A sorry state of affairs

Recent State Government intrusion into corporate law upsets the delicate balance achieved in the national co-operative agreement and creates a dangerous precedent which threatens the certainty and efficiency of Australia’s business environment.

The power to make laws with respect to ‘foreign corporations, trading or financial corporations formed within the limits of the Commonwealth’ is assigned to the Commonwealth Parliament in section 51(xx) of the Constitution.

The High Court of 1990 in New South Wales v the Commonwealth, found that the Constitution, despite allocating a power to make laws, did not support the Commonwealth’s ability to actually register and incorporate companies.

As a result, the States and Territories agreed to refer their residual power to create corporations to the Commonwealth along with the regulatory function as now performed by ASIC. In doing so, they retained some oversight powers and the ‘Corporations Agreement’ was signed.

Unfortunately, recent events have demonstrated that the States are increasingly unafraid to use their Corporations Agreement oversight powers to thwart rules that are generally considered to be in the national interest.

An example is the ‘100 member’ rule.

The proposed Corporations Amendment Bill (No. 1) 2006 which will scrap the 100 member rule (see www.treasury.gov.au for the Regulation Impact Statement) was set to come into force during this session of Parliament. At present a company must call a meeting if five percent of eligible shareholders or 100 shareholders call for an Extraordinary General Meeting to be held. Under the new rules this will be limited to five percent of the voting power.

The removal of the ‘100 member’ rule should not be overly controversial. It is expensive to host an EGM and the greater the number of shareholders, the greater the notification costs.

While the number of companies forced into this costly exercise has not been excessive, recent examples have included Wesfarmers, Gunns and North Limited; the small group of committed NRMA members demonstrated its potential for abuse by calling for 12 EGMs in an 18-month period during 2001 and 2002.

Of course, none of the resolutions debated in these EGMs has come close to being supported by the broader shareholder base.

As a result of a removal of the 100 member rule, an EGM will be able to be called by five percent of the shareholders and another provision will remain allowing 100 shareholders to put a resolution at the Annual General Meeting. These options preserve shareholder activism without the creation of unnecessary costs. If a small group of shareholders is unable to gain support from five percent of their colleagues to host an EGM, their issue is unlikely to be of relevance to the interests of the wider shareholding.

The proposed removal of the ‘100 member’ rule has been the result of six years of consultation. Various industry groups including the Australian Shareholders Association have agreed that removal of this out-dated provision would ultimately benefit all shareholders.

A draft Bill containing the removal of the 100 member rule, and other initiatives designed to improve proxy voting and facilitate the electronic circulation of members’ resolutions and statements, has received substantial industry support.

However, at the 27 July 2006 meeting of the Ministerial Council of Corporations (MINCO), the State and Territory Attorneys-General announced that they would reject the Bill on the basis that they did not agree with the removal of 100 member rule.

Another proposal, the one favoured by the State Attorneys-General, is the ‘square root’ rule. This would allow the square root of the number of shareholders to call an EGM and, whilst this prospect may excite mathematicians, it has no place in the world of business where certainty and simplicity in rule making are hopefully back in vogue.

The decision of the Attorneys-General creates a dangerous precedent upon which the Corporations Law and ASIC’s oversight responsibilities may be used as pawns in an increasingly acrimonious industrial relations battleground.

The State Government intrusion into Corporations Law is both unwelcome and unwarranted and Finsia, in coalition with a range of business and shareholder groups, has written to the State Attorneys-General to outline our concerns.

Similarly, in June 2006, the ‘Coalition for Corporate Certainty’ representing various shareholder, director, business and accounting associations signed a letter to the State Premiers urging them to renew their referral of corporations powers to the Commonwealth. The delay in renewing this referral was causing us concern and fortunately the referral of powers was ultimately renewed.

However, we continue to believe that a more permanent solution is required.

Finsia is urging all governments to consider an open-ended referral of Corporation Laws powers without the ability for the States to deny approval of specific proposals. This referral would recognise that the States have the right, upon giving significant notice, to withdraw their participation should they feel that the Corporations Law powers are not being used appropriately.

A secure, certain and unconfused business environment requires this Constitutional certainty without the need for another costly High Court case.