remote. This sounds like an absurd and untenable suggestion; however, there are a number of circumstances that support this contention. First, there is the ease with which money can be transferred offshore through electronic commerce. This can happen in a matter of seconds, yet it takes years to retrace the money trail.

The second point is that there is an enhanced capacity, through e-commerce, to have a raft of offshore companies, which makes lifting the corporate veil that much more difficult. There is a capacity to churn and turnover a huge volume of shares in one day in speculative stock, which will not necessarily excite attention. There is also a lack of enforcement measures aimed at combating money laundering in the securities industry. Federal legislation is in place - the Financial Transaction Reports Act 1988 - however, this is honoured in the breach. Security dealers are defined under that Act as cash dealers. They are supposed to undertake prudential checks such as the 100-point identity check, and to report suspicious transactions. However, I am aware that this does not occur.

The occasional lack of rigour in ASIC investigations also causes some problems if a subsequent decision is made to go down the criminal prosecution path. There are stories about documents being seized in such a way that their continuity is not preserved for their use as evidence in a subsequent criminal trial. There is also the question of the timeliness of the investigation. The member for Kingsley hit on this point in relation to HIH Insurance. I note the report in today's *The Australian* newspaper that raids were conducted on the directors and associates of HIH Insurance last night. It is like shutting the stable door after the horse has bolted.

The next issue is the failure to capitalise on market intelligence. This is one of the roles of ASIC and it is not being done sufficiently. ASIC should observe that well-known Liberal Party dictum: keep your friends close and your enemies closer. A general climate of lawlessness has been created throughout the corporate community. For example, many of the tax schemes that the member for Kalgoorlie cited as affecting hapless workers in his electorate would not have come about, or certainly would not have progressed so far, had ASIC taken a more robust view about some of the promoters. They have since come to ASIC's attention. Many of those people are also linked to the promotion and marketing of financial products, yet they seem to have gone unscathed for many years. I know of one individual, who is an undischarged bankrupt, who has actively promoted a couple of the tax-effective schemes. ASIC operates on the assumption that many in the market can self-audit, but it has gone beyond that and it is now a case of market failure. There must be closer scrutiny of corporate activity. I also predict that as well as possible infiltration of the securities market by organised crime, there is a real potential for malfeasance in the area of superannuation, which is a huge pool of money. Unless there is extreme vigilance, issues could arise in the future.

The final matter is the question of closeness between the federal Government, those charged with the administration of ASIC, and the companies they are supposed to regulate. As I said earlier, there are some allegations that there has been an indication of capture by ASIC. Many in ASIC believe that its primary role is to service the effective running of companies and that the public interest comes a poor second. They regard it as being their duty not to place too many impositions on companies that are highly supportive of the current federal Government. In this regard, occasionally, in my view, the federal Minister for Financial Services and Regulation, Joe Hockey, oversteps the mark by having close relations with a number of companies that would ordinarily be the subject of oversight.

I support the Bill; however, there must be a real commitment by the Commonwealth to maintain the ongoing integrity of the market and to rigorously enforce the criminal sanctions under the Corporations Law.

Question put and passed.

Bill read a second time and proceeded directly to third reading.

Third Reading

MR McGINTY (Fremantle - Attorney General) [1.30 pm]: I move -

That the Bill be now read a third time.

I place on record my appreciation of the cooperative way in which this matter has been progressed so expeditiously through the Parliament, particularly the Legislative Assembly this week. I thank in particular the member for Kingsley, as the opposition spokesperson in this area, for her contribution to the debate. I do not think anything was said with which I take issue. We all share the apprehension about the efficacy of commonwealth regulatory activities. Unfortunately, we have the example of the activities of the Australian Prudential Regulation Authority in the HIH Insurance collapse, which, on the face of it, suggests a measure of incompetence or negligence by that body. We have seen what I regard as the failure by the Australian Securities and Investments Commission in the finance broking scandal. Admittedly, the state regulatory bodies did not do any better, and arguably did worse. However, the role played by ASIC in that was substantially to assist in shutting the stable door after the horse had well and truly bolted. That is not the sort of role we expect to see.

I would like a far stronger role to be played by the regulatory bodies in their enforcement function. It is often the case in bodies such as ASIC, the Finance Brokers Supervisory Board, APRA, and perhaps also the Civil Aviation Safety Authority in the role it plays in the regulation of airline safety issues, that people are confused about the role they play. When they want to get close to business, and therefore promote the particular industry or business and work with it on educational and industry promotional matters, it can quite often cause too cosy a relationship to exist when it comes to the regulatory and enforcement side of what they are supposed to do. It represents a challenge for legislators and regulators throughout Australia - perhaps even throughout the world - to effect the necessary separation so that the measure of cooperation can proceed, while at the same time the measure of regulation can also be effective. I certainly share the views expressed by the member for Kingsley in that regard.

I think we were both right on the other matter about the New South Wales legislation. It passed through the New South Wales Parliament last night, so we can both claim it is happening about now.

Mrs Edwardes: So everybody has passed legislation?

Mr McGINTY: Yes. It is interesting to note that when I attended my first meeting of the ministerial council this issue was on the agenda. I indicated on behalf of the Western Australian Government that we wanted to refer powers because it was the only reasonable solution. That was in March. A large amount of work has been done in a very short time. In a sense, apart from New South Wales and Victoria, Western Australia was leading the pack. It is interesting that in the month or so it has taken us to get the legislation through the Parliament, everyone else has got into it and done it. Although Western Australia is the last State to legislate to do this -

Mrs Edwardes: I am not sure what that says about your side.

Mr McGINTY: Perhaps it says more about the Legislative Council than it does about anyone else.

Mrs Edwardes: I think it dealt with it expeditiously as well. Under its standing orders, it pulled together its committee to deal with it, and the committee voted unanimously for it. Given we do not have the Joint Standing Committee on Delegated Legislation up and running, I think the other House, as well as this House, has dealt with the matter in a very short time.

Mr McGINTY: By the standards of the Western Australian Legislative Council, it did brilliantly. Perhaps the best solution, though, is the Queensland arrangement.

Mrs Edwardes: I do not think so.

Ms MacTiernan: You are stepping outside of party policy here.

Mr McGINTY: I also thank the member for Girrawheen for her contribution and for bringing to this Parliament her insight into the operation of commonwealth regulatory authorities, particularly ASIC, based on employment experience prior to becoming a member of this House. I thank her very much for those insights.

The question posed was whether Western Australia would be better served by joining the federal scheme or by legislating for its own scheme. In a sense, in this matter we do not have a choice. In recent times - perhaps it has always been thus - most major commerce and trade has been conducted on a national or international basis. The ability to effectively regulate the activities of trading corporations within the limits of any one State applies to a decreasing number of corporations. Therefore, it places greater emphasis on the need for a constitutionally secure, uniform, national approach to this matter. In the light of the legal decisions in Wakim and Hughes, I do not think that the option of Western Australia's legislating jointly with the other States was left open. I perhaps put this outside the matter raised by the member for Kingsley when she referred to the 1992 report of the Select Committee on Parliamentary Procedures for Uniform Legislation Agreements, of which she was a member, by saying that that is fine if one has a choice in weighing up the pros and cons. In this matter, in a sense, there was no real choice.

Mrs Edwardes: The question always needs to be posed, and this Parliament needs to decide that.

Mr McGINTY: Yes. In this case, there was no choice because of the constitutional position arrived at by the High Court of Australia in those decisions, which struck down the cross-vesting schemes and rendered the national arrangement unstable. That is the overriding consideration in this case. Obviously, this matter can be addressed in a number of ways. One arrangement was tried in 1990, and in the late 1990s as well. That was a cross-vesting scheme under which both the Commonwealth and State conferred jurisdiction on each other's courts to deal with these matters. We tried that and it was found wanting constitutionally. The second approach is a constitutional amendment, which I suspect is the long-term solution to this problem. If we are interested in retaining state powers over Corporations Law to the limited extent that currently exists, a constitutional amendment could achieve that. The third option is the one we have adopted today; that is, the question of referral of powers to the Commonwealth. This is not the final answer to this problem, but it is the most sensible answer in the short term to the matters that lie ahead of us.

I thank members. We have arranged to have this legislation proclaimed tomorrow, I think, so that it will come into effect on or before Sunday, which is 1 July and the beginning of the new financial year.

I close my comments by extending a particular thank you to three gentlemen who have done remarkable things in the past few months: Greg Calcutt, parliamentary counsel; Peter Richards from the Ministry of Justice; and Dr Jim Thomson from the Crown Solicitor's Office. In particular, I extend to Greg Calcutt my personal thanks. The drafting of this legislation was complex, as well as a huge task. To be able to draft the legislation, bring the matter before the Parliament and have it passed by the Parliament to meet the deadline that had been imposed - that is, to have it operational on 1 July - was no mean feat. I extend my thanks to Greg for a job very well done.

Question put and passed.

Bill read a third time and passed.