

CORPORATE REGULATION: WHERE TO FROM HERE?

By Federal Attorney General Mr Daryl Williams

The High Court's decision in *The Queen v Hughes* has added to uncertainty surrounding the enforcement of the Corporations Law.

Under the Corporations Law scheme, State and Northern Territory laws confer power upon the Commonwealth DPP to prosecute Corporations Law offences. Commonwealth law allows the DPP to exercise that power.

Broadly, the Court decided in *Hughes* that prosecution by the Commonwealth Director of Public Prosecutions in this case was valid. However, the Court's reasoning leaves open the possibility that there are circumstances in which the Commonwealth DPP would not have the power to prosecute offences under the Corporations Law. This means the *Hughes* decision is unlikely to put an end to challenges to the validity of important elements of Australia's national scheme of corporate regulation.

The High Court has long recognised that the Constitution must be made to work as an instrument of government, and must not operate as a legal straitjacket. A robust High Court has been and continues to be vital to the maintenance of good government in Australia, particularly given the near impossibility of securing any formal amendment of the Constitution.

However, the Court's influence in shaping Australian government has been starkly illustrated by the impact of such controversial decisions as *Re Wakim*. These decisions have removed options designed to achieve a more integrated and efficient system of national government. They have also created some uncertainty for governments grappling with difficult or controversial matters of public administration.

The decisions in *Re Wakim* and *Hughes*, in particular, have created a pervasive uncertainty about the

foundations of corporate regulation in Australia. This uncertainty has in turn undermined business confidence and Australia's ability to take a leading role as a regional centre of excellence in financial markets and products.

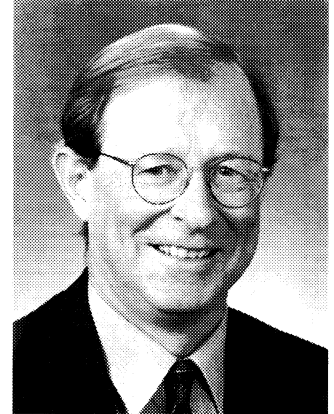
The Court's decision on Wednesday did not rule out further challenges to the ability of Commonwealth officers to exercise all their powers under the Corporations Law scheme. Questions remain about the ability of a Commonwealth instrumentality to exercise a power conferred by State law in a particular case, if the power has the potential to adversely affect the rights of individuals and is not clearly supported by a head of Commonwealth legislative power.

This uncertainty is exacerbated by the complexity of the existing Corporations Law scheme. The Court remarked upon the scheme's 'textual awkwardness'. Justice Kirby referred to the 'incomprehensible network of federal, State and Territory laws' which constitute the Corporations Law.

I believe the Court has turned on the red lights to warn Governments, both State and Territory, that there are flaws in the Corporations Law scheme which need to be addressed. As Justice Kirby noted, the present arrangements are 'a fragile foundation for a highly important national law'. He went on to note that although Mr Hughes' challenge was not successful, 'the next case may not present circumstances sufficient to attract the essential constitutional support.'

It is not acceptable to have such an important law on which our commercial trade is based subject to repeated legal challenges.

It is clear that urgent action is necessary to place Australia's system of corporate regulation on a certain and sound constitutional footing. It is essential to develop a replacement legislative foundation which is not vulnerable to



repeated challenge, and which clearly permits the scheme to be administered and enforced on a national basis by Commonwealth bodies.

The best way to achieve a more secure constitutional foundation is by an appropriate referral of power by the States to the Commonwealth under s.51(xxxvii) of the Constitution. This would reduce the vulnerability of the Corporations Law scheme to future constitutional challenges and, at the same time, would permit reinstatement of the Federal Court's corporate law jurisdiction lost as a result of the decision in *Re Wakim*.

I understand that some States want a Constitutional change via a referendum. Whilst theoretically feasible, Australians dislike Constitutional referendums and have a habit of voting them down. In my view, waiting for a doubtful referendum may stall what hope we have for a workable, certain and national Corporations Law.

A referral is the only realistic way to secure a national, comprehensive and cooperative system of corporate regulation in the near future. It can take place this year and provide a solution this year.

Commonwealth officers put a proposal for a referral of State power to their State counterparts last week. It is essential for this proposal to be finalised and implemented as a matter of highest priority.