

National applied laws schemes—a WA perspective

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Part 1—Introduction and some basic ideas

1.1—Introduction

The aim of the jurisdictions participating in a cooperative legislative scheme is to coordinate their legislation in relation to a particular subject matter. In some cases that will mean creating the effect (more or less) of a single law applying throughout Australia (or, at least, all participating jurisdictions).

There is a great variety of cooperative schemes in effect in Australia. The Parliamentary Counsel's Committee (PCC) Protocol on Drafting National Uniform Legislation lists nearly 70 cooperative schemes of one sort or another.¹

Some basic types of cooperative schemes

I think that there are 4 basic types of cooperative schemes. I have identified them by reference to common characteristics and there is nothing special about these “types”. I am not attempting to create strict categories, just assist understanding of the scope and types of schemes that exist.

Referrals of power under the Constitution:

- A federal law is enacted under the Constitution s.51(xxxvii) by the Commonwealth Parliament after a referral of power from one or more State Parliaments, and it might be subsequently adopted by non-referring States.
- The result is Commonwealth law that applies under the Commonwealth Constitution in the referring and adopting States.
- e.g. the *Corporations Act 2001* (Cth) and the Personal Property Securities scheme (a referral and adoption scheme in WA).

Mirror legislation:

- A common drafting exercise in which legislation that is the same or similar is enacted by the Parliaments of each participating jurisdiction.
- The result is State law applying under the Constitution of each participating State.
- e.g. the *Rail Safety Act 2010* (WA).

Applied laws schemes²:

- Schemes in which a common text is enacted by the Parliament of one jurisdiction which, it is intended, will be applied, as amended from time to time, by the Parliaments of the other participating jurisdictions.
- The result is State law applying under the Constitution of each participating State.
- e.g. the *National Gas (South Australia) Act 2008* (SA), the *Health Practitioner Regulation National Law (Victoria) Act 2009* (Vic) and the *Occupational Licensing National Law (Queensland) Act 2010* (Qld).

Federal law/applied law schemes:

- Schemes in which a Commonwealth law covers only part of the subject matter, because of Constitutional restrictions, and State applied laws cover the rest of the subject matter.
- e.g. the Australian Consumer Law, set out in the *Competition and Consumer Act 2010*³ (Cth), applies in Australia to the extent of the Commonwealth's legislative power and, in WA's case, the *Fair Trading Act 2010* (WA) applies the Australian Consumer Law in WA to a limited range of matters.

Degrees of uniformity within schemes

Cooperative schemes achieve varying degrees of uniformity depending upon a number of key features, which are usually dependent upon the particular intergovernmental agreement. The degree of uniformity does not necessarily relate to the type of scheme.

At one end of the spectrum is:

- a single law with a centralised administration, e.g. the *Corporations Act 2001* (Cth); or
- a combination of laws of the States (and perhaps of the Commonwealth), with:
 - centralised administration;
 - centralised control over the content of, and changes to, the law;
 - secondary laws⁴ of one jurisdiction.
 - e.g. the old *Corporations Law*.

At the other end of the spectrum is:

- a combination of laws of the States (and Territories), each with its own State based administration, no centralised control over the content of, and changes to, the law, and secondary laws of each State, e.g. the *Rail Safety Act 2010* (WA) or even the Pay-roll Tax Acts of the various jurisdictions.

² Some people call this template legislation. The possibility of a participating jurisdiction mirroring the common text rather than applying it is not precluded.

³ Until recently, the *Trade Practices Act 1974* (Cth).

⁴ Explained below under terminology.

Scope and limitations of this paper

This paper is concerned only with national applied laws schemes (and those schemes that rely in part on applied laws), and only those schemes that seek to create a uniform law for the participating jurisdictions. It is, in part, a description of a number of typical or standard provisions in national applied laws schemes and, in part, a discussion of a few issues facing drafters, especially issues that arise because of WA's "different" approach to these matters.

This is not a systematic or complete survey of either the matters that need to be dealt with or the ways of dealing with them. It is a somewhat random selection of examples and issues intended to give an idea of the matters that a national applied laws scheme may need to deal with and an idea of how those matters have been dealt with.

I apologise for referring almost exclusively to the States and not referring to the Territories. I have not considered the special position of the Territories.

Some useful papers

There are a number of useful papers on the subject of cooperative schemes.

- Marina Farnan (OPC) "Commonwealth-State cooperative schemes—issues for drafters".
- John Ledda (NSW PCO) "The drafter's guide to co-operative schemes" (Aug 2001).
- Parliamentary Counsel's Committee (PCC) "Protocol on Drafting National Uniform Legislation" Third Edition: July 2008.

See www.pcc.gov.au/uniform/uniformdraftingprotocol4-print-complete.pdf.

1.2—Some basic ideas

The fundamental thing that occurs in an applied laws scheme is that one jurisdiction applies a law of another jurisdiction. It is probably more useful to think of the thing that is applied as a text rather than a law. From the point of view of the applying jurisdiction it is not a law of that jurisdiction until it is applied as a law of that jurisdiction. That is, the act of a Parliament applying the text as a law of its jurisdiction transforms the text into a law (that then applies in the jurisdiction). This is the traditional or orthodox view.

Some terminology for this paper⁵

apply: I use apply in 2 senses. One to mean that a law, of its own force, applies to a matter. The other to mean the act of a jurisdiction taking a text and applying it as a law of the jurisdiction.

participating jurisdiction: in relation to a particular national applied laws scheme, a jurisdiction that participates in the scheme (however the scheme decides what is a participating jurisdiction).

host jurisdiction: in relation to a particular national applied laws scheme, the jurisdiction that, in one of its Acts, sets out the common text that is applied by the other participating jurisdictions.

⁵ These definitions are to help the reader and are not to be strictly interpreted!

common text: the text set out by the host jurisdiction that is applied by some or all of the other participating jurisdictions. (For Parts 1 and 2 of this paper I will usually refer to the common text, but, as will be expanded upon in Part 3, this label presupposes a particular view (the orthodox view) of the application of laws.)

national applied laws scheme: a scheme in which a number of jurisdictions seek to create a coordinated approach to the law on a particular matter by applying a common text set out by the host jurisdiction.

Application Act: the thin bit. The Act of a participating jurisdiction that applies the common text and sets out local definitions and other necessary local machinery provisions.

applied law: the fat bit. The result of the Application Act having applied the common text (as amended from time to time) as a law of the particular jurisdiction.

secondary laws: laws as to the interpretation of the applied law, laws concerning administrative review, freedom of information or criminal process and laws dealing with the cross-vesting of jurisdiction, etc. etc.⁶.

the schemes surveyed: the national applied laws schemes that I had a look at, represented by the following WA Acts and Bills:

- the *Corporations (Western Australia) Act 1990*;
- the *Agricultural and Veterinary Chemicals (Western Australia) Act 1995*;
- the *Competition Policy Reform (Western Australia) Act 1996*;
- the *New Tax System Price Exploitation Code (Western Australia) Act 1999*;
- the *Fair Trading Act 2010*;
- the *National Gas Access (WA) Act 2009*;
- the *Health Practitioner Regulation National Law (WA) Act 2010*; and
- the *Occupational Licensing National Law (WA) Bill 2010*⁷.

1.3—Applying the law

Most, if not all, national applied laws schemes have one or more provisions that:

- identify the thing to be applied;
- apply that thing as a law of the jurisdiction;
- provide for the citation of the applied law.

⁶ The PCC Protocol on Drafting National Uniform Legislation refers to “adjectival” laws (laws concerning the methods of enforcement of legal rights, as compared to substantive law).

⁷ Presently stalled in the WA Parliament. The Legislative Council Standing Committee on Uniform Legislation and Statutes Review recommended (in Report 61 April 2011) that the Bill should not be passed in its current form. I understand the Committee’s main objection to be that there is insufficient detail in the Bill and that too much is left to the regulations.

The following is an extract from the *Fair Trading Act 2010* (WA) which applies the Australian Consumer Law set out in the *Competition and Consumer Act 2010*⁸ (Cth) Schedule 2.

19. Application of Australian Consumer Law

- (1) For the purposes of this section, the Australian Consumer Law text consists of—
 - (a) Schedule 2 to the *Competition and Consumer Act 2010* (Commonwealth), as in force on the commencement of this section (but as modified by section 36); and
 - (b) the regulations made under section 139G of that Act, as those regulations are in force from time to time.
- (2) The Australian Consumer Law text—
 - (a) applies as a law of this jurisdiction; and
 - (b) as so applying, may be referred to as the *Australian Consumer Law (WA)*; and
 - (c) in so far as it constitutes Schedule 2 to the *Competition and Consumer Act 2010* (Commonwealth), is part of this Act; and
 - (d) in so far as it constitutes regulations made under section 139G of the *Competition and Consumer Act 2010* (Commonwealth), is subsidiary legislation for the purposes of this Act.

[Other examples: *National Gas Access (WA) Act 2009* (WA) s.7; *Health Practitioner Regulation National Law (WA) Act 2010* (WA) s.4.]

It is relatively common, at least in WA, for the Application Act to set out modifications to the common text. In this case, the *Fair Trading Act 2010* (WA) s.36 sets out a few modifications to the text. The common text is modified before being applied.

In recent years applied laws schemes have clarified the status of the applied law in the applying jurisdiction. For instance, once a text has been applied it is a law of WA but, without more, it is not clear whether the applied law is a written law⁹. Without clarifying the status in WA of the applied law (see s.19(2)(a)¹⁰) and any subsidiary legislation, it may be that when other WA legislation refers to a written law, those references will not include the applied law. The relevant definitions in the *Interpretation Act 1984* (WA) are:

written law means all Acts for the time being in force and all subsidiary legislation for the time being in force;

Act means any Act or Ordinance passed¹¹ by the Parliament of Western Australia, ...;

⁸ The *Competition and Consumer Act 2010* (Cth) is the old *Trade Practices Act 1974* (Cth), see the *Trade Practices Amendment (Australian Consumer Law) Act (No. 2) 2010* (Cth) Schedule 2 item 5.

⁹ “written law” is a WA specific term, see the *Interpretation Act 1984* (WA) s.5. A couple of other examples: NSW see the *Interpretation Act 1987* (NSW) s.65, Tas. see the *Acts Interpretation Act 1931* (Tas) s.5.

¹⁰ This provision also makes the Law part of the Application Act; so it would be possible to refer to something done under, or an offence against, the Law as having been done under or against the Application Act.

¹¹ It is hard to see how an applied law is passed by the Parliament and so it is unlikely to come within the definition of an Act. In the case of the *Health Practitioner Regulation National Law (WA) Act 2010* (WA), the Health Practitioner Regulation National Law is set out in the Schedule to the Act (rather than, for example, in a note which does not form part of the Act) and so was passed by the Parliament.

subsidiary legislation means any proclamation, regulation, ... , or other instrument, made under any written law and having legislative effect;

1.4—Subsidiary legislation

There are a number of ways of bringing into effect subsidiary legislation for the purposes of the applied law.

- Regulations of the host jurisdiction may be expressly applied as a law of WA, see the *Fair Trading Act 2010* (WA) s.19(1)(b); the *Agricultural and Veterinary Chemicals (Western Australia) Act 1995* (WA) s.6 and the *Corporations (Western Australia) Act 1990* (WA) s.8.
- A regulation making power in the Application Act of WA may be used to make regulations for WA, see the *National Gas Access (WA) Act 2009* (WA) s.8 and Part 3 (although very few regulations were made under this power).
- The applied law may include a power to make subsidiary legislation, see, for example, the *Health Practitioner Regulation National Law (WA) Act 2010* (WA) Schedule s.245.

The third approach is discussed at greater length at 3.2.4.

1.5—WA’s approach to applied laws schemes—updating the applied law

Most jurisdictions participating in a national applied laws scheme apply the common text as amended from time to time. However, the WA Parliament has a disinclination to do so on the basis that it is ceding too much of its sovereignty to the other jurisdiction.¹² The Parliament also feels that applying a law as amended from time to time means that the law will change without the Parliament being able to control or scrutinise that change. So, WA Application Acts usually either:

- set out or apply a fixed version of the common text and then provide a mechanism for modifying the applied law whenever the common text is amended by the host jurisdiction; or
- insert some sort of brake in the system so that amendments to the common text do not automatically apply in WA.

A simple example—a fixed version is amended by the WA Governor

The *Occupational Licensing National Law (WA) Bill 2010* (WA) sets out the Occupational Licensing National Law in the Schedule to the Bill and then applies that Law.

5. Amendments to Schedule

- (1) The Governor may amend the Occupational Licensing National Law set out in the Schedule by order published in the *Gazette*.
- (2) An order cannot be made under subsection (1) unless a draft of the order has first been approved by a resolution passed by both Houses of Parliament.
- (3) A resolution under subsection (2) can originate in either House of Parliament.

¹² There are a couple of exceptions. The *Corporations (Western Australia) Act 1990* (WA) section 7 (as in force before the commencement of the *Corporations Act 2001* (Cth)) applied the Corporations Law as in force from time to time. See also the *Agricultural and Veterinary Chemicals (Western Australia) Act 1995* (WA).

The capacity to amend the Schedule is not restricted to when the host jurisdiction amends the common text (the Occupational Licensing National Law) but I assume that it is not intended to use this capacity for other purposes. The intention in the Intergovernmental Agreement is that the participating jurisdictions should not enact legislation that is inconsistent with the national law. Note: the original provision of this type in WA¹³ was conditional upon the host jurisdiction amending the common text. Amendments via this approach may occur in a timely manner, but experience with the *Consumer Credit (Western Australia) Act 1996* (WA) shows that this is not always the case.

A curious example

The *Fair Trading Act 2010* (WA) applies the Australian Consumer Law as in force on the commencement of the *Fair Trading Act 2010* (WA).

20. Amendments to Australian Consumer Law

The Governor may amend the *Australian Consumer Law (WA)* (as described in section 19(1)(a)) by bill.

The *Fair Trading Bill 2010* (WA) cl.20, as introduced:

20. Amendments to Australian Consumer Law

- (1) The Governor may amend the *Australian Consumer Law (WA)* ... by order published in the *Gazette*.
- (2) An order cannot be made under subsection (1) unless a draft of the order has first been approved by a resolution passed by both Houses of Parliament.
- (3) A resolution under subsection (2) can originate in either House of Parliament.
- (4) If notice of a resolution approving the draft of an order is given to a House of Parliament, and none of the things set out in subsection (5) has happened on or before the 21st sitting day of that House after the giving of the notice, the draft of the order is, on and from the expiration of that 21st sitting day, to be treated as if it had been approved by a resolution passed by that House.
- (5) The following are the things referred to in subsection (4) —
 - (a) notice of the resolution approving the draft of the order has been withdrawn in that House before the notice has been called upon and the resolution moved;
 - (b) notice of the resolution approving the draft of the order has been called upon in that House and the resolution moved but then withdrawn;
 - (c) the resolution approving the draft of the order has been moved in that House and lost;
 - (d) that House has passed the resolution approving the draft of the order;
 - (e) the Legislative Assembly expires or is dissolved, or the Parliament is prorogued.

¹³ See the *Consumer Credit (Western Australia) Act 1996* (WA) s.5.

This is the best example of such a provision that I have seen because of the default 21 day time period.

A not so simple example—amendments apply in WA if allowed to by the WA Minister

The *National Gas Access (WA) Act 2009* (WA) applies the National Gas Law, as set out in the Schedule to the *National Gas (South Australian) Act 2008* (SA), for the time being in force, but provides a mechanism for WA to control when an amendment to the SA Schedule applies as law in WA.

7A. Amendments to Schedule to South Australian Act

- (1) This section applies if, after the day on which the South Australian Act receives the Royal Assent, the Parliament of South Australia enacts a provision to make an amendment to the Schedule to the South Australian Act as in force from time to time (an **SA Schedule amendment**).
- (2) The Minister may by order declare that an SA Schedule amendment is relevant to the Western Australian National Gas Access Law text.
- (3) If the Minister has not declared that an SA Schedule amendment is relevant, the Western Australian National Gas Access Law text remains as if the amendment had not been made.
- (4) If the Minister has declared that an SA Schedule amendment is relevant, the Western Australian National Gas Access Law text remains, until the beginning of the day fixed by subsection (5), as if the amendment had not been made.
- (5) The day fixed is the day on which the order is published in the *Government Gazette* unless a later day is specified in the order, in which case it is the day specified.
- (6) Subsection (4) does not give an SA Schedule amendment any earlier effect in this State than it has in South Australia.

[For similar approaches see the *Competition Policy Reform (Western Australia) Act 1996* (WA) and the *New Tax System Price Exploitation Code (Western Australia) Act 1999* (WA).]

No special mechanism

The *Health Practitioner Regulation National Law (WA) Act 2010* (WA) sets out the Health Practitioner Regulation National Law in a Schedule to the Act. No special mechanism is provided to modify the Schedule so it can only be amended by an Act of Parliament.

Part 2—Machinery provisions that help create a national scheme

Machinery provisions are needed so that the laws of the participating jurisdictions work together to create the degree of uniformity intended for the national applied laws scheme. These provisions cover a range of matters including:

- the relationship between the applied laws of the participating jurisdictions; and
- the administration of the scheme; and
- at least for some schemes - the application of common secondary laws.

Depending upon the drafting approach, these provisions are either in the Application Act or the applied law. At this stage of the paper, I hope to avoid, as much as possible, attaching any significance to that.

2.1—The relationship between applied laws of the jurisdictions—references to the applied law

Many of the schemes surveyed provide for references to the applied law to be references to the applied law of any or all of the participating jurisdictions. This assists in creating the effect of a single national law.

For example, the *Fair Trading Act 2010* (WA) Part 3 Division 3 (and the equivalent provisions in each participating jurisdiction)¹⁴:

25. References to Australian Consumer Law

- (1) A reference in any instrument to the Australian Consumer Law is a reference to the Australian Consumer Law of any or all of the participating jurisdictions.
- (2) Subsection (1) has effect except so far as the contrary intention appears in the instrument or the context of the reference otherwise requires.

[17. Definitions

...

Australian Consumer Law means (according to the context) —

- (a) the Australian Consumer Law text; or
- (b) the Australian Consumer Law text, applying as a law of a participating jurisdiction, either with or without modifications;]

26. References to Australian Consumer Law of other jurisdictions

- (1) This section has effect for the purposes of an Act, a law of this jurisdiction or an instrument under an Act or such a law.
- (2) If a law of a participating jurisdiction other than this jurisdiction provides that the Australian Consumer Law text as in force for the time being applies as a law of that jurisdiction, the Australian Consumer Law of that jurisdiction is the Australian Consumer Law text, applying as a law of that jurisdiction.

Such provisions do not appear in all of the schemes that I surveyed, particularly the schemes that are drafted according to the new approach (see Part 3).¹⁵

2.2—The relationship between applied laws of the jurisdictions - the definition of “participating jurisdiction”

Most of the recent schemes that I surveyed have the concept of a participating jurisdiction. This concept defines the scope of a scheme and accommodates the possibility that a jurisdiction may not participate in the scheme. Some definitions also have the effect of restricting a participating jurisdiction’s capacity to vary its applied law and remain a participating jurisdiction. (This may be a conscious attempt to enforce a degree of uniformity amongst the participating jurisdictions.)

¹⁴ These provisions are modelled on the *Corporations (Western Australia) Act 1990* (WA) Part 3.

¹⁵ The schemes not involving the Commonwealth, e.g. the *National Gas Access (WA) Act 2009* (WA), the *Health Practitioner Regulation National Law (WA) Act 2010* (WA) & the *Occupational Licensing National Law (WA) Bill 2010* (WA).

2.2.1—Some examples

The *New Tax System Price Exploitation Code (Western Australia) Act 1999* (WA) s.3(1):

participating jurisdiction means a jurisdiction that is a party to the Conduct Code Agreement and applies the New Tax System Price Exploitation Code text as a law of the jurisdiction, either with or without modifications;

The National Gas Law s.21¹⁶:

21. Participating jurisdictions

The State of South Australia, the Commonwealth, each of the States of New South Wales, Victoria, Queensland, Western Australia and Tasmania, and the Australian Capital Territory and the Northern Territory are participating jurisdictions for the purposes of this Law.

The *Criminal Investigation (Identifying People) Act 2002* (WA) s.87¹⁷

corresponding law means a law prescribed under section 88 to be a corresponding law;

participating jurisdiction means another State, a Territory or the Commonwealth in which a corresponding law is in force;

2.2.2—The Health Practitioner Regulation National Law

A fixed version of the Health Practitioner Regulation National Law (the **HPRNL**) is set out in the Schedule to the *Health Practitioner Regulation National Law (WA) Act 2010* (WA). It is not applied as amended from time to time. The HPRNL was amended during the passage of the Bill through the WA Parliament.

Is WA a participating jurisdiction? This has 3 aspects to it:

- Does WA give itself the status of participating jurisdiction?
- Can other participating jurisdictions see WA as a participating jurisdiction?
- Can WA see other jurisdictions as participating jurisdictions?

The definition of “participating jurisdiction” in the HPRNL of each jurisdiction is:

participating jurisdiction means a State or Territory —

(a) that is a party to the COAG Agreement; and

(b) in which —

(i) this Law applies as a law of the State or Territory; or

(ii) a law that substantially corresponds to the provisions of this Law has been enacted;

Subparagraph (i):

- I think that the reference to “this Law” is not an internal reference to the WA HPRNL (see the use of “this Law” in sub (ii), that is, the need for correspondence of WA’s law to something outside of this jurisdiction).

¹⁶ See, for example, the Schedule to the *National Gas (South Australia) Act 2008* (SA) or the Note to the *National Gas Access (WA) Act 2009* (WA).

¹⁷ Not part of an applied laws scheme, but a useful example.

- That being the case, under this subparagraph, WA can see other jurisdictions that apply the Law as participating jurisdictions, but may not be seen, either by itself or other jurisdictions, as a participating jurisdiction because WA does not apply “this Law” as understood by the other participating jurisdictions¹⁸, but mirrors it.

Subparagraph (ii):

- The WA version of the HPRNL is set out in the Schedule to the Act and expressed to be applied, by s.4. However, I am of the view that the HPRNL is enacted in WA and that the “applying” it approach is merely a way of producing a set out that is comparable with that of other participating jurisdictions. That is, WA has enacted a mirror version of the Law.
- That being the case, under this subparagraph, WA can be seen, by itself and by other jurisdictions, as a participating jurisdiction. (The opinion in WA is that the WA version of the HPRNL substantially corresponds to the provisions of the Law.)

Issues relating to this definition are discussed further in Part 4.

2.3—Administration of the applied law

Most applied laws will confer functions on one or more regulators. There are a variety of approaches. Schemes where a high degree of uniformity is required have regulators that are common to all participating jurisdictions.

Following are a few examples. In most cases, the example does not describe the full picture in terms of the administration of the particular scheme.

2.3.1—Where the State chooses its regulator

The Australian Consumer Law (see the *Fair Trading Act 2010 (WA)*) contemplates that the States and Territories may choose their own regulator, and confers functions on a “regulator”. This is achieved by s.22 of the Application Act, an ambulatory definition in the applied law and the conferral of functions of “the regulator”.

[The Application Act:]

22. Meaning of generic term in Australian Consumer Law for purposes of this jurisdiction

In the *Australian Consumer Law (WA)* —

regulator means the Commissioner (as defined in section 6).

[The applied law:]

regulator:

- for the purposes of the application of this Schedule as a law of the Commonwealth—means the Commission; or
- for the purposes of the application of this Schedule as a law of a State or Territory—has the meaning given by the application law of the State or Territory.

¹⁸ Here I have taken a strict view of applying this Law. See also Part 4.

The principal regulator for the National Gas Law (see the *National Gas (South Australia) Act 2008* (SA)) in all participating jurisdictions, other than WA, is the AER (the Australian Energy Regulator established by the *Competition and Consumer Act 2010* (Cth) s.44AE). There is no provision for a State or Territory to choose their own regulator, but WA did anyway¹⁹. The ERA (the Economic Regulation Authority of WA) is the regulator for the National Gas Law in WA.

2.3.2—A Commonwealth regulator - the *Hughes* case

In summary:

- the Commonwealth creates a body as the regulator for a scheme;
- the States confer functions on it;
- the States cannot do this effectively unless the Commonwealth has permitted this;
- to the extent to which the regulator has a duty to perform those (State) functions, the Commonwealth must:
 - impose the duty; and
 - have a head of power by which to do that.

For example, the ACCC²⁰ is the primary regulator under the Competition Code (see the *Competition Policy Reform (Western Australia) Act 1996* (WA) and the *Competition and Consumer Act 2010* (Cth) Part IV & IX and Part I of the Schedule). Under this scheme, the States confer functions on the ACCC.

There are potential Constitutional problems with this approach, see the *Hughes*²¹ case. The following is a paraphrase of part of the paper by Marina Farnan (“Commonwealth-State cooperative schemes - issues for drafters” pg. 11):

- A Commonwealth regulator can undertake State functions where the State gives a function to be performed. The Commonwealth needs to permit the State to do this.
- If a State law purports to confer a function or power on a Commonwealth regulator that is wider than what the relevant Commonwealth Act permits, the State law will be ineffective under s.109 of the Constitution to the extent of the inconsistency.
- If a duty (to perform a function or exercise a power) is to be imposed on the Commonwealth regulator, that may need to be imposed by Commonwealth law. That is, a State may not be able to impose a duty on a Commonwealth regulator, even when Commonwealth legislation permits that.
- If the Commonwealth is to impose a duty on a Commonwealth regulator, that must be supported by a head of Commonwealth power, especially where the function or power may affect rights of individuals.

¹⁹ This was achieved by modifying the NGL text, see the *National Gas Access (WA) Act 2009* (WA) s.9(1) and Schedule 1 (which contains the modifications) and the WA version of the NGL s.2 (the definitions of AER, ERA & regulator) and s.2A.

²⁰ The ACCC was established by the *Trade Practices Act 1974* (Cth) s.6A - now called the *Competition and Consumer Act 2010* (Cth).

²¹ *R v Hughes* (2000) 202 CLR 535. See the *Co-operative Schemes (Administrative Actions) Act 2001* (WA) for WA’s part in validating decisions that might otherwise have been invalid after *Hughes*.

There are various options for dealing with these issues which are nicely outlined in the paper by Marina Farnan. They include “the establishment of State and Territory offices corresponding to Commonwealth offices, to be held by the same individuals who hold the Commonwealth offices”²².

Conferral of functions and consent to conferral of functions by another jurisdiction:
 The *Competition Policy Reform (Western Australia) Act 1996* (WA) s.19 confers on Commonwealth authorities and officers the functions and powers conferred or expressed to be conferred on them under the WA version of the Competition Code. Section 20 allows certain Commonwealth authorities to perform functions in WA under the Competition Code of another participating jurisdiction.

The State cannot effectively confer functions on a Commonwealth regulator unless the Commonwealth has, by law, permitted that conferral. See the *Competition and Consumer Act 2010* (Cth) s.150F:

150F—Commonwealth consent to conferral of functions etc. on Commonwealth entities

- (1) An application law may confer functions or powers, or impose duties, on a Commonwealth entity for the purposes of the Competition Code.

The rest of s.150F and s.150FA deal with the imposition of duties on the ACCC so as to avoid the *Hughes* problems described above.

2.3.3—Where the regulator is created by the applied laws

The examples so far have been of a regulator created by the law of a particular jurisdiction and then given functions by other jurisdictions. A number of schemes are intended to have the effect that their regulators are created, once, by the combined effect of each participating jurisdiction’s applied law.

For example, the *Health Practitioner Regulation National Law* s.31²³:

31. Establishment of National Boards

- (1) Each of the following National Health Practitioner Boards is established for the health profession listed beside that Board in the following Table —

Table — National Boards

Name of Board	Health profession
...	
Medical Board of Australia	Medical

...

- (2) A National Board —
 - (a) is a body corporate with perpetual succession; and
 - (b) has a common seal; and
 - (c) may sue and be sued in its corporate name.

²² See pg. 12 of Marina Farnan’s paper. Further, Gibbs CJ refers to this approach in *R v Duncan* (1985) 158 CLR 535 at p.552, see 3.2.3 of this paper.

²³ See the *Health Practitioner Regulation National Law (WA) Act 2010* (WA) the Schedule and the equivalent provisions of each other participating jurisdiction.

- (3) A National Board represents the State.

A National Health Practitioner Board is the registration body for the particular health profession in Australia.

Briefly, the Health Practitioner Regulation National Law s.7 provides that it is the intention of each participating jurisdiction that an entity established by the Law is one single national entity that can perform its functions in each participating jurisdiction. [The Occupational Licensing National Law has similar provisions.]

This matter is discussed in more detail below at 3.2.3.

2.4—Whose secondary laws apply?

To achieve some consistency in the interpretation and administration of an applied law across the participating jurisdictions many schemes provide for common rules on these matters. This requires that certain laws of the participating jurisdictions do not apply to the applied law. For example, the *Health Practitioner Regulation National Law (WA) Act 2010* (WA) s.7:

7. Exclusion of legislation of this jurisdiction

- (1) Except as provided in subsection (2), the following Acts of this jurisdiction do not apply to the *Health Practitioner Regulation National Law (Western Australia)* or to the instruments made under that Law —
 - (a) the *Auditor General Act 2006*;
 - (b) the *Financial Management Act 2006*;
 - (c) the *Freedom of Information Act 1992*;
 - (d) the *Interpretation Act 1984*;
 - (e) the *Parliamentary Commissioner Act 1971*;
 - (f) the *Public Sector Management Act 1994*.
- (2) Sections 41 and 42 of the *Interpretation Act 1984* apply to regulations made under the *Health Practitioner Regulation National Law (Western Australia)*.

It is important to note that the State's Application Act is not excluded from the application of those laws.

2.4.1—Interpretation of the applied law

All of the schemes surveyed dealt with the interpretation of the applied law. To avoid variations in interpretation between participating jurisdictions a common set of interpretative rules applies. Usually either:

- interpretation provisions (that cover much the same ground as in an Interpretation Act) that are set out in the common text²⁴; or
- the *Acts Interpretation Act 1901* (Cth)²⁵.

²⁴ See e.g. the National Gas Law Schedule 2 in the *National Gas (South Australia) Act 2008* (SA) and the *Health Practitioner Regulation National Law (WA) Act 2010* (WA) s.7(1) and the Health Practitioner Regulation National Law Schedule 7 set out in the Schedule to the Act.

²⁵ See e.g. the *Fair Trading Act 2010* s.23 and the *New Tax System Price Exploitation Code (Western Australia) Act 1999* (WA) s.7.

2.4.2—Whose administrative/review laws apply - the *Wakim* case

If nothing is expressly provided for then the default position applies. Judicial review of the State based decisions of a State regulator can be sought under the law of the State, and of Commonwealth based decisions of a Commonwealth regulator in the federal courts under the *Administrative Decisions (Judicial Review) Act 1977* (Cth).

Typically, where the regulator is a Commonwealth body or office holder²⁶ the Commonwealth's administrative laws are applied.

In summary:

- the Commonwealth creates a body as the regulator for a scheme;
- the States confer functions on it;
- the States apply the Commonwealth's administrative laws (the AAT Act and, in the past, the AD(JR) Act) as State laws to the State based decisions of the regulator;
- there are Constitutional problems when those laws, as State laws, purport to confer (State) jurisdiction on the Federal Court;
- the solution was for the States to cease to apply the AD(JR) Act, and the Part of the AAT Act that conferred jurisdiction on the Federal Court.

In a number of schemes the Commonwealth applies its administrative laws to the Commonwealth based decisions of the regulator and the States apply the *Administrative Appeals Tribunal Act 1975* (Cth) and other Acts, as State laws, to the State based decisions of the Commonwealth regulator. Good examples are:

- the *Agricultural and Veterinary Chemicals (Western Australia) Act 1995* (WA);
- the *Competition Policy Reform (Western Australia) Act 1996* (WA); and
- the *New Tax System Price Exploitation Code (Western Australia) Act 1999* (WA).

For example, the ACCC exercises powers under the Competition Code applied in WA by the *Competition Policy Reform (Western Australia) Act 1996* (WA). Its decisions under the State Act are reviewable by the AAT, see ss.29 & 30 of the State Act.

29. Definition

In this Division —

Commonwealth administrative laws means —

- (a) the following Acts —
 - (i) the *Administrative Appeals Tribunal Act 1975* of the Commonwealth;
 - [(ii) deleted]
 - (iii) the *Freedom of Information Act 1982* of the Commonwealth;
 - (iv) the *Ombudsman Act 1976* of the Commonwealth;
 - (v) the *Privacy Act 1988* of the Commonwealth;
- and
- (b) the regulations in force under those Acts.

²⁶ Examples include ASIC (under the old Corporations Law); the Commonwealth Minister under the Australian Consumer Law; the AER under the National Gas Law; the ACCC in relation to the *Competition Policy Reform (Western Australia) Act 1996* (WA).

30. Application of Commonwealth administrative laws to Competition Code of this jurisdiction

- (1) The Commonwealth administrative laws apply as laws of this jurisdiction to any matter arising in relation to the Competition Code of this jurisdiction as if that Code were a law of the Commonwealth and not a law of this jurisdiction.

The special position of the AD(JR) Act 1977 (Cth):

Prior to 2001 the *Administrative Decisions (Judicial Review) Act 1977 (Cth)* was included in the list of Commonwealth administrative laws that the States applied. This Act confers jurisdiction on the Federal Court to review decisions. By applying this law, the States were purporting to confer State jurisdiction on the Federal Court. The High Court in *Wakim*²⁷ decided that a State could not do that, directly or indirectly.

The Commonwealth has taken the view that it can provide for judicial review under the *Administrative Decisions (Judicial Review) Act 1977 (Cth)* of decisions of its regulators made under State law. This is done by listing the State law as an enactment under which decisions of a Commonwealth regulator are reviewable.²⁸

Decisions of the AAT appealable to the Federal Court:

Decisions of the AAT are appealable to the Federal Court on questions of law. This includes decisions of the AAT made under a power conferred by a State Law. The *AAT Act 1975 (Cth)* ss.43B & 44:

43B Part applies whether Tribunal's power conferred by an enactment or by a law of a State

- (1) This Part applies in relation to a proceeding that was before the Tribunal before the commencement of this section, or that is before the Tribunal after that commencement, under power conferred on it by or under:
 - (a) an enactment; or
 - (b) a law of a State.
- (2) This Part has effect in relation to a proceeding before the Tribunal under power conferred on it by a law of a State as if a reference in this Part to a provision of this Act that is not in this Part were a reference to that provision as applying as a law of the State.

44 Appeals to Federal Court of Australia from decisions of the Tribunal

Appeal on question of law

- (1) A party to a proceeding before the Tribunal may appeal to the Federal Court of Australia, on a question of law, from any decision of the Tribunal in that proceeding.

The problem here of course is that when the States apply the *AAT Act 1975 (Cth)* as a law of the State, it looks like they are conferring the jurisdiction in s.44 on the Federal Court. The *Agricultural and Veterinary Chemicals (Western Australia) Act 1995 (WA)* s.18A has the effect that the State does not apply Part IVA (ss.43B to 46) of the *AAT Act 1975 (Cth)*.

²⁷ *Re Wakim; Ex Parte McNally* (1999) 198 CLR 511.

²⁸ See the *Administrative Decisions (Judicial Review) Act 1977 (Cth)* the definitions of "decision to which this Act applies" and "enactment" and Schedule 3.

2.4.3—Whose criminal law applies?

Where the Commonwealth's criminal laws are applied:

To produce uniformity in the treatment of offences under an applied laws scheme, some schemes apply the Commonwealth's criminal laws as State laws in relation to offences under the applied law.

For example, see the *New Tax System Price Exploitation Code (Western Australia) Act 1999*²⁹ (WA) ss.21 to 25 (parts of which are extracted here):

22. Application of Commonwealth laws to offences against New Tax System Price Exploitation Code of this jurisdiction

- (1) The laws of the Commonwealth apply as laws of this jurisdiction in relation to an offence against the New Tax System Price Exploitation Code of this jurisdiction as if that Code were a law of the Commonwealth and not a law of this jurisdiction.

23. Application of Commonwealth laws to offences against New Tax System Price Exploitation Codes of other jurisdictions

- (1) The laws of the Commonwealth apply as laws of this jurisdiction in relation to an offence against the New Tax System Price Exploitation Code of another participating jurisdiction as if that Code were a law of the Commonwealth and not a law of that other jurisdiction.

Note: applying the criminal law of the Commonwealth is not the only option. The criminal law of any particular participating jurisdiction could be applied.

Where the criminal law of each participating jurisdiction applies:

Not all applied laws schemes make specific provision in relation to offences against the applied law. In that case, an offence in WA against the applied law of WA, or of another participating jurisdiction, is treated in the same way as any other offence against any other "ordinary" law of WA or that other jurisdiction.³⁰

One difficulty that arises where the criminal law of each participating jurisdiction applies in relation to offences against the applied laws is that not all participating jurisdictions have the same concepts in their criminal law. However, this may have to be dealt with to create offences that are the same across all participating jurisdictions. For example, WA may need to enact "strict" or "absolute" liability offences.

Strict and absolute liability offences:

Strict and absolute liability offences are not known to WA criminal law. These are concepts understood in the context of the common law or the Criminal Code of the Commonwealth (see the *Criminal Code Act 1995* (Cth)).

²⁹ See also the *Competition Policy Reform (Western Australia) Act 1996* (WA) ss.24 - 28.

³⁰ An aside: Some applied laws schemes specifically contemplate that local tribunals or courts will deal with proceedings under the applied law. See, for example, cl.7 of the *Occupational Licensing National Law (WA) Bill 2010* (WA) and the definition of "relevant tribunal or court" in the Occupational Licensing National Law in the Schedule to that Bill.

Most offence provisions in WA do not have a mental element as understood by the common law or by the Criminal Code of the Commonwealth.

The Criminal Code of WA s.23:

23. Intention and motive

- (1) Unless the intention to cause a particular result is expressly declared to be an element of the offence constituted, in whole or part, by an act or omission, the result intended to be caused by an act or omission is immaterial.
- (2) Unless otherwise expressly declared, the motive by which a person is induced to do or omit to do an act, or to form an intention, is immaterial so far as regards criminal responsibility.

The Criminal Code of WA provides a number of defences which are available to the accused, eg:

- accident (s.23B);
- mistake of fact (s.24).

The displacement of one or more of these defences may create an effect that approximates strict or absolute liability.

Part 3—A discussion of 2 approaches to applied laws schemes

For the purposes of this paper I will consider 2 broad approaches to setting up national applied laws schemes. They are simplifications to highlight a few issues.

The Corporations Law approach:

This approach is commonly used when a Commonwealth Act sets out the common text. For example:

- the *Corporations (South Australia) Act 1990* (SA);
- the *Competition Policy Reform (Western Australia) Act 1996* (WA);
- the *New Tax System Price Exploitation Code (New South Wales) Act 1999* (NSW);
- the *Fair Trading Act 2010* (WA).

The “new” approach:

This approach seems to have been adopted by the PCC for a number of recent exercises, at least where the Commonwealth is not involved. For example:

- the Health Practitioner Regulation National Law;
- the Occupational Licensing National Law;
- the Education and Care Services National Law;
- various other National Laws being drafted.

3.1—The Corporations Law approach

Under the Corporations Law approach each participating jurisdiction applies the common text in its jurisdiction and sets out provisions that help create the effect of a national law. As part of that, the Application Acts provide for some or all of the following:

- referring to the applied law of the particular jurisdiction and of each other participating jurisdiction;
- common interpretation rules;
- common administrative and criminal laws;
- binding of the Crown in right of the jurisdiction by the applied law of the jurisdiction and of each other participating jurisdiction;
- the conferral of functions on a central administrative entity (if there is one);
- no double jeopardy;
- etc.

Subsidiary legislation is made by the host jurisdiction under its Application Act and then expressly applied by each other participating jurisdiction.

As far as I can tell, this approach is not an attempt to create a single law, but to create the effect of a single law.

The Application Act of a participating jurisdiction is the central piece of legislation that does all of the “work” in setting up the jurisdiction’s part of the applied laws scheme. It applies the common text and subsidiary legislation as a law of the jurisdiction, provides for the applicable secondary laws etc. etc. The Application Act is the mechanism by which the elements of the applied laws scheme are put in place for the jurisdiction.

Note: This approach is quite useful for WA given its preference for not applying the common text as amended from time to time and for getting its part of the applied laws scheme up and running some time after the other jurisdictions. An example:

The host jurisdiction has made regulations that have been applied and have effect in all other participating jurisdictions apart from WA. WA can, sometime after that, apply the regulations as a law of WA. There is no necessity for WA to empower the making of the regulations at the time of their making (or when they are first applied).

3.2—The “new” approach

The new approach differs from the Corporations Law approach in 2 key ways. There appears to be an attempt to create a single law applying “across” all the participating jurisdictions, or at least the language used suggests that. The common text is in non-jurisdiction specific terms (e.g. “this Law”, “this jurisdiction”, “the court”, “the appropriate regulatory authority” etc.). If they are defined, these terms are defined in the Application Acts of the participating jurisdictions.³¹

The second difference is that much of the work of setting up the scheme is done in or via the applied law rather than by the Application Acts of the participating jurisdictions. For example, bodies are established by the applied law and the regulation making power is in the applied law.

³¹ See 2.5 of the PCC “Protocol on Drafting National Uniform Legislation” Third Edition: July 2008.

3.2.1—How the new approach might work

This is not an in depth analysis of how the new approach might work, more a general description, of some observable phenomena, to allow me to raise some issues. In broad terms, it seems that the new approach is intended to work as follows:

- a jurisdiction (the host jurisdiction) sets out the common text, which refers to itself as “this Law”;
- all participating jurisdictions apply “the Law”³² in and for their respective jurisdictions;
- things made and done under the applied law automatically apply in and for the participating jurisdictions.

The intended effect seems to be a single law applying in and for all participating jurisdictions, effectively a single law speaking as if made by a single law maker (the **national law**).

The 2nd and 3rd dot points need some elaboration. It seems that the view is that once one jurisdiction (presumably the host jurisdiction) has applied the Law (as a law) things can be made and done under it³³ that will be effective in and for the other participating jurisdictions when they subsequently apply the Law.

- One view is that what a participating jurisdiction (other than the host jurisdiction) applies is not so much a text as a law. That is, the law of the host jurisdiction is applied by, and becomes a law of, the applying jurisdiction. Further, when the Law is applied all its accoutrements (subsidiary legislation made under it and perhaps administrative decisions made under it) apply in the applying jurisdiction. It is as if there is a single law, the influence of which is extended as each participating jurisdiction applies the Law.
- Whether or not what is applied is a text or a law, I think that we end up imputing certain intentions to the Parliament of the applying jurisdiction on the basis that, by applying the Law, the Parliament of the applying jurisdiction has evidenced an intention to be part of the scheme. Part of that intention seems to be that powers in the Law can be exercised for or in respect of the applying jurisdiction, including an intention that exercises of power prior to a jurisdiction joining the scheme are to be effective in the applying jurisdiction once it has joined the scheme.

Compare this to the Corporations Law approach in which the national law is built up, piece by piece, as each jurisdiction puts in place its parts of the scheme.

The creation of a single law?

My view that there is intended to be a single law, rather than the effect of a single law, has some support in the following example provisions (in the applied law).

Example 1:³⁴

participating jurisdiction means a jurisdiction in which —

- (a) this Law applies as a law of the jurisdiction; or
- (b) a law that substantially corresponds to the provisions of this Law has been enacted;

³² Use of “the Law” in Parts 3 and 4: In this context I will cease using “the common text” to reflect that the thing that is being applied might not, under the new approach, be merely a text. I am not sure what else to call it. I will use “this Law” and “the Law” interchangeably.

³³ For example, regulations, rules, registrations.

³⁴ The Occupational Licensing National Law cl.4.

As already discussed (at 2.2.2) the use of “this Law” in this provision seems to be intended to refer to the national law (at least not to the Law of the particular jurisdiction).

Example 2:³⁵

6. Single national entity

- (1) It is the intention of the Parliament of this jurisdiction that this Law as applied by an Act of this jurisdiction, together with this Law as applied by Acts of the other participating jurisdictions, has the effect that an entity established by this Law is one single national entity, with functions conferred by this Law as so applied.
- (2) An entity established by this Law has power to do acts in or in relation to this jurisdiction in the exercise of a function expressed to be conferred on it by this Law as applied by Acts of each participating jurisdiction.

What seems to be assumed by the use of “this Law” in section 6(1) & (2) is that there is a law existing in the legal ether that is extended into each participating jurisdiction when the jurisdiction applies the Law as a law of that jurisdiction.

3.2.2—A rather flexible use of “this Law”

What is more useful, perhaps, is to observe that “this Law” is used rather flexibly, both in terms of the meaning given to the term and in its scope over time.³⁶

“this Law” is not defined. However, it seems to be used in at least 2 senses.³⁷ Using cl.6 of the Occupational Licensing National Law as an example:

6. Single national entity

- (1) It is the intention of the Parliament of this jurisdiction that this Law as applied by an Act of this jurisdiction, together with this Law as applied by Acts of the other participating jurisdictions, has the effect that an entity established by this Law is one single national entity, with functions conferred by this Law as so applied.

The 1st 2 occurrences of “this Law” refer to what a jurisdiction has applied and the 2nd 2 occurrences of “this Law” refer to the result of that application, either:

- to the Law of the particular jurisdiction; or
- to the national law (i.e. the combined result of each participating jurisdiction’s Application Act).

Note: on the orthodox view of applying laws, what is applied is a text and so the 1st 2 occurrences of “this Law” might refer to the Occupational Licensing National Law text (set out in the Schedule to the *Occupational Licensing National Law Act 2010* (Vic)).

³⁵ The Occupational Licensing National Law cl.6.

³⁶ See discussion at 4.4 (near to the end).

³⁷ It may also be the case that “this Law” is used in a 3rd sense, that is, to refer to, for example, the Occupational Licensing National Law (WA), see cl.7 of the *Occupational Licensing National Law (WA) Bill 2010* (WA). Is it possible for the Parliament of a jurisdiction to say things about the territorial application of a law, other than one of its own? In this context, I am not sure what else “this Law” could mean.

3.2.3—Bodies created by “this Law”

National applied laws schemes drafted according to the new approach often include in the applied law (as compared to the Application Act) provisions that create a body to perform functions under the scheme. A good example to refer to is that of a national registration board established by the Health Practitioner Regulation National Law. A registration board for a particular health profession is the registration body for that profession throughout Australia³⁸. What is the effect of this approach?

The single body model:

One possibility is that the participating jurisdictions have indeed created a single body. This is the intended effect. The Health Practitioner Regulation National Law s.7:

7. Single national entity

- (1) It is the intention of the Parliament of this jurisdiction that this Law as applied by an Act of this jurisdiction, together with this Law as applied by Acts of the other participating jurisdictions, has the effect that an entity established by this Law is one single national entity, with functions conferred by this Law as so applied.
- (2) An entity established by this Law has power to do acts in or in relation to this jurisdiction in the exercise of a function expressed to be conferred on it by this Law as applied by Acts of each participating jurisdiction.
- (3) An entity established by this Law may exercise its functions in relation to —
 - (a) one participating jurisdiction; or
 - (b) 2 or more or all participating jurisdictions collectively.
- (4) In this section, a reference to this Law as applied by an Act of a jurisdiction includes a reference to a law that substantially corresponds to this Law enacted in a jurisdiction.

The multiple bodies model:

An alternative approach is that an identical body is created by each participating jurisdiction’s applied law. Each body is governed by the same person or persons. The effect is that of a single body, as if all the bodies were stacked, one upon the other, creating the appearance of a single body. When the body registers a health professional, 8 identical decisions are made (one for each participating jurisdiction) and the effect of Australia wide registration is achieved.

R v Duncan - support for the single body model:

In *R v Duncan; Ex parte Australian Iron and Steel Pty Ltd* (1983) 158 CLR 535, the High Court considered whether the Coal Industry Tribunal was validly constituted. It was constituted by Commonwealth and New South Wales legislation. At 552, Gibbs CJ said:

It does not seem to me to matter whether the effect of the statutes of the Commonwealth and the State was to create one tribunal which derived powers from two sources, or two tribunals, deriving power from different sources, but constituted by one person.

³⁸ See 2.3.3 for example provisions.

The view of the High Court generally was that the joint operation of the Commonwealth and State Acts created a single tribunal rather than separate Commonwealth and State tribunals.³⁹

The view taken in *Duncan* was confirmed⁴⁰ in *Re Cram; Ex parte NSW Colliery Proprietors' Association Limited* (1987) 163 CLR 117. At 131, Mason CJ, Wilson, Brennan, Deane, Dawson, Toohey and Gaudron JJ took the view that the conclusion drawn in *Duncan* was “inescapable”, for two reasons:

- first, both the Commonwealth and State Acts referred to “a ... Tribunal” or “the Tribunal” (which I take to mean that the Commonwealth and State Acts indicated an intention to create a single body); and
- second, “the powers derived from the Commonwealth and State Acts are not required to be exercised in isolation from each other, but may be exercised concurrently or in combination in the one matter”.

3.2.4—Subsidiary legislation made under “the Law”

As already mentioned, a scheme set up according to the new approach will have the power to make subsidiary legislation in the applied law rather than in the Application Act. This has significant implications for WA which I will cover in Part 4.

The new approach seems to assume that once the host jurisdiction has applied the Law, subsidiary legislation may be made under the Law of the host jurisdiction and that the subsidiary legislation can be couched in terms of a national law that will become operative when the other jurisdictions apply the Law.⁴¹

Disallowance of the national regulations:

There is a tension between achieving uniformity across all participating jurisdictions (that is, all participating jurisdictions have the national regulations or no participating jurisdiction does) and the legitimate assertion of the capacity of the Parliament of each participating jurisdiction to disallow regulations made in or for its jurisdiction.

Under the standard provisions of the Occupational Licensing National Law⁴², the Ministerial Council makes national regulations, which are to be published in NSW. The regulations are to be tabled in the Parliament of each participating jurisdiction. A participating jurisdiction may disallow a regulation according to its laws concerning disallowance. However, the disallowance is not effective unless a majority of participating jurisdictions have disallowed the regulation, in which case the regulation ceases to have effect for all jurisdictions. Note the distinction between disallowing a regulation and it ceasing to have effect.

³⁹ See Gibbs CJ (at 553) (with whose reasons Murphy J (at 566) stated his general agreement and Wilson and Dawson JJ (at 567) stated their substantial agreement), Mason J (at 561), Brennan J (at 577) and Deane J (at 586–7).

⁴⁰ Further confirmed in *Joint Coal Board v Cameron* (1989) 24 FCR 204, at 212-213, by Beaumont and Pincus JJ, and in *Re Construction, Forestry, Mining and Energy Union; Ex parte the Colliery Officials' Association of NSW* (1993) 179 CLR 71 at 75 by Deane, Toohey and McHugh JJ.

⁴¹ Note: when one jurisdiction makes subsidiary legislation that is to be applied in a number of jurisdictions, the scope of the subsidiary legislation may well be beyond what the host jurisdiction needs or is capable of enacting. One view is that there is no power to do this at all and that the subsidiary legislation is a nullity to the extent to which it is beyond the scope of what the host jurisdiction can enact. Another view, and the preferable one I think, is that the aspects of the subsidiary legislation not relevant to the host jurisdiction are merely ineffective but, when applied by the relevant jurisdictions, become effective law.

⁴² ss.163-165 *Occupational Licensing National Law Act 2010* (Vic).

164. Parliamentary scrutiny of national regulations

- (1) The member of the Ministerial Council representing a participating jurisdiction is to make arrangements for the tabling of a regulation made under this Law in each House of the Parliament of the participating jurisdiction.
- (2) In addition, any other requirement of a law of a participating jurisdiction relevant to the disallowance of a regulation in that jurisdiction^[43] is to be complied with in that jurisdiction in relation to a regulation made under this Law as if the regulation had been made under an Act of that jurisdiction.
- (3) A regulation made under this Law may be disallowed in a participating jurisdiction by a House of the Parliament of that jurisdiction in the same way, and within the same period, that a regulation made under an Act of that jurisdiction may be disallowed.
- (4) A regulation disallowed under subsection (3) does not cease to have effect in the participating jurisdiction, or any other participating jurisdiction, unless the regulation is disallowed in a majority of the participating jurisdictions.
- (5) If a regulation is disallowed in a majority of the participating jurisdictions, it ceases to have effect in all participating jurisdictions on the day of its disallowance in the last of the jurisdictions forming the majority.

An equivalent provision to this was included in the *Health Practitioner Regulation National Law (WA) Bill 2010* (WA) but was omitted during the Bill's passage through the WA Parliament, on the recommendation of the Uniform Legislation and Statutes Review Committee of the Legislative Council.

The *Occupational Licensing National Law (South Australia) 2010* (SA) sets out the text of the Occupational Licensing National Law in the Schedule to the Act⁴⁴. During the passage of the Bill through the SA Parliament cl.164 (in the same terms as cl.164 above) was amended to remove subcl.(4) & (5).

The approach in the *Health Practitioner Regulation National Law* and the *Occupational Licensing National Law* is being reconsidered. It may be that the disallowance of regulations will be dealt with in each participating jurisdiction's Application Act.

Part 4—Issues and approaches in WA

This Part covers some issues arising in the course of drafting Application Acts for WA.

4.1—Some “features” of WA’s approach

The WA Parliament is reluctant to enact a law that applies the law of another jurisdiction as amended from time to time. This seems to arise from 2 or 3 possible sources:

- the WA Parliament's position that to apply another jurisdiction's law as amended from time to time is to cede too much of its, or the State's, sovereignty;

⁴³ In relation to WA, see cl.8 of the *Occupational Licensing National Law (WA) Bill 2010* (WA) which, combined with cl.164(2), has the effect that the provisions in the *Interpretation Act 1984* (WA) relevant to the tabling and disallowance of regulations have effect, despite the *Interpretation Act 1984* (WA) otherwise not applying to the *Occupational Licensing National Law (WA)*. Also, note that the *Interpretation Act 1984* (WA) s.42(2) provides for disallowed regulations to cease to have effect, “Notwithstanding any provision in any Act to the contrary, ...”!

⁴⁴ Note: the Bill was introduced into the Legislative Council as a very slim 3 page Bill that was to apply the Occupational Licensing National Law of Victoria as in force from time to time.

- the view that isolation and local circumstances in WA are not always sufficiently accommodated in the national policy.

Consequently, WA's participation in a national applied laws scheme usually has a number of "features" that, at least up until now, most other participating jurisdictions have not had. They are:

- that the WA Parliament has a tendency to mirror rather than apply the Law;
- that WA has WA specific modifications to the Law (to date, set out in the Application Act);
- that the Parliament may amend the Law during the course of the Bill's passage through the Parliament.

Another "feature" is that WA is likely to join the scheme late because of the time it takes to decide how to deal with its local issues and the time it takes for legislation to pass through the Parliament.

Some recent examples:

The *National Gas Access (WA) Act 2009* (WA) applies the *National Gas Law* (set out in the Schedule to the *National Gas (South Australia) Act 2008* (SA)) as in force from time to time, but with a mechanism to prevent amendments to the SA version of the National Gas Law applying in WA until the WA Minister declares the SA amendments to be relevant for WA.⁴⁵ If an SA amendment is not declared to be relevant by the WA Minister then the divergence from the SA version of the National Gas Law is treated as a modification in WA of the SA version of the National Gas Law.⁴⁶

Note: there is more latitude in the *National Gas Law* scheme for local variations, at least for WA. See the definitions of "national gas legislation" and "participating jurisdiction".

The *Fair Trading Act 2010* (WA) applies the Australian Consumer Law (set out in the *Competition and Consumer Act 2010* (Cth)) as in force on the commencement of the *Fair Trading Act 2010* (WA), 24 December 2010. There is no mechanism to amend the Law to keep it up-to-date with the Law set out in the Commonwealth Act other than an amending Act.

Both the *Health Practitioner Regulation National Law (WA) Act 2010* (WA) and the *Occupational Licensing National Law (WA) Bill 2010* (WA) set out the Law in the Schedule to the Application Act. The *Occupational Licensing National Law (WA) Bill 2010* (WA) includes a mechanism by which the fixed version of the Law may be amended. The *Health Practitioner Regulation National Law (WA) Act 2010* (WA) includes no such mechanism. See 1.5 for more on this.

An aside on some nomenclature - mirroring or applying:

In the case of the *Health Practitioner Regulation National Law (WA) Act 2010* (WA) and the *Occupational Licensing National Law (WA) Bill 2010* (WA), the Law set out in the Schedule is expressed to apply as a law of WA. Even so, I think that WA is not applying the Law as understood in the context of a national applied laws scheme, but mirroring it.

⁴⁵ See ss.7, 7A & 7B. The WA version of the National Gas Law is set out in a note to the WA Application Act. Our Office is able to amend that note from time to time to present on our database an up-to-date version of the National Gas Law in WA.

⁴⁶ See s.7(2) of the *National Gas Access (WA) Act 2009* (WA).

I think that a jurisdiction is only truly applying the Law, in the context of a national applied laws scheme, when it applies it by reference as amended from time to time. When a jurisdiction applies a fixed version of the Law (whether by reference or by setting it out in a Schedule) there is no difference in effect to just enacting the Law as the Parliament would for any “ordinary” domestic law, even though the Law is expressed to be applied. This is a matter of form, not of substance. The State has not relinquished any control over the content of the Law.

4.2—Applying or enacting “the Law” in WA and the definition of “participating jurisdiction”

4.2.1—Applying or enacting the Law

There are a number of possible methods for “applying” the Law in WA:

1. To apply the Law as amended from time to time, with a suitable brake so that amendments to the Law of the host jurisdiction do not automatically apply in WA: for example see the *National Gas Access (WA) Act 2009* (WA) ss.7, 7A & 7B.
2. To refer to a fixed version of the Law of the host jurisdiction and provide a mechanism to amend the resultant applied law: for example see the *Fair Trading Bill 2010* (WA) cl.20.
3. To set out a version of the Law in a Schedule to the Application Act and provide a mechanism to amend the resultant applied law: for example see the *Occupational Licensing National Law (WA) Bill 2010* (WA) cl.5.

The following discussion centres on trying to ensure that, for a particular national applied laws scheme, WA can meet the applicable definition of “participating jurisdiction”. The standard definition of “participating jurisdiction” in the most recent schemes⁴⁷ is:

participating jurisdiction means a jurisdiction in which —

- (a) this Law applies as a law of the jurisdiction; or
- (b) a law that substantially corresponds to the provisions of this Law has been enacted;

I assume that “this Law” is not an internal reference, but refers to the national law or, at least, the text set out by the host jurisdiction. This is despite s.1 of the National Law: “This Law may be cited as ...”⁴⁸

There are 3 aspects to this definition that need to be kept in mind.

- That WA needs to be able to call itself a participating jurisdiction.
- That WA needs to be able to see other jurisdictions as participating jurisdictions.
- That other participating jurisdictions need to be able to see WA as a participating jurisdiction.

⁴⁷ The Health Practitioner Regulation National Law, the Occupational Licensing National Law and the Education and Care Services National Law.

⁴⁸ This point is argued in more detail at 2.2.2.

Applying the Law:

I think that method 1 gives WA the best chance of meeting paragraph (a) of the definition. However, this depends upon what latitude there might be in the idea of “applying this Law”. On a strict view, there needs to be an exact (or extremely close) match between what WA applies and what the host jurisdiction sets out from time to time for WA to have applied the Law. This view is consistent with the presence of the reference to “a law that substantially corresponds” in paragraph (b). Note: the *National Gas Law* does not have such a restrictive definition of “participating jurisdiction”.

Turning to method 2, if WA were to apply the Law, by reference to the Law set out by the host jurisdiction, at a fixed point in time (and not set out the Law in its Application Act), then I think that WA would not meet paragraph (a) of the definition, certainly not for any length of time.

- Even if WA is initially a participating jurisdiction per paragraph (a), it will cease to be one when the host jurisdiction amends the Law. That would be the case even if WA amended its version of the Law to keep it up-to-date as WA would no longer have applied “this Law” as understood by the other participating jurisdictions (it will only have applied the fixed version).
- Further, the Law is usually modified in WA’s Application Act, and even if it is not, there is a chance that the Parliament will make changes to the Law. If either is the case then WA will not have applied “this Law”.
- For both these points I have, at this stage, taken a strict view of what it means to “apply this Law”.

Enacting the Law:

I think that method 3 gives WA the best chance of arguing that it meets paragraph (b) of the definition. Setting out the Law in a Schedule is clearly enacting a law.⁴⁹ Whether WA meets paragraph (b) of the definition then just depends on the degree of modification to the WA Law and how broadly “substantially corresponds” is to be interpreted.

It can also be argued that method 2, applying (by reference) a fixed version of the Law, is enacting the Law.

If the Law is enacted then WA is relying on paragraph (b) of the definition to be a participating jurisdiction. The logic of paragraph (b) is that what WA enacts is a law that substantially corresponds to the provisions of the Law, but is not the Law. Consequentially, references to “this Law” in the National Law (of WA and of the other participating jurisdictions) might not refer to what WA has enacted.

The countervailing argument is that if WA is a participating jurisdiction then that must mean something and, therefore, “this Law” is to be read flexibly so that it includes what WA has enacted.

⁴⁹ Despite the Law having been enacted, WA Application Acts still include a provision that applies the Law as a law of WA. While this may be redundant, I think that WA should continue to include an application provision in its Application Acts on the basis that WA should differ from the other jurisdictions as little as possible when it comes to drafting the “machinery provisions” in the Application Acts. Also, including the application provision allows WA to have a bet both ways. That is, to argue, as is necessary, that WA has enacted corresponding provisions for the purposes of paragraph (b) of the definition or that WA has applied the Law for the purposes of paragraph (a) of the definition (see the alternative argument as to “applying the Law”).

It is possible that WA could include in its Application Bill or the National Law set out in the Schedule to the Bill an interpretation provision that takes account of this. However, WA cannot legislate to fix this issue in the other participating jurisdictions so I conclude that it is better to leave things as they are and rely on the countervailing argument.

An alternative argument as to “applying the Law”:

It is possible to argue that an Application Act that has enacted the Law is, nonetheless applying the Law. That is, assuming that a law that is the same (or substantially the same) as the Law is in effect in WA, WA has applied (i.e. given effect to) the Law. This assumes a mechanism to keep the WA Law up-to-date, and relies on a flexible reading of “this Law” and that the definition, paragraph (a), does not require that a jurisdiction apply the Law but that the Law applies (as a law of the jurisdiction), regardless, seemingly, of how it came to apply.

4.2.2—Time for a new approach to the definition of “participating jurisdiction”?

The current definition of “participating jurisdiction” is dependent upon a jurisdiction meeting a somewhat indeterminate statutory test. An alternative definition could mean that the issues outlined above would not arise.

Approach 1:

The National Gas Law s.21:⁵⁰

21. Participating jurisdictions

The State of South Australia, the Commonwealth, each of the States of New South Wales, Victoria, Queensland, Western Australia and Tasmania, and the Australian Capital Territory and the Northern Territory are participating jurisdictions for the purposes of this Law.

Approach 2:

A definition under which each jurisdiction determines whether or not it is a participating jurisdiction by some sort of declaration in or under the Application Act.

Either approach produces certainty and the definition does not dictate how a jurisdiction goes about applying the Law nor does it create interpretation difficulties. However, neither approach requires a participating jurisdiction to maintain any degree of uniformity with the other participating jurisdictions.

Approach 3:

Another possibility is for the Ministerial Council⁵¹ to make regulations declaring which jurisdictions are participating jurisdictions. This would allow the participating jurisdictions to decide whether a particular participating jurisdiction had gone too far in modifying its Law.

⁵⁰ See the *National Gas (South Australia) Act 2008* (SA) and, for WA, the Note to the *National Gas Access (WA) Act 2009* (WA).

⁵¹ Or possibly the Governor of the host jurisdiction, on the advice of a majority of the Ministers of the participating jurisdictions.

4.3—Subsidiary legislation made under “the Law”

4.3.1—The power to make subsidiary legislation

For this Part I will assume that the new approach works as described at 3.2. As part of that, I assume that when a participating jurisdiction (other than the host jurisdiction) applies the Law at a time when the host jurisdiction has made subsidiary legislation under the Law, the Law comes with that subsidiary legislation. That being the case, why would the Law that is applied need powers to make subsidiary legislation?

There seems to be 2 possible views:

1. The relevant law making entity (e.g. the Ministerial Council, the Governor of the host jurisdiction) makes the subsidiary legislation under the power in the Law of the host jurisdiction. By applying the Law, the Parliament of an applying jurisdiction evidences an intention to participate in the scheme and have the Law and all its accoutrements apply in the jurisdiction.

On this view, it would seem that the applied law does not need powers to make subsidiary legislation (except in the host jurisdiction).

2. The relevant law making entity in making subsidiary legislation, acts under the power to make that subsidiary legislation of each participating jurisdiction, that is, under multiple grants of power. On this view, it is necessary for there to be a power to make subsidiary legislation in the applied law of each participating jurisdiction.

The choice between these 2 views becomes important when a jurisdiction does not apply the Law as amended from time to time and/or comes late to a scheme. WA's , approach in the 2 examples below is consistent with the 2nd of the 2 views.

The example of the Health Practitioner Regulation National Law:

Regulations were made for the purposes of the Health Practitioner Regulation National Law by the Ministerial Council under section 245 of that Law (in its existence as a national law). However, the regulations were made at a time when WA's Application Act had not commenced. WA took the view that the regulations were unlikely to apply in WA (even after WA enacted the Law) because, at the time of their making, the Ministerial Council had no power to make regulations for WA. To get around this, the Ministerial Council made a set of regulations specifically for WA, under WA's Health Practitioner Regulation National Law section 245 (in the Schedule to the WA Application Act). These regulations apply the national regulations as in force from time to time.

The example of the National Gas Law:

The National Gas Rules are made under the *National Gas Law*. The initial Rules were made by the SA Minister on 1 July 2008, before the *National Gas Access (WA) Act 2009* (WA) was passed. Section 294 of the WA Act expressly applies the National Gas Rules as in force when the WA Act came into operation. This is an example of the WA Application Act dealing with a “transitional” matter arising because WA joined the scheme late.

Note: these issues do not arise when using the Corporations Law approach since the relevant subsidiary legislation is made by the host jurisdiction in the expectation that each other participating jurisdiction will expressly apply it (either as in effect at a particular time or as amended from time to time).

The basis for WA's approach:

WA's approach in both these situations is based on the view that:

- the law maker at the time of making the subsidiary legislation did not have power to make subsidiary legislation effective for WA because WA had not yet granted that power;
- when WA's Application Act applied or enacted the Law (which includes the power to make the subsidiary legislation), the existing subsidiary legislation did not automatically apply in WA;
- what the law maker made was not capable of becoming a law of WA merely by WA joining the scheme (that is, applying or enacting the Law).

The last 2 points turn on what the intention of the Parliament of WA is, since only it can apply laws in its jurisdiction⁵², i.e. other jurisdictions cannot "push" laws into WA. The existence of a regulation making power in the WA version of the Law suggests that the Parliament did not intend that the national regulations automatically apply in WA.

Further, the way WA applies or enacts the Law seems to give no room to argue that anything else, other than the text of the Law, is applied or enacted. The *Health Practitioner Regulation National Law (WA) Act 2010 (WA)* and the *Occupational Licensing National Law (WA) Bill 2010 (WA)* both set out the Law (as a text) in a Schedule and apply that as a law of WA. The *National Gas Access (WA) Act 2009 (WA)* expressly applies a text. Because what is "applied" is just a text, I suggest that this cannot include regulations made under the Law of another participating jurisdiction.

4.3.2—Ensuring that WA's regulations are part of the national regulations

I assume that regulations in WA for a national applied laws scheme will need to be, or be part of, national regulations, for the purposes of WA and for the purposes of each other participating jurisdictions. This will be necessary where, for example, a status is conferred under the regulations and that status needs to be effective in more than one participating jurisdiction. For example, if the regulations have a concept of being registered under the national regulations then we need to ensure that registration under WA's regulations will be recognised as registration under the national regulations by the other participating jurisdictions, and visa versa.

The approach taken for the Health Practitioner Regulation National Law seems to me to be a preferable approach. In that case, the Ministerial Council made a set of regulations specifically for WA, under WA's Health Practitioner Regulation National Law section 245 (in the Schedule to the WA Application Act).⁵³ This way the regulations in WA are made under the Law (albeit WA's version of the Law⁵⁴) by the same entity that made the regulations for the rest of the participating jurisdictions.

This approach might also be appropriate in relation to the Occupational Licensing National Law:

national regulations means the regulations made under section 160;

⁵² Ignoring the position of the Commonwealth for the purposes of this point.

⁵³ These regulations apply the national regulations as in force from time to time.

⁵⁴ Relying on references to "this law" being read sufficiently flexibly to include WA's Law.

Would it be possible for the Governor of WA to make regulations, for WA, for a national applied laws scheme and for those regulations to be “national regulations”? For the purposes of this question I assume a definition of national regulations substantially in this form:

national regulations means the regulations made under this Law;

Provided that WA is a participating jurisdiction, “this Law” is read flexibly and the regulations are substantially the same as the national regulations for the other participating jurisdictions then I think that WA’s regulations would be national regulations, even though a different entity made the national regulations for the other participating jurisdictions.

4.4—Bodies created by “this Law”

As mentioned at 3.2.3, a national applied laws scheme drafted according to the new approach often includes, in the applied law, provisions that create an administrative body. I assume here that a single body is created by the combined effect of each participating jurisdiction’s applied law. Turning now to WA’s position.

Where WA joins a scheme at the same time as the other participating jurisdictions, but mirrors the Law rather than applying it from time to time, it may be relatively easy to argue that, in relation to the creation of a body by the Law, WA’s position is not relevantly different to that of any of the other participating jurisdictions. WA joined with all the other participating jurisdictions in creating the body.

Where WA is late in joining a scheme under which a body is created, WA will not have participated in the creation of the body. This was the case for the Health Practitioner Regulation National Law where WA joined the scheme late. Nonetheless, the WA version of the Health Practitioner Regulation National Law includes provisions to the effect that those bodies are established.

Given the High Court’s attitude in *R v Duncan* etc. (see 3.2.3), it might not be profitable to consider whether WA has created separate bodies. It may be sufficient that the WA Application Act confers functions on the bodies and that WA, with the other participating jurisdictions, has expressed the intention that the single body model applies. The WA provisions establishing the bodies may merely be redundant.

Turning to more practical issues. If WA commences its Application Act some time after at least some of the other participating jurisdictions there may be “transitional” matters that the WA Application Act needs to deal with. Referring again to the Health Practitioner Regulation National Law, national professional registration bodies were created under the national law. If one of the registration bodies registers a health practitioner before WA’s Application Act commences, will that registration be effective in WA when WA’s Application Act commences? Because of the definition of “registered health practitioner” it may well be that that registration is indeed effective in WA:

registered health practitioner means an individual who —

- (a) is registered under this Law to practise a health profession ... ; or
- (b) ...

This requires that “this Law” be read flexibly over time to cover the Law as it was before WA’s Application Act came into operation and as it became after that.

4.5—A little more on “this Law” and the definition of “participating jurisdiction”

Continuing with the Health Practitioner Regulation National Law as an example, it is likely to be necessary to decide whether a practitioner registered under the Law of WA is “registered under this Law” for the purposes of another participating jurisdiction:

registered health practitioner means an individual who —

- (a) is registered under this Law to practise a health profession ... ; or

Ignoring the definition of “participating jurisdiction” for the time being, I think that “this Law”, in the context of the scheme, would mean:

- the Law of the host jurisdiction; and
- a law of another jurisdiction that substantially corresponds to the Law of the host jurisdiction.

In working out whether WA’s law substantially corresponds to the Law of the host jurisdiction, I assume that the following would be primary considerations:

- whether WA is a party to the intergovernmental agreement; and
- the degree to which WA’s law corresponds to the Law of the host jurisdiction.⁵⁵

I assume that how WA’s law came to be (whether applied or enacted) would not be a primary consideration.

It seems to follow that, so long as WA is a member of the scheme and has a law that substantially corresponds to the Law of the host jurisdiction, a practitioner registered under the WA Law would be recognised as a practitioner “registered under this Law” by another participating jurisdiction. A definition of “participating jurisdiction” that clearly includes WA could only reinforce the conclusion.

So, in addition to my earlier suggestions as to a definition of “participating jurisdiction”, I suggest the following definition:

participating jurisdiction means a [jurisdiction/State or Territory] —

- (a) that is a party to the [XYZ Agreement]; and
- (b) in which a law that substantially corresponds to the provisions of the [XYZ National Law] of [the host jurisdiction] has effect;

In paragraph (b), by referring to the “XYZ National Law” I hope to avoid implying that paragraph (b) is referring only to the text set out in the Schedule to the host jurisdiction’s Application Act. That way, we do not preclude the result that applying the host jurisdiction’s law means that regulations and other things under that Law also apply in the applying jurisdiction.

The requirement that a law should substantially correspond to “the Law” preserves workability between the Laws of the participating jurisdictions. Some variations to WA’s Law will affect how its Law and the Laws of the other participating jurisdictions work together. If the Law of WA and the Laws of the other participating jurisdictions cannot work together in relation to a significant matter, or to a significant extent, then I think that WA will no longer be a member of the scheme on a practical level. This consideration is an inherent restriction on a jurisdiction’s capacity to vary its Law. This may also determine the limits of substantial correspondence.

⁵⁵ I do not envisage “the Law of the host jurisdiction” being limited to the text set out in the Schedule to the host jurisdiction’s Application Act but to include, at least, subsidiary legislation made under it.

The proposed definition is similar to that in the *Fair Trading Act 2010* (WA) s.17:

participating jurisdiction means a jurisdiction that is a party to the Intergovernmental Agreement and applies the Australian Consumer Law as a law of the jurisdiction, either with or without modifications;

4.6—Some closing thoughts

The High Court's approach - cooperative federalism:

The High Court has, for some time, acknowledged the difficulties inherent in a federal system and has been somewhat sympathetic to the Commonwealth and the States acting cooperatively “so that each, acting in its own field, supplies the deficiencies of the other, and so that together they may achieve ... a uniform and complete legislative scheme”. See *R v Duncan; Ex parte Australian Iron and Steel Pty Ltd* (1983) 158 CLR 535 and a number of the cases cited in it.⁵⁶

The High Court in *The Queen v Hughes* (2000) 202 CLR 535 (Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ) at p.557-558:

Duncan (1983) 158 CLR 535 is one of a number of decisions⁵⁷ which recognise that co-operation on the part of the Commonwealth and States may well achieve objects that could be achieved by neither acting alone.

However, there is a limit to this. The High Court also said in *Hughes* that the mere fact of a law being a part of a cooperative scheme will not cure any constitutional invalidity: “the combined operation of legislative power that cooperative federalism entails, ‘is limited according to the constitutional validity which each representative parliament can give’.”⁵⁸

As discussed above, at 3.2.3, the High Court in *Duncan* and in *Cram* was of the view that the Commonwealth and NSW had combined to create a single body. However, I suspect that the High Court will not go so far as to consider that jurisdictions can combine to create a single law.

I also wonder whether the High Court's sympathy towards the difficulties inherent in a federal system will apply equally to schemes where only the States and Territories are involved. I assume that the States and Territories cannot combine to make a federal law.⁵⁹ This must operate as an outer limit to what States can achieve cooperatively. Whether this will mean that the High Court is not so sympathetic to schemes that do not involve the Commonwealth I do not know. All of the schemes that adopt the new approach involve only the States and Territories.

⁵⁶ *R v Duncan; Ex parte Australian Iron and Steel Pty Ltd* (1983) 158 CLR 535: Gibbs CJ at p.552, Mason J at p.560, Murphy at p.655, Brennan J at p.579-80 & Deane J at p.589.

⁵⁷ *Deputy Federal Commissioner of Taxation (NSW) v W R Moran Pty Ltd* (1939) 61 CLR 735 at 774, per Starke J; *Wilcox Mofflin Ltd v New South Wales* (1952) 85 CLR 488 at 508-511, per Dixon, McTiernan and Fullagar JJ; at 526-528, per Williams J; *R v Lydon; Ex parte Cessnock Collieries Ltd* (1960) 103 CLR 15 at 20; *Airlines of NSW Pty Ltd v New South Wales* (1964) 113 CLR 1 at 40, 42, per Taylor J; at 48, per Menzies J; at 51-52, per Windeyer J; *Clark King & Co Pty Ltd v Australian Wheat Board* (1978) 140 CLR 120 at 179, per Mason and Jacobs JJ. See, since *Duncan*, *Re Cram; Ex parte NSW Colliery Proprietors' Association Ltd* (1987) 163 CLR 117 at 130.

⁵⁸ From Alex De Costa, ‘The Corporations Law and Cooperative Federalism after *The Queen v Hughes*’ (2000) 22 *Sydney Law Review* 451, 465.

⁵⁹ That, I think, would be inconsistent with the Constitution of the Commonwealth. The Constitution established the Commonwealth Parliament to make federal laws and gave the States the capacity to refer matters to the Commonwealth Parliament so that the Commonwealth could make laws on those matters.

The attractions of the new approach:

There are attractions to the view that by applying “the Law” the applying jurisdiction gets the Law and all its accoutrements. There are often things other than regulations made or done under an applied law, some or all of which it would be useful to be effective in or in relation to the applying jurisdiction (to the extent to which they are relevant). I note that under the Corporations Law approach certain things done under the applied law are assumed to apply when the applied law is applied.⁶⁰

Even if this view of the new approach is correct in relation to other jurisdictions, I am not sure that it will work in relation to WA. As mentioned, at 4.3, the way WA applies the Law seems to give no room to argue that anything else is applied other than the common text. That is, WA expressly applies a text which, because it is just a text, would not come with anything else.

A conclusion:

Perhaps the preferable way to view WA’s participation in national applied laws schemes is to decide whether there is a law, with all its accoutrements, applying in WA that substantially corresponds to that of the host jurisdiction, regardless of the method by which that law came to be. A definition of “participating jurisdiction” that corresponds to that view might enable drafters in WA to navigate the restrictions of WA’s approach to national applied laws schemes and yet be satisfied that WA’s applied law was truly part of the national law.

⁶⁰ But see s.13 of the *Corporations ([name of jurisdiction]) Act 1990*.