

Commonwealth-State cooperative schemes—issues for drafters

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Introduction

1 Australia has a federal system of government under which (in general terms) the Commonwealth has an enumerated list of legislative powers. The Constitution preserves the Constitutions and powers of the States (sections 106-108), but provides that Commonwealth legislation overrides inconsistent State legislation (section 109).¹ This means that there are areas where it is considered necessary or desirable to have national legislation, but where the Commonwealth does not have power to legislate comprehensively.²

2 This paper looks at the kinds of legislative schemes that have been established by the Commonwealth and the States to overcome deficiencies in the legislative power of each. The paper looks at the issues for drafters that arise in setting up such schemes. These issues include policy issues, and constitutional and other legal issues. The paper also looks briefly at issues of process for OPC in dealing with such schemes.

1 What is a cooperative scheme?

3 In a paper given to the 2001 Drafting Forum held in Melbourne, John Ledda from the NSW Parliamentary Counsel's Office described a cooperative scheme as "a scheme in which each participating jurisdiction promulgates legislation to facilitate the application of a standard set of legislative provisions in that jurisdiction to regulate a matter of common concern".³ (This description could cover schemes between countries, but my paper concentrates on Commonwealth-State schemes.)

4 Commonwealth-State schemes may be categorised in different ways. John Ledda's paper (mentioned above) divides them into "mirror legislation", "applied law schemes" and "references to the Commonwealth". Another conceptual division is into "references to the Commonwealth", "mirror legislation" and "complementary law regimes", either by applied laws or non-applied laws.

5 While these categories are useful as a starting-point, they are not necessarily helpful in thinking about the policy issues that need to be worked out, because within the categories there are various possible combinations and permutations. I have adopted the latter terminology for the purposes of discussion. I note, however, that no matter how desirable a particular model may seem in theory, it may be unacceptable to stakeholders, and so you as the drafter may be left with a model that is less than ideal.

¹ See for example Lumb and Moens *The Constitution of the Commonwealth of Australia*, 6th ed. Butterworths, paragraph 11.

² Subject areas in which cooperative schemes have been established include: corporations; therapeutic goods; workplace relations; energy regulation; competition policy; classification of films, publications and computer games; research involving human embryos; human cloning; the establishment of the Australian Crime Commission; meat inspection; gene technology; fair trading; GST price exploitation; counter-terrorism.

³ John Ledda, *The Drafter's Guide to Cooperative Schemes*, paper given at Drafting Forum 2001, Melbourne.

2 Different models of cooperative schemes

2.1 Reference to the Commonwealth Parliament

6 Paragraph 51(xxxvii) of the Constitution gives the Commonwealth Parliament power to make laws with respect to:

matters referred to the Parliament of the Commonwealth by the Parliament or Parliaments of any State or States, but so that the law shall extend only to States by whose Parliaments the matter is referred, or which afterwards adopt the law

7 Examples of subject areas in relation to which referrals have been given include corporations (see below), workplace relations⁴ and counter-terrorism⁵. Particular issues that arise are set out below, based largely on material prepared by Mr Vince Robinson from the Commonwealth Office of Parliamentary Counsel.

Matters are referred (not power)

8 What can be referred to the Commonwealth Parliament is *matters*. The State referring Act needs to be framed so as to refer a matter to the Commonwealth Parliament.

How a matter may be specified

9 A State may refer a matter to the Commonwealth Parliament by specifying a particular subject matter. An example is “the matter of the inspection of meat that is intended for human consumption or for use as animal food” (*Meat Inspection Act 1983*).

10 A State may refer a matter to the Commonwealth Parliament by reference to a particular text. An example is the *Mutual Recognition Act 1992* (see, in particular, the section 43 definition of *participating jurisdiction*).

State reference can be limited in time and can be withdrawn

11 A State that gives the Commonwealth Parliament a referral can:

- provide that the referral is given only for a limited time;
- withdraw the referral by repealing the referring Act;
- provide in the referring Act that the referral ceases when some executive act (such as a making a proclamation) is done.

Definitive text

12 If the referral is given by reference to a text, it will be necessary for each referring State to specify a definitive copy of the text. In the case of the new Corporations legislation, it was a copy of a text tabled in the New South Wales Parliament. It would have been

⁴ See Part XV of the *Workplace Relations Act 1996* (Cwlth); *Commonwealth Powers (Industrial Relations) Act 1996* (Vic).

⁵ See Part 5.3 of the *Criminal Code* (Cwlth); *Terrorism (Commonwealth Powers) Act 2003* (Vic).

possible to have a different definitive text for each State but the States were attracted to the option of having only one definitive text for all the States.

When can the reference be acted on

13 A number of States take a conservative view on how far the referring legislation must have advanced before the Commonwealth can introduce or enact legislation in reliance on the referral. In the past, Commonwealth legislation has been enacted when one State referring Act has been enacted (though not necessarily commenced). However, as an alternative, the Commonwealth may adopt the practice of not introducing the Commonwealth legislation until one State referring Act has commenced, or even until all have commenced. In some earlier referral based projects, the Commonwealth legislation was introduced after a State referral Bill was introduced, passed after the State referral was passed and commenced after the State referral Bill commenced. In considering how to approach this, jurisdictions may be influenced by the desirability of having the soundest possible basis for the relevant scheme.

Form in which the reference is cast

14 Despite the generous terms of paragraph 51(xxxvii) of the Constitution, the States may not favour referring matters to the Commonwealth under that paragraph that are already within the Commonwealth's legislative powers. As a result, the matter referred may be expressed to be referred "to the extent to which it is not within the legislative power of the Commonwealth".

15 The States are similarly inclined to express referrals as being made only to the extent to which the State Parliaments have the power to do so.

Retrospective legislation in reliance on referral

16 It seems clear that the Commonwealth can pass retrospective legislation in reliance on a referral. The State referring Act does not need to expressly provide for such retrospective operation. Retrospective operation would not be possible, of course, if the State referring Act expressly precluded the enactment of retrospective legislation in reliance on the referral.

Adoption as an alternative to referral

17 Paragraph 51(xxxvii) contemplates that a State may adopt a law enacted in reliance on a referral by other States. The Commonwealth considers that the adopting State may only adopt such a law as it exists at a particular time and cannot adopt it as in force from time to time. This is a significant difference between an adopting State and a referring State.

18 Laws adopted by a State in reliance on paragraph 51(xxxvii) apply in the State as Commonwealth laws. It is always possible for a State to apply the text of a Commonwealth law in the State as State law.

19 A law adopted by a State in reliance on paragraph 51(xxxvii) will only apply according to its terms. So if the Commonwealth law is expressed to apply only in referring States, an adoption of the law by a non-referring State would be ineffective to apply the law as Commonwealth law in the State.

20 Later adoption by a State that does not give a referral causes significant problems if you are trying to establish and maintain a uniform scheme. It can also create timing problems (particularly if there is a hiatus of some kind, or an absence of appropriate law, for the State between the commencement of the scheme generally and the adoption of the law by the State).

Interaction with section 99 of the Constitution

21 A law enacted in reliance on one or more paragraph 51(xxxvii) references can only operate in a referring or adopting State. Any preference to a State (or a part of a State) over another State (or a part of another State) that arises because of this necessary geographical limitation will not invalidate the law under section 99 of the Constitution.

22 It is possible, however, that a law enacted in reliance on both a reference and another Commonwealth head of power could contravene section 99.

Recent example of a reference—corporations

23 A particular recent example of a reference of power is the regulation of companies in Australia. This reference came about because of the High Court's decisions in the cases *Re Wakim; Ex Parte McNally*⁶ (**Wakim**) and *R v Hughes*⁷ (**Hughes**).

24 To summarise, after the High Court held that the Corporations Law scheme was invalid to the extent that it involved the conferral of State jurisdiction on federal courts (*Wakim*) and the conferral of State administrative functions on federal bodies and officials (*Hughes*), the Commonwealth and the States agreed that a new constitutional basis should be established for corporations laws by the States giving the Commonwealth a reference under paragraph 51(xxxvii) of the Constitution. The States refused to give the Commonwealth a subject matter reference but were willing, however, to give the Commonwealth a textual reference.

25 The key points for drafters are set out in the bullet points below (again, these are based on material prepared by Mr Vince Robinson).

- The new Corporations legislation now operates throughout Australia as Commonwealth law.
- Section 109 of the Constitution governs the interaction of the new Corporations legislation and State law but there are provisions in the new Corporations legislation to allow a State to cause a roll back of new Corporations legislation (see sections 5F and 5G of the *Corporations Act 2001*).
- The new Corporations legislation is based (at least in part) on references of matters by the States to the Commonwealth under section 51(xxxvii) of the Constitution. These references take the form of:

- an initial reference to enact texts; and

⁶ *Re Wakim; Ex Parte McNally* (1999) 198 CLR 511.

⁷ *R v Hughes* (2000) 171 ALR 155.

- an amendment reference.

- The form and scope of changes to the new Corporations legislation scheme will need to fit within the terms of the amendment reference.⁸
- When adding provisions to the new Corporations legislation it will sometimes be necessary to decide whether a geographic reference should be to “Australia” or to “this jurisdiction”.⁹
- The references have sunset clauses and may be withdrawn or extended.
- A reference to the new Corporations legislation will (by and large) pick up a reference to the previous corporations legislation.

26 References of power have many advantages. In a paper given to the 2005 Constitutional Law Forum,¹⁰ Jim Faulkner describes State references as a particularly fruitful approach. He notes the difficulties caused by the *Hughes* case (which I will speak more about later). Mr Faulkner notes that recent developments have “seen the reference mechanism transformed into a very sophisticated and flexible instrument of federal policy”.¹¹ In particular he refers to the idea that the precise terms of a Bill should in effect be the “matter” referred.

27 Mr Faulkner also mentions the significance of the “roll-back” mechanism, as a means of ensuring that States don’t give up their capacity to enact inconsistent laws when they cooperate in a reference-based arrangement. He makes the point that, compared to the kinds of arrangements I discuss next, the reference approach has the benefit of simplicity in many respects.¹²

28 However, accepting for the moment that it is unlikely that all cooperative schemes will be done in this way, I now turn to other models.

2.2 Mirror legislation

29 The term *mirror legislation* usually describes a system where one jurisdiction enacts a law that is then enacted in similar terms by other jurisdictions. A paradigm case of mirror legislation was the Uniform Companies Acts of the 1960s and 1970s. Each State passed a Companies Act and the Commonwealth passed Companies Ordinances for the Northern Territory and the Australian Capital Territory. However, there was not a central body to administer the legislation.

⁸ The amendment reference works by reference to the subject matters of the formation of corporations, corporate regulation and the regulation of financial products and services. It only allows legislation that takes the form of an express amendment of the Corporations Act and ASIC Act. Among other things, this means that application and transitional provisions need to be inserted into the new Corporations legislation and cannot stand as items in amending Bills. It is also governed by a purpose clause that puts out of bounds amendments that have the sole or main underlying purpose or object of regulating industrial relations matters.

⁹ While at the moment these two terms cover the same geographic area, they will cease to do so if any of the States ceases to be a *referring State*.

¹⁰ Jim Faulkner, *Recent Developments in Constitutional Policy*, paper given at 2005 Constitutional Law Forum held by the Australian Government Solicitor in Canberra, ACT.

¹¹ *ibid*, p. 6.

¹² *ibid*, p. 8.

30 A current example of mirror legislation is the fair trading legislation contained in the *Trade Practices Act 1975* (Cwlth) (the *TPA*). Each State, the Northern Territory and the Australian Capital Territory has passed legislation which generally “mirrors” the consumer protection provisions of Divisions 1 and 1A of Part V of the TPA. The State legislation applies to “persons” rather than to “corporations”.¹³ Again, no central body administers the legislation (although it is possible to have mirror legislation with a central administering body—see section 2.4 below).

2.3 Complementary applied law schemes

31 A *complementary applied law scheme* is where one jurisdiction (which need not be the Commonwealth) enacts a law on a topic, which is then applied by other jurisdictions as a law of that jurisdiction.¹⁴ The 1980s cooperative scheme for corporations was an applied law scheme. The States applied the ACT Corporations Law, but retained their own administrative machinery. Some functions under the applied laws were conferred on the National Companies and Securities Commission. The 1990s Corporations Law Scheme was also an applied law scheme. The Commonwealth enacted the Corporations Law as a law for the ACT, and the States applied the text of the Corporations Law as State laws. Under that scheme, there was a single national regulator, the Australian Securities and Investments Commission.

32 A current example of a complementary applied law scheme is the agricultural and veterinary chemicals legislation. The Commonwealth enacted a Code (the Agvet Code) expressed to apply to “participating territories” (of which the ACT is the only one), with provisions to enable the States to apply the text of the Code as a law of the State.

33 An applied law scheme based on enacting a law for a Territory, the text of which is then applied in the States, does not seem to be as viable now as in the past, because the trend is towards treating the Territories in the same way as States. However, this option avoids some of the legal complexity of using a patchwork of powers. Where the Commonwealth enacts a law that applies in a Territory, and other States apply the law as a law of their State, the constitutional basis of the law is the territories power (section 122 of the Constitution) and the States apply the law *as a law of the State*. The law will not otherwise apply in the States. (If a Bill is based on the territories power, bear in mind that the territories power differs from other heads of Commonwealth power in that some of the usual limitations may not apply—for example, in relation to the imposition of taxation and the separation of powers.)

34 The Competition Code regime is an example of a slightly different complementary applied law model. The TPA contains substantive provisions (in Part IV) that apply to corporations. The provisions of Part IV also have an extended operation because of section 6 of the TPA. A “Schedule form” of Part IV is also included in the TPA. The Schedule form is expressed to apply generally to persons and is supported by provisions to facilitate the application by the States of the text of the Schedules as State law.¹⁵ The New Tax System Price Exploitation Code is in similar form.

¹³ See Part V of the *Trade Practices Act 1975* (Cwlth). An example of the State legislation is Part 5 of the *Fair Trading Act 1987* (NSW).

¹⁴ For example, South Australia was the promulgating State in relation to the gas pipelines law—see *Gas Pipelines Access (South Australia) Act 1997* (SA).

¹⁵ See Part XIA of the Competition Code for the supporting provisions.

35 The background to section 6 of the TPA was that its precursor was held to be invalid by the High Court, basically because the provisions concerned were not capable of being read down. The provisions could at the same time apply to *all* trade and commerce and *only* to interstate and overseas trade and commerce. The 1974 Act, on the other hand, provides an operation under section 6 that is completely separate to the application of the Act to corporations. This was described by Justice Mason in the *CLM Holdings* case as follows:

for the most part the operative sections of the Act, which, according to their terms, regulate the conduct of corporations, are based upon the corporations power and the territories power. ... Section 6 recognises that the Act will in the first instance have a direct operation according to its terms and at the same time provides that in addition to this operation the Act shall have a further operation in accordance with the provisions of section 6(2) and (3).¹⁶

36 Instead of having a Schedule form of Part IV, it would have been possible for the States to apply the text of Part IV with modifications (for example “as if each reference to a corporation were a reference to a person”). However, such an application tends to be imprecise and may not produce the desired result in all cases. In this case, I understand that the States preferred to have the exact text set out. The Schedule form of Part IV is simply text that is applied by States.

37 A slightly different model is that adopted in the *Therapeutic Goods Act 1989*, the *Gene Technology Act 2000* and the *Water Efficiency Labelling Standards Act 2005*. In that model, the legislation is drafted generally but has a provision that limits the operation of the legislation to things within constitutional power. Conceptually this is similar to the Competition Code/Trade Practices Act model, but the text for adoption by States is the Act as a whole (appropriately modified).

38 Where the Commonwealth enacts a law that applies to specified things within Commonwealth constitutional power, the law will apply in the States *as a Commonwealth law* to the extent possible, and State legislation will apply to the extent that its application is consistent with the application of the Commonwealth law.

2.4 Combination schemes

39 A scheme can be set up using a combination of mirror legislation and applied law approaches, and this has been the case in some recent schemes, with some States enacting their own laws mirroring Commonwealth laws, and at least one State applying the Commonwealth law as a law of the State. Examples of this approach are the schemes regulating therapeutic goods, gene technology and research involving embryos. Under each of these schemes, the Commonwealth legislation extends to a range of things within its constitutional power.¹⁷ The States have then either applied the Commonwealth law as a law of the State, with appropriate modifications, or enacted their own legislation in similar terms.¹⁸

¹⁶ *R v Australian Industrial Court; Ex Parte CLM Holdings Pty Ltd* (1977) 136 CLR 235 at 243-244.

¹⁷ *Therapeutic Goods Act 1989* (Cwlth); *Gene Technology Act 2000* (Cwlth); *Research Involving Human Embryos Act 2002* (Cwlth).

¹⁸ For example, see *Gene Technology (New South Wales) Act 2003* (NSW) (which is an applied law) and *Gene Technology Act 2001* (Vic.) (which is mirror legislation).

2.5 Complementary (non-applied) law schemes

40 A complementary non-applied law approach has been taken in relation to the classification of films, publications and computer games. Films, publications and computer games are classified under Commonwealth legislation (the *Classification (Publications, Films and Computer Games) Act 1995*). Controls and penalties are imposed under State and Territory legislation (see, for example, the *Classification (Publications, Films and Computer Games) (Enforcement) Act 1995* (Vic.)).

41 The *Classification (Publications, Films and Computer Games) Act 1995* is based on the territories power. Section 3 states that the purpose of the Act is to provide for the classification of publications, films and computer games for the Australian Capital Territory.

2.6 Advantages and disadvantages

42 Generally speaking, mirror legislation is more likely to result in inconsistency, both at the time of enactment, and subsequently as laws are amended. If the Commonwealth and each State enact substantive provisions that mirror each other but do not have any necessary connection with each other, it is likely that uniformity will be lost (either initially or over time).

43 Usually there are mechanisms aimed at keeping laws consistent, but the practical effect of these can be to make legislative change difficult to achieve. Even where all States initially agree to retain consistency this can be made difficult by political changes. Legislation can take time to get through State Parliaments, and there can be problems of timing, the priority accorded, and so on.

44 In the perfect applied law regime where a law is promulgated by one jurisdiction and is picked up by other jurisdictions as in force from time to time, there are effective limits (which may be non-legislative) on modification and there is central administration and enforcement of that law, which can be expected to provide a substantial degree of uniformity.

45 However, applied law regimes do not always involve central administration (the 1980s cooperative scheme for companies is an example), and this can reduce uniformity. Further, any capacity for the applying State to have control over text can also lead to inconsistency. Applied law schemes can also be quite complex and there are many possible pitfalls. For example, Sir Robert Garran said in 1935:

for a long time the inhabitants of the Territory were deprived of all opportunity of getting unmarried. This was because when the ACT became a Territory, NSW laws were adopted “as if the territory continued to form part of New South Wales.” However, “the New South Wales law required domicile in New South Wales as the basis of jurisdiction and domicile in the territory is not domicile in New South Wales. It was not until 1932 that a Matrimonial Causes Ordinance was passed applying the New South Wales law with the modification that ‘domicil’ was to be read in reference to the Territory.”¹⁹

¹⁹ Speech given by Sir Robert Garran to the 1935 Australian Legal Convention, Vol 9 *Australian Law Journal*, November 15, 1935, Supplement. (It might be considered that this would be covered by the “as if” form of words, but there was evidently some doubt in relation to the issue.)

46 A relevant consideration is how strong the need for uniformity is. For example, the Trans-Tasman therapeutic goods scheme is a scheme where uniformity is not essential in all aspects and in fact a reasonably high degree of variation is envisaged.

3 Issues for drafters

3.1 Constitutional law issues

3.1.1 What is the constitutional basis of the scheme?

47 It will be apparent from the above discussion that a basic point to consider in drafting a cooperative scheme is its constitutional basis.

48 The constitutional basis of the scheme will have a number of legal and administrative ramifications. In some instances the instructors will have a clear view on the constitutional basis, but in other cases this may not be settled and you may have some input. While a reference of powers from the States is possibly the most desirable approach to achieve consistency, uniformity and validity, such a reference may not be a viable political option and other possibilities may need to be examined.

3.1.2 Issues arising from the Hughes case

49 The basic decision in *Hughes* has been set out in detail in numerous academic articles. There is an excellent detailed paper by Graeme Hill²⁰ that sets out a summary of the case and the issues it raises. In very broad terms the case suggests that:

- (a) the Court appeared to affirm the Commonwealth's ability to undertake State functions where no more than the *exercise of a power* was concerned;
- (b) there may be a "constitutional imperative" for any *duties* imposed on Commonwealth bodies or officers to be imposed by Commonwealth law. That is, it may be beyond the legislative power of a State to impose a duty on a Commonwealth body even if the Commonwealth Parliament consents to the imposition of that duty;
- (c) where a Commonwealth law imposes a duty on a Commonwealth body or officer to exercise a power or perform a function conferred by State law, the imposition of that duty must be supported by a head of Commonwealth power, especially where the power or function may affect the rights of individuals; and
- (d) if a State law purports to grant a wider power or authority to a Commonwealth body or officer than Commonwealth law consents to, the State law will be inconsistent to that extent with the Commonwealth law and will be invalid under s 109 of the Constitution.

50 There are various options for dealing with the decision in *Hughes*. The first 3 options below are discussed in more detail (the others have been canvassed elsewhere in this paper).

²⁰ *R v Hughes and the Future of Cooperative Legislative Schemes* (2000) 24 MULR 478.

51 Some options are:

- Option 1:** provisions like those first included in the *Agricultural and Veterinary Chemicals Act 1994* (Cwlth) and subsequently refined and included in several Acts. The current preferred precedent is sections 6AAA to 6AAC of the *Therapeutic Goods Act 1989* (Cwlth) (the **TG Act**), which are similar to provisions of the TPA²¹ (see below option 1).
- Option 2:** provisions like those of the *Australian Crime Commission Act 2002* (Cwlth) (see below option 2).
- Option 3:** the establishment of State and Territory offices corresponding to Commonwealth offices, to be held by the same individuals who hold the Commonwealth offices (see below option 3).
- Option 4:** parallel enforcement by Commonwealth, State and Territory bodies (see section 2.2).
- Option 5:** enforcement of some aspects by States and Territories alone (see section 2.5).
- Option 6:** a reference of power, from States to the Commonwealth (see section 2.1).
- Option 7:** a referendum.

Option 1—TGA style provisions

52 This option has been favoured because it is relatively simple, does not require major structural change and does not require much, if any, legislative amendment by States.

53 Provisions of this kind are intended to overcome the decision in *Hughes* by providing the following:

- the Commonwealth authorises the imposition by State law of duties, as well as the conferral by State law of functions and powers, on Commonwealth officers and authorities;
- any duty purported to be imposed under a State law is taken to be imposed by force of State law where State legislative power is sufficient to support that duty and, where that is not the case, Commonwealth legislative power is relied upon (to the extent that it is sufficient to support the duty);
- if the imposition of a duty on a Commonwealth officer or authority under applied State law contravenes a relevant constitutional doctrine or exceeds the legislative power of both the State and the Commonwealth, the State law is taken to confer a *discretionary power* rather than a *duty* on the Commonwealth officer or authority;
- if an applied State law purports to confer jurisdiction in relation to a matter on the Federal Court, the jurisdiction is taken to be conferred on the court by the Commonwealth Act.

²¹ See section 44ZZM of the *Trade Practices Act 1974*; sections 44AH to 44AK of the *Trade Practices Act 1974* (not yet commenced).

54 The text of sections 6AAA to 6AAD of the TGA is set out in Attachment A, with notes as to the intended effect of each provision.

Option 2—Australian Crime Commission type approach

55 This approach is along similar lines to the TGA model but is more extensive in that it identifies particular sources of Commonwealth legislative power.²² In particular, the ACC Act utilises the concept of “federally relevant criminal offence”, which is a term limited by reference to criminal activity within constitutional reach. Provisions similar to the TGA provisions are also included, although with some differences in scope.

56 The advantage of this approach is that it more explicitly reduces constitutional uncertainty, although theoretically it should not be more legally effective than TGA style amendments.

Option 3—Dual appointments

57 As far as I am aware, this option has not been adopted in order to address the *Hughes* issue but is based on comments in *Hughes* that:

It may be accepted that ... in the exercise of the incidental power the parliament may permit officers of the Commonwealth holding appointments by or under statute to accept appointments in addition to their Commonwealth appointments.²³

58 The concept is that State legislation would establish State offices parallel with Commonwealth offices under a particular Act. The individual holding the Commonwealth office would also hold the corresponding State office.

59 State legislation would need to provide:

- (a) for a State office corresponding to the Commonwealth office; and
- (b) that the individual holding, or performing duties of, the corresponding Commonwealth office is taken to hold the State office; and
- (c) that the powers and functions conferred by the State law should be taken to be conferred on the State officer; and
- (d) that in exercising powers or performing functions under the State law the officer would act as nearly as possible to how he or she would act under the corresponding Commonwealth law.

60 Commonwealth legislation would need to provide for consent to Commonwealth officers holding State appointments and that Commonwealth officers could, when exercising powers or performing functions conferred on the State office, expend Commonwealth money (if the latter is intended).

61 There is a question as to whether parallel *authorities* (as opposed to offices) could be created.

²² See *Australian Crime Commission Act 2002*.

²³ *Hughes* at page 163.

62 Theoretically, this option would solve the “Constitutional reach” problem. However, the option is quite conceptually complex and has not (as far as I know) been adopted. It may be regarded as very artificial. It would require fairly substantial amendments to State and Commonwealth legislation.

Other options

63 The other options essentially involve parallel enforcement or enforcement by States. These are options that revert more to the model of complementary applied law schemes identified at the start of this paper.

64 Bear in mind that if you are inserting provisions relating to an existing scheme, some form of State validating legislation may be necessary, although such legislation may already be in effect. State Acts such as the *Cooperative Schemes (Administrative Actions) Act 2001* (NSW) are relevant in this regard. That Act validates invalid administrative actions purportedly taken by Commonwealth officers under certain State laws, and the State laws to which the Act applies can be added to by Proclamation.

3.1.3 Interaction between Commonwealth and State law—section 109 of the Constitution

65 When drafting a cooperative scheme you will need to consider the interaction of the Commonwealth and State legislation. Section 109 of the Constitution provides that:

When a law of a State is inconsistent with a law of the Commonwealth, the latter shall prevail, and the former shall, to the extent of the inconsistency, be invalid.

66 In an applied law model such as the pre-2001 corporations law regime, the Commonwealth law applied only in the ACT. State laws applied the Commonwealth law *as State law*, and therefore State law could override it. By contrast, the *Corporations Act 2001* (Cwlth) is a *Commonwealth* law, and section 109 of the Constitution will operate to deny effect to any State law that is inconsistent with it.

67 Under some other applied law schemes, the situation may be complicated by the fact that the State applies a Commonwealth law, but the Commonwealth law has its own operation in the States. For example, the *Gene Technology Act 2000* (Cwlth) applies to certain things within Commonwealth constitutional power. The Act provides that State laws may operate concurrently (other than a State law that is prescribed by the regulations). The provision indicates that the Commonwealth does not intend to cover the field, that is, to make exhaustive or exclusive provision with respect to the subject matter of the Act. However, State laws that are inconsistent for reasons other than because of the “covering the field” test will give way. It may not always be clear when a State law is inconsistent. Thus, this type of cooperative scheme may lead to areas of uncertainty as to whether Commonwealth law or State law applies. For many purposes it may not be necessary to know this, especially where the Commonwealth and State laws are identical, but it may be necessary for some purposes, and this could create difficulties.

3.1.4 Severability issues

68 In cases where a Commonwealth-State scheme relies on several heads of Commonwealth legislative power, with the States filling the gaps, you need to be aware of

severability issues (of course, this issue is not confined to cooperative scheme legislation). OPC's Drafting Direction No. 8 of 1993 (available on OPC's website) deals with this issue. The important points to note are that:

- (a) section 15A of the *Acts Interpretation Act 1901* (Cwlth) does not mean that a provision drafted without regard to the extent of Commonwealth power will be valid in so far as it happens to apply to the subject matter of a particular power;
- (b) a provision of general application will not be read down unless the Parliament indicates an intention that the provision is to have a distributive operation.

69 In terms of drafting approaches in relation to utilising a range of Commonwealth constitutional powers, the most commonly used options are:

- (a) draft all provisions with clear reference to the head(s) of power relied on (eg. Part IV of the TPA); or
- (b) draft generically but include a reading down provision (eg. *Water Efficiency Labelling Standards Act 2005* (Cwlth); *Gene Technology Act 2000* (Cwlth)); or
- (c) draft provisions with a clear reference to one head of power, then extend the operation of the Act (eg. sections 5 and 6 of the TPA).

70 One slightly different issue that relates to severability that in my view arises in the light of *Hughes* is whether Commonwealth Acts should specify all the possible heads of power that could be relevant. In *Hughes* the Court seemed to suggest that the executive power together with the incidental power might be sufficient to support the conferral of duties on Commonwealth officers where there were Commonwealth-State arrangements. However, if these powers are not sufficient, will the Court go looking for possible heads of power, or would they need to be spelled out in the legislation? On one view *Hughes* did not require that the Commonwealth legislation in that case specifically advert to the Commonwealth head of power pursuant to which the duty was conferred; it was sufficient that the facts in that case disclosed a connection with a Commonwealth head of power that would support the conferral of the duty on the Commonwealth officer.

71 Another view is that the High Court cannot be relied upon to read down provisions in Commonwealth enactments simply on the basis that the Parliament could have made a valid law based on an available head of power. Rather the Court needs to be satisfied that the Parliament did so intend based on a reading of the provisions.

72 In this context the question arises whether the High Court would hold valid the imposition of duties on Commonwealth officers or authorities, where that imposition was beyond the Constitutional powers to which the Act was expressed to rely upon, but within powers the Act *could have relied upon*. It would be interesting to see what the High Court has to say about these provisions should they ever be challenged.

73 It may be that the test for severability when the Commonwealth is legislating to create substantive rights and obligations is different from the test applied when determining whether the Commonwealth can agree to functions, powers and duties that arise under State law being

conferred on Commonwealth officers as part of a Commonwealth-State scheme. This would go some way to explaining why *Hughes* seemed to depart from the High Court's standard approach to severability. However, others have suggested that certain dicta in *Hughes* support the view that such provisions would be valid, even in the absence of specific Commonwealth-State cooperative arrangements.

3.2 Administrative law issues

Which administrative law scheme applies?

74 An issue for cooperative schemes is the administrative law regime that is going to apply. In a basic "mirror" scheme, you could have similar substantive provisions in the Commonwealth and State legislation, but different administrative enforcement and review mechanisms. However, there would be an obvious lack of uniformity in such a system.

Wakim decision

75 If there is a centralised regulatory body, it may be considered desirable that all decisions of the body are reviewable under the one system. In *Wakim* the High Court decided that State jurisdiction may not be conferred on federal courts (see also section 3.7 of this paper). Cooperative schemes commonly provide for AAT review of decisions made under State laws, as if those decisions had been made under laws of the Commonwealth.

76 Concern has been expressed that because an appeal on a question of law is available to the Federal Court from a decision of the AAT, this could amount to a State Act conferring jurisdiction on the Federal Court. However, the Commonwealth's view is that *Commonwealth* legislation can provide for the judicial review of decisions made by Commonwealth officers or authorities under State or Territory legislation. After the decision in *Wakim* the Commonwealth amended the AAT Act so that the Federal Court could review decisions made by the AAT under State or Territory legislation.²⁴

77 The Commonwealth takes the approach that if State legislation is invalid so far as it purports to confer jurisdiction on a federal court to deal with such reviews, the Commonwealth can instead confer that jurisdiction, and that conferral will be valid even though it relates to powers exercised under State legislation.

78 South Australia has provided in both the *Gene Technology Act 2001* (SA) and the *Research Involving Human Embryos Act 2003* (SA) that decisions of the Regulator are appealable under the State Act to the District Court of South Australia, rather than relying on the relevant Commonwealth provisions²⁵ (which provide that application may be made to the AAT for review of decisions made under the relevant State laws by Commonwealth officers). This is very unusual and could lead to interesting and complex issues arising.

3.3 Criminal law issues

79 Under an applied law regime, it is usual for the applied law to treat an offence against the State Act as if it were an offence against the Commonwealth Act and apply

²⁴ *Jurisdiction of Courts Amendment Act 2000* (Cwlth).

²⁵ Section 19, *Gene Technology Act 2001* (Cwlth); section 45, *Research Involving Human Embryos Act 2002* (Cwlth).

Commonwealth criminal laws to offences against the applied law (see for example Part 4 of the *Research Involving Human Embryos (New South Wales) Act 2003* (NSW)).

80 By contrast, mirror legislation sets out the offences in full, including in respect of mental elements, penalties, prosecution etc. This can create issues in drafting a cooperative scheme, because States have not (with the exception of the ACT) adopted the approach set out in Chapter 2 of the Commonwealth *Criminal Code*, so it may be necessary for State legislation to cover some matters that Commonwealth legislation would leave to the Code. For example, State drafters may prefer to spell out mental elements and may prefer, for consistency, that this also be done in the Commonwealth legislation.²⁶ At a Commonwealth level this may involve discussion with the Criminal Law area of the Attorney-General's Department as State and Commonwealth drafting styles may differ and may involve issues of Commonwealth criminal law policy.

81 The use of penalty units in Commonwealth legislation will not be adopted in States that do not use penalty units, which means that penalty levels have the potential to become inconsistent over time.

82 Section 80 of the constitution requires that “the trial on indictment of any offence against a law of the Commonwealth shall be by jury”. There is no such requirement (as far as I am aware) for trial by jury of State offences. These issues are discussed in *Cheng v The Queen*.²⁷ This has implications for the drafting of certain Commonwealth offences, particularly where they involve aggravated offences.²⁸

3.4 Numbering

83 Where there is mirror legislation, it can be helpful if there is consistency in numbering. A good example is the *Gene Technology Act 2001* (Vic.), which mirrors the Commonwealth Act, and uses the same numbering. Where a provision is only needed in the Commonwealth Act, the Victorian Act contains a section number and heading and then a note explaining what the Commonwealth provision does. Where a provision is only needed in the Victorian Act, alphanumeric numbering is adopted.²⁹

3.5 Interpretation

84 You will need to think about the interpretation provisions that are going to apply in a cooperative scheme.

85 Under an applied law regime, the State Act will usually provide that the Commonwealth *Acts Interpretation Act 1901* applies as a law of the State in relation to the applied provisions.³⁰

²⁶ See for example *Health Legislation (Research Involving Human Embryos and the Prohibition of Human Cloning) Act 2003* (Vic.).

²⁷ *Cheng v The Queen* (2000) 203 CLR 248.

²⁸ Specifically, if an aggravated offence is created by creating a single offence and providing a higher penalty for an aggravated offence, a provision should be included ensuring that aggravating circumstances are alleged in the charge.

²⁹ See section 8A of the *Gene Technology Act 2001* (Vic.).

³⁰ See for example section 7, *Gene Technology (New South Wales) Act 2003* (NSW); section 7, *Agricultural and Veterinary Chemicals (New South Wales) Act 1994* (NSW).

86 Under a mirror legislation regime, the State interpretation legislation will apply unless otherwise provided. This can lead to inconsistencies in the legislation. If there are centralised regulatory and enforcement arrangements this can cause difficulties.

3.6 Modification

3.6.1 General

87 A major policy issue that arises in relation to cooperative schemes is the modification of the legislation. From the point of view of promoting uniformity, modifications should ideally be reflected in all jurisdictions. However, this can present problems, because jurisdictions often prefer to retain autonomy and control over their own legislation.

88 From a drafting point of view, the issue is to work out what, if anything, you need to say about modification. You also need to be able to explain to your instructors the kinds of approaches that can be taken in relation to modification. In an applied law scheme where Commonwealth law relies on the territories power, the Commonwealth has direct control of the text of legislation that is being applied (assuming it is Commonwealth legislation), but States can override it by enacting inconsistent State legislation. However, the Commonwealth could (subject to constitutional limitations) legislate as to the consequences of such modification. (The discussion in sections 2.3 and 3.1.3 of this paper is relevant to this issue.) For example, section 150A of the TPA contemplates that the Competition Code could be applied with modifications, but an intergovernmental agreement sets in place procedures for modifications to be made. There is a capacity for the Minister to put a notice in the *Gazette* (section 150K) if there is “excessive modification”.

89 In the gene technology scheme, the *Gene Technology (New South Wales) Act 2003* (NSW), which applies the *Gene Technology Act 2000* (Cwlth) as a law of NSW, provides that regulations under the NSW Act may modify the Commonwealth law in its application to New South Wales. The practical effect of this may, however, be limited (because the Commonwealth Act’s application is so broad). However, it does lead to potential inconsistency.

90 In cooperative schemes, there may be a mechanism for removing jurisdictions from the scheme. This could be activated if laws of the jurisdiction stray too far from the scheme. Whether or not this will occur is a policy/political issue, but drafters and instructors will need to examine what mechanisms may need to be in place in order to implement the policy, and the consequences if a jurisdiction is removed from a scheme. This will not be the same in all schemes and you will need to consider the situation on its merits. You should bear in mind that some matters may not need to be dealt with in legislation (they could be covered in an intergovernmental agreement, for example).

91 Consultation between participative jurisdictions is usually required in relation to modification—see section 3.8.

3.6.2 References

92 In the corporations context, the Commonwealth agreed to take the “textual reference” as long as it included a mechanism that would allow amendments. The States would not agree to an open ended amendment reference but only to an amendment reference in a form that would allow the Commonwealth to amend the corporations legislation in relation to the

formation of corporations, corporate regulation and the regulation of financial products and services.

93 It was important for the States that they continue to be able to displace the Corporations legislation. The mechanisms for doing this are found in sections 5E to 5G of the *Corporations Act 2001*.

94 Section 5E sets the starting framework by expressly allowing for concurrent operation of State laws. It specifically allows the State, among other things, to impose additional obligations on companies and their officers.

95 Section 5F creates a mechanism by which the States can disapply the corporations legislation. This is a negative capacity to say that the corporations legislation does not apply to a particular matter. The State law declares a matter to be an excluded matter for the purposes of section 5F. Section 5F then operates to turn the corporations legislation off in relation to that matter in that State.

96 Section 5G creates a mechanism by which the States can make a positive rule about a matter that is different from the corporations legislation rule on that matter.

3.7 Jurisdiction of courts

97 The effect of the decision in *Wakim* is set out in various academic papers.³¹

98 Generally, the High Court held in several cases that provisions of State legislation that confer jurisdiction on Federal Courts are invalid.

99 Clearly, the effect of this decision is relevant to cooperative schemes. The main points are:

- State legislation cannot directly or indirectly confer jurisdiction on a federal court;
- State legislation can confer powers and functions on Commonwealth bodies that are not federal courts, but State legislation cannot apply the provisions of the AAT Act that confer jurisdiction on the Federal Court (although Commonwealth legislation can—see section 3.2 above);
- The *Administrative Decisions (Judicial Review) Act 1977* (Cwlth) now provides a mechanism for review by the Federal Court of decisions by Commonwealth officers or authorities made under State legislation. However, the State or Territory legislation has to be set out in Schedule 3 for this to occur.

3.8 Process issues

100 In setting up a Commonwealth-State scheme it is desirable that all parties be involved from the earliest possible point. Obviously, this will need to be discussed with instructing officers and will be subject to their requirements.

³¹ See for example Graeme Hill, *The Demise of Cross-Vesting* (1999) 27 Federal Law Review 547.

101 Many existing schemes require consultation before amendments are made to relevant legislation. For example, under the Corporations Agreement 2002, the Commonwealth is required:

- (a) in respect of a Bill that **repeals or amends** the Corporations legislation—to consult, and in some circumstances obtain the approval of, the Ministerial Council for Corporations before the Bill is introduced (clause 506 of the Agreement); and
- (b) in respect of any other legislative proposal for Commonwealth legislation that would **alter the effect, scope or operation** of the Corporations legislation—to notify the Ministerial Council at the earliest practicable time after the development of the proposal and preferably before the introduction of the Bill concerned (clause 516 of the Agreement).

102 There are other intergovernmental agreements that also require consultation with States.³²

103 At the Commonwealth level, the Department of the Prime Minister and Cabinet has a role in relation to Commonwealth-State relations and intergovernmental agreements. The website of the Council of Australian Governments (www.coag.gov.au) is also a useful information point.

104 Commonly, the Parliamentary Counsels' Committee is involved in drafting legislation to be promulgated in participating jurisdictions.

³² These include:

Amendments to the rate of the GST or the text of the GST legislation.

Amendments of Part IV of the *Trade Practices Act 1974* (the competition provisions) or of the Competition Code (within the meaning of section 150C of that Act).

Amendments of the *Agricultural and Veterinary Chemicals Code Act 1994*.

Amendments of the gene technology legislation.

Amendments of the *Research Involving Human Embryos Act 2002* or the *Prohibition of Human Cloning Act 2002*.

Attachment A

“Hughes” provision—Therapeutic Goods Act 1989

6AAA Commonwealth consent to conferral of functions etc. on its officers and authorities by corresponding State laws

- (1) A corresponding State law may confer functions or powers, or impose duties, on:
 - (a) a Commonwealth officer; or
 - (b) a Commonwealth authority.

[This is the conferral provision.]

- (2) Subsection (1) does not authorise the conferral of a function or power, or the imposition of a duty, by a corresponding State law to the extent to which:
 - (a) the conferral or imposition, or the authorisation, would contravene any constitutional doctrines restricting the duties that may be imposed on Commonwealth officers or Commonwealth authorities; or
 - (b) the authorisation would otherwise exceed the legislative power of the Commonwealth.

[This is a reading down provision that limits the operation of subsection (1) to the extent necessary to ensure as far as possible that the Commonwealth authorisation under that subsection is constitutionally valid. The reference to any constitutional doctrines restricting the duties that may be imposed on Commonwealth officers or authorities includes any doctrine of this kind arising out of the decision in the Hughes case.]

- (3) Subsection (1) does not extend to a function, power or duty of a kind specified in regulations made for the purposes of this subsection.

[This provision enables the Commonwealth to make regulations to control or limit the duties, functions or powers that are conferred by a corresponding State law on a Commonwealth officer or authority. This may not be required in all cases.]

- (4) This Act is not intended to exclude or limit the operation of a corresponding State law that confers any functions or powers, or imposes any duties, on a Commonwealth officer or Commonwealth authority to the extent to which that law:
 - (a) is consistent with subsections (1) to (3); and
 - (b) is capable of operating concurrently with this Act.

[This provision ensures that Commonwealth officers and authorities are able to exercise powers and perform functions or duties under both Commonwealth and State law provided the latter meets the requirements of this section and the powers, functions or duties are capable of being exercised or performed concurrently with the Act. It is designed to cover laws that would be invalid under a “covering the field” test of inconsistency and may not be needed in all cases.]

6AAB When duty imposed

Application

- (1) This section applies if a corresponding State law purports to impose a duty on a Commonwealth officer or Commonwealth authority.

State legislative power sufficient to support duty

- (2) The duty is taken not to be imposed by this Act (or any other law of the Commonwealth) to the extent to which:
 - (a) imposing the duty is within the legislative powers of the State concerned; and
 - (b) imposing the duty by the corresponding State law is consistent with the constitutional doctrines restricting the duties that may be imposed on a Commonwealth officer or Commonwealth authority.

[The majority of the High Court in Hughes seemed to leave open the question of whether there may be any “constitutional imperative” for a duty, power or function to be imposed or conferred by Commonwealth law. The approach adopted in this section is that if State legislative power is sufficient to support the imposition of a duty, the State law is taken to be the source of the duty. Subsections (3), (4), (5) and (6) will apply in a situation where it is necessary for a particular duty that is purportedly imposed on a Commonwealth officer or authority by a State law to be taken to be imposed by a Commonwealth law.]

Commonwealth legislative power sufficient to support duty but State legislative powers are not

- (3) If, to ensure the validity of the purported imposition of the duty, it is necessary that the duty be imposed by a law of the Commonwealth (rather than by force of the corresponding State law), the duty is taken to be imposed by this Act to the extent necessary to ensure that validity.

*[Subsection (3) deals with the situation where the State legislative powers are not sufficient to support the duty being imposed upon a Commonwealth officer or authority but there is sufficient Commonwealth legislative power to support that duty. Thus it alters the **source** of the duties imposed on Commonwealth officers.]*

- (4) If, because of subsection (3), this Act is taken to impose the duty, it is the intention of the Parliament to rely on all powers available to it under the Constitution to support the imposition of the duty by this Act.

[This subsection makes it clear that if, because of the application of subsection (3), the Commonwealth Act is taken to impose the duty, it is the Parliament's intention to place reliance on all its available constitutional powers to support the Act's imposition of the duty.]

- (5) The duty is taken to be imposed by this Act in accordance with subsection (3) only to the extent to which imposing the duty:
 - (a) is within the legislative powers of the Commonwealth; and
 - (b) is consistent with the constitutional doctrines restricting the duties that may be imposed on a Commonwealth officer or Commonwealth authority.

[The duty is taken to be imposed only to the extent to which imposing the duty is within the legislative powers of the Commonwealth and is consistent with relevant constitutional doctrines.]

- (6) To avoid doubt, neither this Act (nor any other law of the Commonwealth) imposes a duty on the Commonwealth officer or Commonwealth authority to the extent to which imposing such a duty would:
 - (a) contravene any constitutional doctrine restricting the duties that may be imposed on a Commonwealth officer or Commonwealth authority; or
 - (b) otherwise exceed the legislative power of the Commonwealth.

[This subsection makes it clear that no Commonwealth law imposes a duty on a Commonwealth officer or authority to the extent that to do so would contravene any relevant constitutional doctrine or would otherwise exceed the legislative power of the Commonwealth.]

- (7) Subsections (1) to (6) do not limit section 6AAA.

[This subsection is intended to counter any argument that the scope of the authorisation of the conferral of functions or powers or imposition of duties under section 6AAA is limited by the operation of subsection 6AAB.]

6AAC Imposing duty under State law

- (1) This section:
 - (a) applies only for the purposes of the application of the provisions of this Act or another law of the Commonwealth (with or without modification) as a law of a State by a provision of a corresponding State law; and
 - (b) does not apply for those purposes if the corresponding State law otherwise provides.

[This section specifically deals with the imposition of a duty under State law. Unless a corresponding State law provides otherwise, this provision applies only for the purposes of applying a law of the Commonwealth, with or without any modification, as a State law by a provision of a corresponding State law. This is a reference to the way some States have adopted the Commonwealth Act, by reference, as a State Act in enacting a “corresponding State law”.]

- (2) If the corresponding State law purports to impose a duty on a Commonwealth officer or Commonwealth authority to do a particular thing, the duty is taken to be imposed by the corresponding State law to the extent to which imposing the duty:
 - (a) is within the legislative powers of the State; and
 - (b) is consistent with the constitutional doctrines restricting the duties that may be imposed on a Commonwealth officer or Commonwealth authority.
- (3) To avoid doubt, the corresponding State law does not impose the duty on the Commonwealth officer or Commonwealth authority to the extent to which imposing the duty would:
 - (a) contravene any constitutional doctrine restricting the duties that may be imposed on a Commonwealth officer or Commonwealth authority; or
 - (b) otherwise exceed the legislative powers of the State.
- (4) If imposing on the Commonwealth officer or Commonwealth authority the duty to do that thing would:

- (a) contravene any constitutional doctrine restricting the duties that may be imposed on a Commonwealth officer or Commonwealth authority; or
- (b) otherwise exceed the legislative powers of both the State and the Commonwealth; the corresponding State law is taken instead to confer on the officer or authority a power to do that thing at the discretion of the officer or authority.

*[Subsection (4) covers the situation where States can't impose duties on Commonwealth officials and the Commonwealth can't impose the duties because of a lack of power. It provides that a **discretion** is conferred instead of a **duty**.]*

6AAD Conferral of jurisdiction on federal courts

If:

- (a) a provision of a corresponding State law purports to apply a provision of a law of the Commonwealth (the applied provision) as a law of the State; and
- (b) the applied provision purports to confer jurisdiction in relation to a matter on a federal court;

the jurisdiction in relation to that matter is taken to be conferred on the court by this section.

[This provision deals with the conferral of jurisdiction on federal courts by a State law. Where a corresponding State law adopts, as a State law, a provision of a Commonwealth law that confers jurisdiction on the Federal Court in relation to a matter, the jurisdiction of the Federal Court in relation to that matter is deemed to be conferred by section 6AAD, rather than by the State law.]