THE GOVERNMENT AS A VENDOR — CAVEAT EMPTOR

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In this commentary, I propose to confine myself to a few observations on the early stage of preparing a government business enterprise for sale.

Before a government business enterprise can be sold, it must be put into a form where it can be dealt with in the market place, either through the means of a public float or by way of a trade sale. In either case, the desired objective is to deal with the enterprise as a company subject to the *Corporations Law*. This is generally achieved in one of two ways.

First, the entity is converted to a public company registered under the *Corporations Law*. This requires a statute in the State of incorporation to achieve the conversion, to provide for the adoption of a memorandum and articles of association and the creation of a share capital. The statute will also need to facilitate the registration of the entity as a company under Division 3 of Chapter 2 of the *Corporations Law*, which is the division corresponding with the transfer of incorporation provisions under the former *Companies Code*. This latter step generally requires legislative assistance, because the relevant provisions of the *Corporations Law* only operate in respect of an entity where transfer of incorporation is authorised under the law of the entity's place of origin.

Legislation of the kind to which I have referred will require reference to the Ministerial Council on Corporations ("MINCO") either for notification or consent, under what is apparently still a draft agreement dealing with national scheme laws relating to corporations.

A useful example of a corporatisation by this method is found in the case of the Government Insurance Office ("GIO") in New South Wales. Under the *Government Insurance Office (Privatisation) Act* 1991, the GIO was given a share capital and provision was made for the issue of fully paid shares to the Minister having responsibility for that body. The GIO was required to adopt a memorandum and articles of association and was converted into a public company in the manner I have mentioned. The conversion was achieved by force of the GIO legislation. This legislation need not have gone further than to put the entity into a condition where it was eligible for conversion to a public company and to authorise the transfer of its incorporation. The provisions of the *Corporations Law* dealing with the registration of non-companies as companies would have done the rest. However, in the GIO situation, the privatisation legislation proceeded further and dealt with the entire question of conversion into a public company and thus displaced the provisions of the *Corporations Law* dealing with the topic.

The major advantage of proceeding merely by conversion into a public company in the manner to which I have referred is that the entity remains the same and there is no vesting or transfer of assets with all the attendant difficulties that are raised by proceeding in that manner.

Nevertheless, a great deal of work will be required from an accounting and financial point of view to put the entity into a condition which would enable it to meet the accounting standards established under the *Corporations Law* and the standards set by the accounting bodies. In all probability, the books of account will not have been maintained in a manner suitable to meeting the accounting requirements of the *Corporations Law*. Proper asset registers will need to be established and the question of provisioning will need to be addressed. Where an existing entity is corporatised, there is generally much to be done in the field of finance and accounting.

The other method of proceeding is to incorporate a public company and transfer the undertaking to it. This involves a much more complex operation and should only be considered where, for one reason or another, it is impossible to corporatise the existing entity. This would occur, for example, where there is a major division of assets and liabilities so that, whichever way the matter proceeds, questions of the vesting or transfer of assets and liabilities will be of major importance.

The transfer of assets by conventional means is a time-consuming affair. It generally involves parties other than the transferor and transferee. A contract may prohibit the transfer of contractual rights without the consent of some other party to the transaction. The contract may be of a kind where the rights are regarded as personal in nature and unassignable under the general law. The contract may contain confidentiality provisions which would be transgressed in the event of a transfer. The transfer of liabilities cannot occur without the concurrence of the creditor or other party to the transaction and, in effect, involves a novation. Where it is necessary to consult other persons, there will be considerable delay and, in some cases, pressure will be applied by third parties to secure advantages which could not otherwise have been obtained.

It is therefore common in any case where the assets are numerous and where there are complex contractual and financial arrangements to obtain legislative assistance to achieve the vesting or transfer. The legislation can be made to override questions of confidentiality, prohibitions against assignment and so forth. In the State where the government business enterprise is owned, there will generally be no difficulty in obtaining stamp duty and other revenue relief in connection with the vesting.

Where there are assets and liabilities in other States and Territories (and possibly overseas as well) to be transferred, the issues become more complex.

The rules of private international law are not at all clear on the law applicable to an assignment of property — at least where that property consists of chattels or choses in action. There seems to have been very little case law on the topic and what there is, is difficult to follow and seldom leads one to a firm conclusion. Most of the development in this area appears to be the work of academic text writers. In contrast, the courts seem to have made very little headway. Some text writers consider that matters of assignment are governed by the law of the situs of the property concerned; others speak of a proper law of the assignment. It has been suggested that contractual aspects of an assignment of property should be governed by the proper law, but that the conveyancing aspects should be governed by the law of the situs.

It does seem reasonably clear, however, that if the transfer of assets from a statutory corporation to a public company is to be effected by a vesting statute, the situation of the property is all-important in determining the law to be applied. If, for example, movable property is situated in say Victoria, a statute of the Victorian Parliament will be necessary to ensure an effective vesting of the assets: *Bank Voor Handel en Scheepvaart v Slatford* (1953) 1 QB 248 per Devlin J at pages 257, 258 and 260.

On the other hand, the effectiveness of an assignment of a liability by a vesting statute will depend, it seems, on the proper law of the contract under which the liability arose. Also, to affect the transferee, the transfer would have to be made by the law with which the transferee is most closely connected: *Re United Railways of the Havana and Regla Warehouses Limited* [1960] Ch 52.

If the assets and liabilities concerned are numerous and are spread over several States and Territories of the Commonwealth, vesting legislation may be necessary in all States and Territories affected. This has tended to occur in recent years in relation to the merger of banks.

Of recent times, consideration has been given to the notion of universal succession as a device to facilitate the merger of the assets and liabilities of two entities without the need for legislation in several jurisdictions and, perhaps, with a saving in stamp duty which might otherwise be payable if the more conventional vesting route were taken.

Under private international law, matters of constitution and status of a corporation are governed by the law of the place of incorporation. It seems, therefore, that if an Act of Parliament in the place of incorporation of two bodies corporate declares one to be the successor of the other, that Act will be recognised in other jurisdictions and effect will be given to it: *National Bank of Greece & Athens v* Metliss [1958] AC 509. A procedure using the notion of universal succession should therefore obviate most of the difficulties which arise in relation to vesting. In particular, the need for legislation in several States and Territories should be avoided.

If the corporation which is to be merged has assets and liabilities which are not to be included as part of the merger, these must be dealt with beforehand. Of course, the merging corporation may have liabilities which are not to be included in the merger and which are governed by the law of some overseas jurisdiction. Considerations of this kind may prevent the parties concerned from using the concept of universal succession, so that in the end, they may have no choice but to rely on conventional vesting legislation.

Examples of the use of the concept of the universal successor in recent times are to be found in the merger of the State Bank of Victoria with the Commonwealth Bank of Australia in 1990 and in the *Bank Integration Act* 1991 (Cth).

In the case of the State Bank of Victoria, the *Commonwealth Banks Restructuring Act* 1990 provided that all property and rights of the State Bank of Victoria were to vest in the Commonwealth Bank, all liabilities of the State Bank of Victoria were to become liabilities of the Commonwealth Bank and the Commonwealth Bank was to become the successor in law of the State Bank of Victoria: section 67. Reciprocal legislation was passed by the Victorian Parliament — the *State Bank (Succession of Commonwealth Bank) Act* 1990 — and section 9 of that Act was in the same terms as to vesting and succession.

The transaction involving the State Bank of Victoria and the Commonwealth Bank imported the notion of vesting as well as the notion of succession. These seem to me to be two quite separate and distinct notions. Vesting does not involve merger of the personalities of two entities, but rather a passing of title to or an interest in property from one entity to another. The concept of vesting by statute attracts stamp duty complications in most jurisdictions, whereas universal succession should not, although, as a practical matter, the concept of universal succession is not easy to explain to revenue authorities who tend to look at the end result rather than the means.

It may be that the assets of the State Bank of Victoria were largely based in that State and that the issue of stamp duty in other States did not arise. In any event, as the vesting in that case was in the Commonwealth Bank, the Commonwealth itself would have been competent to legislate to exempt the transaction from State stamp duties: *Australian Coastal Shipping Commission v O'Reilly* (1962) 107 CLR 46.

The *Bank Integration Act* 1991 was concerned with the merger of various private savings banks carrying on business in Australia into their parent banks. Again, the draftsman was not content with merely declaring one bank to be the successor in law of the other. For good measure, he added words to ensure assets of each savings bank were vested in the parent bank and that liabilities of each savings bank became the liabilities of the parent bank: section 13. It does seem to me that the concepts of vesting and universal succession are quite distinct and that the draftsman should have opted for one or the other, but not both.

As an incidental matter, the *Bank Integration Act* purported to exempt its operation from State stamp duties.

There seems little doubt to me that in the *Bank Integration Act*, the Commonwealth Parliament was making legitimate use of its banking powers. In that case, there was an acquisition of assets by a bank by the device of a Commonwealth statute properly using Commonwealth legislative powers under the Constitution. In these circumstances, I believe that relief from State stamp duty affecting the vesting, which the *Bank Integration Act* purported to give, was reasonably incidental to the banking power and a valid exercise of Commonwealth legislative power.

In *Gazzo v Comptroller of Stamps* ((1981) 149 CLR 227), the High Court held that a provision of the *Family Law Act* 1975 purporting to exempt a transfer of land under the Torrens system made in pursuance of an order of the Family Court under that Act from State stamp duty was invalid.

The situation in the *Bank Integration Act* is distinguishable from that which arose in *Gazzo's* case. In the case of the *Bank Integration Act*, the provision granting exemption from stamp duty was part of a Commonwealth law which itself effected the intended purpose (the vesting of property in a bank), whereas in *Gazzo's* case, the provisions of the Commonwealth *Family Law Act* in question merely sought to modify the procedures required to be followed under State legislation (the exemption of a transfer under the State titles system from State stamp duty), but where it is nevertheless left to those procedures to effect the intended purpose.

It was decided many years ago in the *Royal Metals* case (*Commonwealth v New South Wales* (1923) 33 CLR 1) that if the Commonwealth desires to obtain registration of its title under State Torrens title legislation, it must comply with the conditions imposed by that legislation. In *Gazzo's* case, the registration of a transfer under the *Family Law Act* was held to be subject to the same restraints.

The advantage of using Commonwealth legislation in the vesting of assets of a government business enterprise is that it is operative Australia-wide and there is therefore no need to approach the matter on a State by State basis. Of course, it is not possible to obtain Commonwealth vesting legislation of the kind contained in the *Bank Integration Act* in most instances because of a lack of Commonwealth legislative power in respect of the subject matter.

The disadvantage of using Commonwealth legislation for vesting purposes, where Commonwealth legislative power does exist, is that the States control most of the property registration systems such as the land titles system, the Mining Register, the Vehicle Security Register and the Bills of Sale Register. Commonwealth legislation can make a request to State authorities, as was done in the *Bank Integration Act*, to give effect to Commonwealth legislation in respect of State registers, but that is as far as it can go.

From the point of view of State registrars, they have a decision to make as to whether they will co-operate and thus preserve the integrity of their registers or whether they are prepared to contribute to a situation where there is more than one system of title and where their registers do not accurately record the whole picture. The trend seems to be to co-operate.

In recent times there is an increasing volume of Commonwealth legislation with which parties will have to contend where there is a transfer or vesting of assets. If the entity is a credit provider such as a bank or finance company, numerous difficulties will be encountered under the *Privacy Act* 1988. That legislation is extensive and complex and the provisions contained in it to accommodate the assignment of lending assets are quite inadequate.

If the entity is a bank or other cash dealer, the *Financial Transaction Reports Act* 1988 will impose limitations on the transfer of files and securities from one entity to another. Recent amendments will relieve the situation somewhat so far as banks are concerned, but it will remain in relation to other financial institutions.

Similar difficulties arise under the Commonwealth *Proceeds of Crime Act* 1986 in relation to the transfer by a bank or finance company of lending assets and related files. Again, this legislation does not seem to adequately accommodate the disposal of assets to a new entity. Recent amendments are of assistance so far as banks are concerned, but that is as far as they go.

The tax file legislation is very strict and does not accommodate the transfer of tax file numbers from one entity to another where there is a vesting or transfer of assets and liabilities and related files.

These matters are, of course, in addition to the numerous licensing statutes of one kind or another which are to be found in the Commonwealth statute book.

The preparation of government business enterprises for sale can be a very demanding and time-consuming exercise. At the present time, where there is a need to transfer assets and liabilities, legislation is generally needed at both State and Commonwealth level and, frequently, in the jurisdictions of several States and Territories.