

E-Mail received from Dominic Villa, Tuesday, 24 April 2001

The solution to the problems resulting from the High Court decision in R v Hughes and Re Wakim is not a referral of powers. The main drawback is that it only provides a solution to the problem on a case by case basis. In the current reference, it solves the problems in relation to the Corporations Law, but not in other areas of co-operative schemes.

What is needed is a politically-acceptable mechanism that provides a solution to the current problems, and also provides a solution that allows the Commonwealth and States the flexibility to implement national schemes in diverse areas as and when the need arises, without having to constantly revisit the uncertainties (both legal and political) of a referral of powers under s51(37).

Although there has not been high success-rate in referenda, it is worth remembering the success in the amendments to the Constitution that were successful in 1977 in making relatively technical amendments to clarify certain aspects of Parliamentary practice as to the replacement of Senators, and also the amendments in relation to the High Court.

2 very minor amendments to the Constitution could solve the current uncertainties in a way that would validate the current national schemes, not risk the further centralisation of power in Canberra, and allow the States to retain the current control they have in relation to the national schemes.

The first amendment would insert a new placitum in s51 empowering the Commonwealth Parliament to pass laws with respect to "Consent to the exercise by the Government of the Commonwealth, or any department or officer of the Commonwealth, of an powers or functions conferred by the Parliament or Parliaments of any State or States."

This amendment would solve the difficulty identified in Hughes, and provide the Commonwealth with a head of power upon which to hang the authorisation that in the Hughes case was supported by s51(1) and 51(29).

The second amendment would add a new sub-section to s76 and allow the Parliament to make laws vesting jurisdiction in federal courts in relation to "With the consent of a State or States, matters arising under the laws of any such State or States".

This would solve the Re Wakim problem, in a way that again merely provides a constitutional foundation for the current scheme, without enlarging the legislative power of the Commonwealth.

Given that there is likely to be an election within a few months of the implementation of the proposed legislative scheme relying on the reference power, consideration should be given to a more stable, long-term solution to the current constitutional difficulties in

implementing national schemes, by way of a referendum to be held at the same time as the election.

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