

CROSS-VESTING: WHY NOT AND WHAT NEXT?

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The recent cross-vesting decision has been interesting from the Law Council's perspective. Of all the policy issues we have been dealing with in the past year, this issue has had the most media attention, and that is even in comparison with the legal aid debate running before the election. Whether it is because the media does not properly understand cross-vesting (and there has been a lot of comment about what cross-vesting might mean from the media point of view), it certainly has attracted attention. The decision raises a lot of policy issues. The problems created by these issues have not really been brought home. It is going to be some time before we see the full impact of the decision.

I think what was interesting about the judgments, and Henry Burmester certainly brought this out in his analysis of them, is that the High Court took such a technical approach to a problem that had been resolved with input from all the states and the federal government. In the late 80s, Governments became more cooperative in the way they approached regulation and business to some extent. Governments devised a scheme that would enable people who were using those regulations to have some kind of order in the way business was managed. That now has been demolished to some extent.

I note that the day after judgment was handed down, Professor Bob Baxt was quoted in the media as saying that the decision was a lawyer's dream and a business person's nightmare. It is the sort of comment that makes lawyers cringe, because I think most of us seek the best outcome for our clients and not the best way to line our pockets. But what we do now have is the possibility of very expensive jurisdictional disputes and while lawyers, no doubt, will make money from that, I don't think that is the initial aim of the exercise. The result of the decision, certainly in the view of the Law Council, is that it will give rise to uncertainty. We are really not sure how certain pieces of legislation will be affected. It is dependent to a large extent on the approaches that the state governments take to the remedial legislation that is required. Henry has referred to that in passing. Obviously, the best short term solution (one that the Law Council has been endorsing) is to have some emergency or remedial legislation that will put out of doubt those cases that have been decided under the cross-vesting regime over the last few years.

The problem is that at the moment we have only had New South Wales and Western Australia put the legislation into effect. It is before the Parliament in all other jurisdictions with the exception of Victoria, and we have a Victorian Premier who says that he is not prepared to recall Parliament. It is now a likely prospect that Victoria will go to an election later this year which means that we will not have the situation rectified in Victoria possibly until next year.

I note that Henry said that if the states get their acts together we will not have litigants racing up to the courts. Well, it seems to me that that is quite likely not to happen, at least on a uniform basis across all jurisdictions if we cannot get Victoria to the party.

One of the medium term solutions the Law Council has been supporting, is to look at the corporations power and see whether it can be extended out and applied more broadly to pick up the bulk of the corporations matters that are before the courts now or are likely to come

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before the courts. It is not a straightforward issue, and it will not be done easily. Henry says that there has not been much pressure from business yet for this to happen, but I suspect that this is because business, like most of us, is still analysing the effect of the decision. It is really going to have to be done on a case by case basis to see what the costs are of running the regime in the split way that it is at the moment. I would not be surprised if there is not more pressure put on by business to use that power, at least as a fix to get us part of the way there until some longer term fix can be put forward.

The long term solution is obviously a referendum and the Law Council supported moving to a referendum at its Council meeting in June. I suspect, like Henry, that it will not happen this year, partly because of the complications of trying to run a referendum on cross-vesting with a referendum on a republic. The two do not seem to fit together, and I think one will divert from the other. Those of us who would like to see some order in it would probably prefer that it did not happen with the referendum on the republic.

So what are some of the issues that come out of this? Over the past 2 or 3 weeks during his visit to the US, the Prime Minister has been trying to promote Australia as a centre for international financial interest and trying to lure major companies to shift their corporate headquarters here. The cross-vesting decision is anathema to that type of policy push. I think the jurisdictional uncertainty that flows from this cross-vesting decision is going to have an impact on decisions that companies might make in relocating. It may, in fact, be that policy aspect that gives the push to the Commonwealth Government to review the way in which it might resolve the problem in the shorter term.

One thing which we all know the Federal Court has been able to provide is uniformity of interpretation and uniformity of approach to corporations law issues. Our concern as a body representing Australia's lawyers is that there continue to be uniformity in the decision making in respect of all uniform national legislation while seeking benefits of having uniform approaches and consistency in interpretation. In my view, this will not be achieved by the patchwork approach that Justices Santow and Austin put forward in today's *Australian Financial Review*. No-one would question their ability as corporate lawyers, or corporate judges for that matter, but we have no sense that there will be the same kind of level of ability or of commitment in the corporations divisions of all State Supreme Courts. If you read the article this morning you will recollect that the judges talk about an informal meeting of the corporations judges around the country, obviously trying to develop some kind of continuity, but it seems to us that this will not provide anywhere near the same kind of certainty that the Federal Court has been able to provide.

We fear that once again we will return to the days when jurisdictional disputes diverted from the core legal issues that needed to be resolved on federal matters. Litigants will have to satisfy themselves with whether or not claims instituted are sufficiently federal in nature to attract the jurisdiction of the Federal Court. For litigants in the family law area, the possibility of running two cases before two separate courts on related and intertwined issues must be intimidating to say the least. I think it also raises issues for our legal aid system, because as you know, at present legal aid is split between Commonwealth matters and state matters, and they are funded separately which is disastrous for our legal aid system.

I think there is also concern that the expertise that has been built up in the Federal Court, particularly in the corporations law area, is going to be lost as those cases disperse back to the state Supreme Courts, and as I said before, there may or may not be that same level of expertise and commitment to uniformity that we have been able to enjoy with the Federal Court.

Finally, the other comment that was made by Santow and Austin JJ was that the removal of cases from the Federal Court to the Supreme Court will not add considerably to the workload

of the court, since the New South Wales Supreme Court, in anticipating this decision, has prepared itself and organised its workload accordingly. Well, it is commendable if the NSW Supreme Court has done that, but I do not think that is the case in all state supreme courts. We are aware of the backlog that exists in Victoria and that is going to get worse, I suspect, if the Victorian Government is unable to introduce some sort of interim remedy for the cases that are before its courts.

For practitioners who work in this area, the sooner there is some certainty, the better. For our clients and the business community as a whole, the sooner there is certainty, the better. As to what approach the Government will take, it is a bit unclear. I take it from Henry's comments that he has not detected strong pushes in particular directions either. The Opposition came out on Friday, with the Shadow Attorney, Rob McClelland, basically putting forward the three layered fix - the short term, the medium term and the long term. More are now in agreement that there does need to be some kind of longer term resolution with a referendum.

