

The Corporations Act 2001

by Tom Bostock

Company law in the UK is currently undergoing a major examination at the hands of the Company Law Review Steering Group. The author outlines reforms made in Australia in this area by the Corporations Act 2001, which along with the Australian Securities and Investments Commission Act 2001 comprises the Corporations legislation.

INTRODUCTION

The Federal Parliament has now enacted the *Corporations Act 2001* ('the CA'), which came into operation on 15 July 2001, together with the *Australian Securities and Investments Commission Act 2001*. The two Acts, along with applicable rules of Federal and State Courts, are referred to in the new legislation as the *Corporations legislation*.

The CA amounts in all to 1834 pages. It does not include the changes to chapters 7 and 8 to be made by the *Financial Services Reform Bill 2001* when it is enacted. The CA replaces the Corporations Law and applies as an enactment of the Commonwealth in each internal Territory and in each State (a *referring State*) that has referred to the Parliament of the Commonwealth under section 51 (xxxvii) of the Constitution:

- the matters that are necessary to enable the Parliament of the Commonwealth to enact the Bill and the concomitant ASIC Bill; and
- the matters of the formation of corporations, corporate regulation and the regulation of financial products and services, to the extent of making laws in respect to those matters by express amendments to the Bills as enacted and as amended from time to time.

All States have enacted the requisite referral legislation.

The CA will replace the former Corporations Law scheme, under which the Corporations Law was contained in an Act of the Commonwealth Parliament (the *Corporations Act 1989*) enacted for the ACT, and applied in each State and Territory by State or Territorial legislation. For the first time, Australia's legislation relating generally to companies, securities and securities markets is legislation enacted by the Commonwealth and applying of its own force in each referring State and in each internal Territory.

The move to Commonwealth legislation stems from two recent decisions of the High Court of Australia:

- in *Wakim*, which rendered the cross-vesting of judiciary arrangements to be invalid to the extent that they purported to confer State jurisdiction on Federal Courts; and

- in *Hughes*, that the Commonwealth cannot authorise its authorities or officers to undertake a function under State law involving the performance of a duty (particularly a function having the potential to effect adversely the rights of individuals) unless the function has a sufficient nexus with one of the heads of Commonwealth legislative power conferred by the Constitution.

In general, the CA is a transcription of the present Corporations Law. The section numbering has not been changed except to correct cross-referencing errors. There do not appear to be any amendments reflecting a change of corporate law policy. Nevertheless, the CA contains numerous amendments to the Corporations Law, arising principally out of:

- the changed nature of the legislation as Commonwealth Legislation applying generally throughout Australia;
- the need to correct manifest drafting anomalies and errors in provisions inserted into the Corporations Law by the *Company Law Review Act 1998* and the *Corporate Law Economic Reform Program Act 1999* ('CLERP Act'); and
- changes in Commonwealth drafting style.

CONSTITUTIONAL BASIS OF THE CA

The Constitutional basis for the CA is stated in section 3 to be:

- (a) as regards the referring States:
 - (i) the legislative powers of the Commonwealth under section 51 of the Constitution other than section 51 (xxxvii); and
 - (ii) the legislative powers of the Commonwealth in respect of matters referred to it by the Parliaments of the referring States under section 51 (xxxvii) of the Constitution.
- (b) as regards the ACT and the NT:
 - (i) the legislative power of the Commonwealth under section 122 of the Constitution; and
 - (ii) the Commonwealth's legislative powers under section 51 of the Constitution.

In new Part 1.1A there are extensive provisions covering the interaction between the Corporations legislation and

State and Territory laws, having regard in particular to section 109 of the Constitution.

INCORPORATION AND REGISTRATION OF COMPANIES

As re-defined in section 9, *this jurisdiction* means the geographical area that consists of:

- (a) each referring State (including its coastal sea);
- (b) the Australian Capital Territory (including the coastal sea of the Jervis Bay territory); and
- (c) the Northern Territory (including its coastal sea).

New section 119A(1), which provides that a company is *incorporated* in this jurisdiction, must be read in the light of that definition.

Under new section 119A(2) a company is taken to be *registered* in;

- (a) the State or Territory specified:
 - (i) in the application for the company's registration under section 117(2)(n); or
 - (ii) in the application for company's registration under section 601BC(2)(o) (registrable body as company under Part 5B.1); or
- (b) the State or Territory in which the company is taken to be registered under section 5H(4)(b) (registration of body as company on basis of State or Territory law).

The reason providing for registration as well as incorporation is primarily to protect State and Territory revenues from stamp duty on share transfers.

Status of pre-15 July 2001 companies

Under CA, s. 1378(1), if a company was registered under Part 2A.2 of the *Corporations Law*, the registration of that company has effect after commencement of the CA as if it were a registration of the company under CA, Part 2A.2. Under CA s. 1378(3), the operation of CA s. 1378(1) does not have the effect of creating a new entity; rather it has the effect of continuing the existence of the company as a legal entity with the same characteristics and attributes as it had immediately before commencement of the CA.

JURISDICTION OF COURTS

Part 9.6A Div 2 confers jurisdiction in relation to civil matters arising under the *Corporations* legislation:

- on the Federal Court of Australia: section 1337A (1);
- subject to section 9 of the *Administration Decisions (Judicial Revision) Act* 1977 (ADJR Act), on the Supreme Court of each State, the ACT and the NT: section 1337B (2);
- the Family Court: section 1337C (1);
- each State Family Court: section 1337C (2).

Under section 1337D (1), if a decision to prosecute a person for an offence against the *Corporations* legislation has been made by an officer of the Commonwealth and the prosecution to be commenced is proposed to be in a State or Territory Court, jurisdiction with respect to the matter is conferred on the relevant Court.

Subject to section 9 of the ADJR Act, jurisdiction is conferred on the *lower courts* (see section 9) of each State, the ACT and the NT with respect to civil matters (other than *Supreme Courts matters*: see section 9) arising under the *Corporations* legislation.

It will be seen that *Wakim* is overcome because State and Territory Courts have no jurisdiction with respect to matters arising under the *Corporations* legislation except federal jurisdiction vested in them by Part 9.6A in exercise of the power in that behalf in section 77 (iii) of the Constitution.

APPLICATION OF OTHER COMMONWEALTH LEGISLATION

Acts Interpretation Act 1901 (AIA): under new CA, s. 5C, the AIA *as in force* on 1 November 2000 applies to the CA, but amendments made after that date do not. This change has resulted in the elimination of several definitions in section 9 of the *Corporations Law*. A further result is that there will in effect be two AIA's: one for the CA, and the other for all other Commonwealth legislation.

Other Commonwealth legislation, which now applies, of its own force to the CA includes:

- Crimes Act* 1914;
- Evidence Act* 1995;
- Administrative Appeals Tribunal Act* 1975;
- Freedom of Information Act* 1982;
- Ombudsman Act* 1976;
- Privacy Act* 1988.

Until 15 July 2001, such Commonwealth legislation applied to the *Corporations Law* of a particular State or Territory only to the extent provided by application of that State or Territory.

INTERACTION BETWEEN CORPORATIONS LEGISLATION AND STATE AND TERRITORY LAWS

New Part 1.1A sets out extensive provisions designed to mitigate, as regards referring States and the Territories, the operation of section 109 of the Constitution, which provides that where a law of a State is inconsistent with a law of the Commonwealth, the Commonwealth law prevails and the State Law, to the extent of the inconsistency, is invalid. ^(A)

Tom Bostock

Partner, Mallesons Stephen Jaques, Melbourne, Australia