BLOW TO NATIONAL COMPANIES LEGISLATION

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By a 6 to 1 majority the High Court of Australia ruled recently that the Commonwealth "corporations" power does not empower the Federal Parliament to legislate for the incorporation of trading and financial companies.

The decision has two immediate and direct effects:

- The provisions of the new Corporations Act 1989 providing that new trading and financial corporations are to be incorporated under that Act, and not under a State law, have been ruled invalid.
- The decision "triggers" an undertaking given by the Commonwealth that, if the Court decided as it has, the Commonwealth would not proclaim Chapters 2 to 5 of the Corporations Act 1989 in their present form.

Chapters 2 to 5 deal with the following matters:

- Ch 2 - constitution of companies (which contains all the incorporation provisions declared invalid)
- Ch 3 - internal administration (which covers such matters as registered office, oppressive conduct, charges, accounts and audit)
- Ch 4 - "various corporations" (including registration of foreign companies and the topic of no liability companies)
- Ch 5 - external administration (which covers receivership, winding up and other matters).

(The High Court's judgment refers only to Chapters 2 **and** 5 as not being proclaimed under the undertaking, but the order made by the Court on this matter on 13 September 1989 clearly refers to Chapters 2 to 5.)

What the Constitution Means

The majority concluded that the power of the Federal Parliament in s.51(20) of the Constitution to make laws with respect to "trading or financial corporations **formed** within the limits of the Commonwealth applied only to formed corporations - that is, already formed under some other power, Commonwealth, State or Territory. They relied on:

- semantics ("the word 'formed' is a past participle used adjectivally")
- the support of precedents including the otherwise discredited judgments of the High Court in *Huddart Parker* in 1909
- discussions that took place in the conventions leading to the adopting of the Constitution.

Justice Deane, dissenting, said:

> "One might as well say that a legislative power with respect to locally manufactured motor vehicles would not extend to laws governing the local manufacture of motor vehicles or that the legislative power with respect to lighthouses would not extend to laws governing the erection of lighthouses since, until it is manufactured locally or erected, neither the locally manufactured vehicles nor the lighthouse exists as such."

However, the law is not settled. As the "Canberra Times" observed (9 February), there is no appeal from the High Court's decision.

State Rights?

While the challenging States have had a notable victory, the decision does not necessarily have wider implications for the federal balance. In particular, nothing said by the Judges limits the wide interpretation already given to the power of the Commonwealth Parliament to control trading activities in Australia carried on by trading corporations once they have been incorporated.

What About the ASC and the Rest of the Corporations Act 1989?

The Australian Securities Commission, to whom the administration of the Corporations Act 1989 has been entrusted, is set up by a separate Act. It has been preparing to commence operations on 1 July next.

The Commonwealth's power over existing trading and financial companies (that is, companies already formed) is not affected by the High Court's decision. Also, the constitutionality of the other substantive parts of the Corporations Act 1989 are not affected by the decision. They are:

- Ch 6 Acquisitions of Shares
- Ch 7 Securities
- Ch 8 The Futures Industry

The Future?

The dust is still settling, but the shape of future possible developments is emerging.

- The Federal Attorney-General, Lionel Bowen, has reaffirmed the Government's commitment to a national companies and securities scheme despite the High Court's judgment, and urged the challenging States (New South Wales, South Australia and Western Australia) to join Victoria and Queensland in agreeing to referrals of power to the Commonwealth.
- In a subsequent statement he has announced that legislation would be introduced in the forthcoming sittings to remove those provisions of the Corporations Act relating to incorporation of companies that had been invalidated by the High Court. It would also give effect to the Commonwealth's undertakings to the High Court not to proclaim Chapters 2 to 5 of that legislation in their present form. The Commonwealth would re-enact those Chapters without the incorporation provisions.

- The legislation would probably require registration under the Commonwealth Act of companies incorporated under State law, whether now or in the future.
- Companies to be incorporated in the future in the ACT could be handled by ASC anywhere in Australia and this could provide a quick method of incorporating and registering (a "one stop shop" process). This could leave the States with maintaining Corporated Affairs Commissions simply to incorporate new companies.
- The States may challenge this but the High Court has said that the power with respect to formed companies "should be construed with all the generality which the words used admit".
- Opposition policy is for retention and enhancement of the present cooperative scheme on companies and securities.
- The South Australian Attorney-General, Chris Sumner, Chairman of the Ministerial Council on Companies and Securities (MINCO), said that the best option was a proposal he promoted in 1988 under which the Commonwealth would have legislative control over the nationally oriented areas of law such as securities, takeovers and prospectuses. Company law and administration would be left with the States.
- Referral of powers by the States would take some time. The alternative of using s.51(38) of the Constitution, which was used in the Offshore Constitutional Settlement to arm the States with additional powers, could also be considered, in this case to supplement or confirm Commonwealth power. It might be a more expeditious procedure than full-blown referrals of power, but Commonwealth and State legislation would still be required.

The position needs to be urgently clarified on the law and on the future of the regulatory agencies (ASC and NCSC), but this may take some time.

DELAY COSTS - PARTICULARS OF A GLOBAL CLAIM

- Philip Davenport

1. Introduction

When a contractor is delayed by numerous acts and omissions for which the Principal is responsible, then unless the contractor has kept meticulous records it may be impossible for the contractor to identify the specific period of delay and damage caused by each individual act or omission. To overcome the problem, the contractor sometimes argues that the cumulative effect of the acts and omissions caused so much of the "overrun" (i.e. the period between the programmed date for practical completion and the actual date of practical completion) as cannot be accounted for by extensions of time granted to the contractor for "neutral delays" (i.e. delays caused by wet weather, strikes or other matters beyond the control of the contractor and not the fault of the Principal). This is often described as a "global" claim (45 BLR at p 73).

2. The Wharf Properties Case

The claimant in *Wharf Properties Limited v Eric Cumine Associates* (1989) 45 BLR 72, 5 Const. L J 228 made a global claim.(1) However, the Court of Appeal in Hong Kong ordered that the claim be struck out. The Court held that the claimant must give particulars of the individual periods of delay alleged to have been caused by the particular breaches of contract alleged by the claimant.(2)

The claimant's statement of claim contained a large number of allegations of breach of contract and negligence in failing to do things at the proper time. The claimant conceded that there were justifiable reasons for certain delays. These were subtracted from all other reasons and the claimant claimed that the whole of the remaining delay was caused by the defendant. The statement of claim ran to 382 pages. The defendant requested particulars of the amount of delay and the amount of damages which the claimant maintained were a consequence of the various acts of breach of contract and negligence. The claimant replied that, due to the complexity of the project, the interrelationship of the very large number of delaying and disruptive factors pleaded and their inevitable "knock-on" effects and the necessarily overlapping nature of the many allegations it was not possible to identify and isolate individual delays.

The defendant applied to the Court to strike out the statement of claim on the basis that the pleadings did not disclose a reasonable cause of action. The claimant conceded that at the trial the claimant would have to prove all the facts which establish the individual periods of delay but the claimant contended that prior to the trial, the claimant was not required to particularise the individual periods of delay allegedly caused by each of the alleged breaches of contract. The Court disagreed and struck out the claim.

Whilst the rules of court in Hong Kong may differ from those in Australian jurisdictions, particularly Practice Note No. 58 of the NSW Supreme Court dated 14 February 1990 governing the Construction List, it is quite likely that