Chapter 4

Other matters relevant to the operation of the corporations legislation

4.1 During the course of the committee's review of the annual reports of bodies established under the *Australian Securities and Investments Commission Act 2001* (the ASIC Act), it identified a matter affecting the operation of the corporations legislation.

4.2 Section 158 of the ASIC Act outlines the staffing arrangements for the Corporations and Markets Advisory Committee (CAMAC). Under paragraph 185(b), CAMAC's staff can include 'persons whose services are so made available under arrangements made under section 249'. Since the ASIC Act commenced on 15 July 2001,[1] the Act has not included a section 249.[2]

4.3 The ASIC Act 2001 replaces the *Australian Securities Commission Act 1989* (the ASC Act 1989). At its commencement, the ASC Act 1989 contained a section 249. The section is copied in full at Appendix 1. Section 249 authorised the Minister to arrange with State and Territory counterparts the secondment of State and Territory officers to CAMAC.

4.4 However, section 249 of the ASC Act 1989 was repealed by Schedule 7 of the *Corporations Legislation Amendment Act 1990*. The Corporations Legislation Amendment Act altered the framework for corporations regulation in Australia. As stated in the Explanatory Memorandum to the Corporations Legislation Amendment Bill 1990, the amendments were designed to 'convert it [the corporations legislation] from a Commonwealth law applying of its own force throughout Australia' to a regulatory system 'suitable for application as a uniform law by the States and the Northern Territory'.[3] With the move to this new regulatory framework, section 249 was considered 'no longer necessary' and was therefore repealed.[4]

4.5 The decisions of the High Court in *Re Wakim: ex parte McNally* (1999) 198 CLR 511 and *The Queen v* Hughes (2000) 74 ALJR 802 effectively invalidated the cross-vesting scheme on which the corporations regulatory framework introduced by the Corporations Legislation Amendment Act was based. Accordingly, in 2001 the ASC Act 1989 was repealed and replaced by the ASIC Act.

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1 *ASIC Act 2001*, s. 2; *Gazette* 2001 No. S285.

2 *ASIC Act 2001*, Act No. 51 of 2001, as made 28 June 2001, available on ComLaw, http://www.comlaw.gov.au/Details/C2004A00819/Download (accessed 15 February 2012).

3 Corporations Legislation Amendment Bill 1990, Explanatory Memorandum, para. 1267–1268.

4 Corporations Legislation Amendment Bill 1990, Explanatory Memorandum, para. 1348.

4.6 As noted in the second reading debates on the Australian Securities and Investments Commission Bill 2001, the 'Commonwealth is not attempting to change the substance of the Corporations Law...but simply to address issues about the constitutionality of the national Corporations Law system'. Accordingly, as stated in the Bill's Explanatory Memorandum, the Australian Securities and Investments Commission Bill 2001 was designed to 're-enact the 1989 Act as a Commonwealth Act capable of operating throughout Australia'.[5]

4.7 At the time the ASIC Act 2001 received Royal Assent, on 28 June 2001, it contained two references to section 249; one in section 158 and the other in section 122. Mirroring the reference to section 249 in section 158, section 122 authorised ASIC to second 'persons whose services are so made available under arrangements made under section 249'.

4.8 However, at its commencement on 15 July 2001 the ASIC Act contained only one reference to section 249. The *Corporations (Repeals, Consequentials and Transitionals) Act 2001* was introduced to 'make minor drafting corrections that do not involve changes in substance'. The drafting corrections included amending section 122. As stated in the Explanatory Memorandum to the Corporations (Repeals, Consequentials and Transitionals) Bill:

> Item 1 recasts section 122 of the *Australian Securities and Investments Commission Act 2001* to remove an erroneous reference to section 249. Section 249 was removed from the *Australian Securities and Investments Commission Act 1989* in 1991 by the *Corporations Legislation Amendment Act 1990*.

4.9 The Explanatory Memorandum to the Corporations (Repeals, Consequentials and Transitionals) Bill does not explain why the reference to section 249 was retained in section 158.

Committee view

4.10 On the basis the information before the committee, three things are clear. First, a reference to section 249 was considered erroneous as the section had been repealed a decade before the ASIC Act was to commence. Second, the Corporations (Repeals, Consequential and Transitional) Act commenced at the same time as the ASIC Act.[6] Therefore, the ASIC Act did not provide ASIC the opportunity to second staff under arrangements made pursuant to section 249. The reference to section 249 was removed before the ASIC Act commenced. Third, if the reference to section 249 in section 122 of the ASIC Act was considered erroneous on the basis that the section

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5 Australian Securities and Investments Commission Bill 2001, Explanatory Memorandum, para 2.4.

6 *Corporations (Repeals, Consequentials and Transitionals) Act 2001*, *s*. 2; ASIC Act 2001, s. 2. Both Acts commenced 'at the commencement of the *Corporations Act 2001*' on 15 July 2001 (see *Gazette* 2001, No. S285).

had been repealed, it is arguable that the reference in section 158 of the ASIC Act is likewise erroneous. On this point, the committee notes that CAMAC's annual report for the 2010–11 financial year does not refer to any arrangements made under a section 249 for the secondment of staff from the States and Territories.

4.11 Accordingly, the committee queries the accuracy of the reference to section 249 in the overview of CAMAC's staffing options in section 158. To ensure the continuity and applicability of the ASIC Act, and the corporations legislation more broadly, the committee considers that the Government should review section 158. The review should ensure that the section is consistent with other provisions in the ASIC Act and the corporations legislation more broadly, and that it accurately conveys the staffing arrangements available to CAMAC.

Recommendation 1

4.12 The committee recommends that the Government review section 158 of the Australian Securities and Investments Commission Act 2001 to ensure that it accurately reflects the staffing options available to CAMAC and does not contain obsolete references to repealed legislative provisions.

Senator Sue Boyce

Deputy Chair