States of confusion

After a decade of nationally operating corporations law in Australia, the High Court is still unable to say that it is constitutionally legitimate. Faced with pervasive confusion in the business and investment community, industry groups are turning up the pressure on governments to find a solution. The Securities Institute is one of the voices.

Along with several other organisations, the Securities Institute has called on the federal and state governments to resolve the uncertainty facing corporate regulation following the High Court decisions in Re Wakim, which removed most of the Corporations Law jurisdiction from the Federal Court, and the Hughes case, which failed to clarify the constitutional status of national corporate regulation.

The system of cross-vesting of jurisdiction between the Federal Court and the state and territory courts for Corporations Law matters was established by the Jurisdiction of Courts (Cross-vesting) Act 1987 enacted by the state, territory and commonwealth parliaments. The purpose of that legislation was to allow state parliaments to invest state jurisdiction in the Federal Court. This was to allow the operation of the new “national” Corporations Law regime for regulating companies and securities, which commenced in 1991. The background to the national scheme is discussed in more detail in an article by Professor Ian Ramsay in this issue of JASSA (see page 26).

In 1999, the High Court held in Re Wakim that Chapter III of the constitution precludes the conferring of state jurisdiction on federal courts and that the commonwealth did not have the power to consent to the vesting. A later High Court decision in Hughes failed to clarify the wider issue of the overall validity of the national scheme, leaving the door open for further challenges on constitutional grounds, which could have an extremely costly impact on the business community.

Re Wakim and subsequent decisions have left the business community confused and uncertain as to the status of corporate regulation and enforcement in Australia. Unless this uncertainty is resolved immediately, it will weaken business investment and increase the overall cost of capital.

After several meetings to consider the available options, the coalition of concerned organisations, which included the Institute, the Business Council of Australia, the Australian Institute of Company Directors and the Law Council of Australia, met a representative of the federal government to discuss ways of resolving this jurisdictional crisis. The two options considered were:

- a referral of power by all states to permit the commonwealth to pass a Federal Corporations Act; or
- a constitutional referendum.

The coalition concluded that the referendum option is too slow and unlikely to succeed, but that a quick and efficient resolution could be achieved by a referral of powers.

As state governments and parliaments supported the national regulation of corporate law in 1990, we consider there is no reason in principle why a referral of powers should not be similarly supported in order to uphold the spirit of that previous agreement.

The coalition has urged the federal and state governments to adopt the referral option as a matter of urgency as a failure to do so has serious economic implications for Australia.