ADMINISTRATIVE LAW AND RELATIONS BETWEEN GOVERNMENTS: AUSTRALIA AND EUROPE COMPARED

*Cheryl Saunders**

INTRODUCTION

The principal focus of this essay is review of administrative decisions taken in the course of co-operation between governments in a federation or in a constitutional system with some federal characteristics.

The nature of the problem is illustrated, albeit in a different context, by a decision of Sir Anthony Mason in *Tasmanian Wilderness Society* v *Fraser.*[1] The decision concerned an inter-governmental body, the Australian Loan Council. The Loan Council was established pursuant to the Financial Agreement, authorised by s 105A of the Australian Constitution.[2] Its members were the Prime Minister and the Premiers of each of the States, or their nominees who were often, in practice, their Treasurers. As it then stood, the Financial Agreement provided for approval of the combined borrowing program of all Australian governments by the Loan Council, under weighted majority voting rules that gave the Commonwealth two votes and a casting vote.[3] In practice, the Loan Council had long since assumed the function of approving the aggregate borrowing program for "larger" semi-government authorities as well, under the so-called "Gentlemen's Agreement".[4] In practice also, the Commonwealth had long since dictated the outcome of Loan Council decisions, through making Commonwealth assistance to State borrowing programs[5] dependent on State acceptance of the total borrowing levels proposed by the Commonwealth for both governments and semi-government authorities at the annual Loan Council meeting. From 1978 the Loan Council assumed the further function of approving proposals to borrow substantial sums for individual infrastructure projects with "special significance for development".[6]

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* Editor's note. This paper has been revised since it was delivered in December 1999 to accommodate developments since that date, in particular *R v Hughes* [2000] HCA 22.

1 (1982) 153 CLR 270.

2 The agreement is extracted in C Howard and C Saunders, *Cases and Materials on Constitutional Law* (1979) at 390-397.

3 Clauses 3(9) and (14)(b).

4 C Saunders, "Government Borrowing in Australia" (1989) 17 *MULR* 187 at 203-205.

5 This assistance took the form both of underwriting the borrowing program and of providing a proportion of it directly in capital grants: C Saunders, "Fiscal Federalism—A General and Unholy Scramble" in G Craven (ed), *Australian Federation* (1992) 101 at 118-119.

6 Commonwealth Budget Paper No 7 1980-1981.

The issue in *Fraser* arose when Tasmania applied to the 1982 meeting of the Loan Council for approval to borrow funds under the infrastructure program for construction of the Gordon below Franklin Dam. South-West Tasmania, including the area in which the proposed dam was to be located, had been entered on the register for the National Estate under the Heritage Commission Act 1975 (Cth). Among other things, the Act required Commonwealth Ministers to "do all such things as...can be...done...for ensuring that...any authority of the Commonwealth in relation to which [they have] ministerial responsibility does not take action that adversely affects" a place that is part of the national estate.[7] Ten days before the Council was due to meet, the Tasmanian Wilderness Society commenced proceedings for an interlocutory injunction to restrain the Prime Minister and Treasurer from voting in favour of this item in the Loan Council.[8] The proceedings were dismissed, on the basis that the Heritage Act did not extend to actions of Commonwealth Ministers in relation to the Loan Council. In the words of Mason J:

> [I]f there be a subject on which the members of the Australian Loan Council stand united, it would be in repelling the suggestion that [the Loan Council] is described accurately as being an "authority of the Commonwealth".[9]

The immediate result was that, as a matter of law, scrutiny of the environmental significance of the dam was confined to the Tasmania political process, at least for the time being.[10] The broad purpose for which the legislation presumably had been passed was circumvented, however, in the sense that *Fraser* left the Prime Minister and the Treasurer free to make decisions in the course of performing some substantial responsibilities of office without reference to the national estate. From one perspective, this does no more than illustrate the point that intergovernmental arrangements typically are not taken into account in drafting scrutiny legislation of this kind. But the example makes a different point as well, to which Mason J also referred.

It is difficult, and sometimes impossible, to subject governing arrangements involving multiple jurisdictions to the procedures of any one of them for the purposes of scrutiny or review of administrative action. The difficulty was illustrated in many respects in the *Fraser* case. The concept of "ministerial responsibility", as understood in a unitary context, could not apply in the same way to participation in an intergovernmental body.[11] No one or two members of such a body (however important in fact, or even in law) could be equated with the whole. There was no evidence about how the Commonwealth intended to vote, and the confidentiality of Loan Council minutes may have made such evidence difficult to secure after the event as well.[12] In practice the relief claimed would have been ineffective, because the Loan Council could make the decision without formal Commonwealth participation. The situation was further complicated by the fact that the Loan Council, possibly not by coincidence, chose this meeting to release electricity authorities from its control over their domestic

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7 Heritage Commission Act 1975 (Cth), s 30(1).

8 (1982) 153 CLR 270 at 271.

9 Ibid at 276.

10 The following year, the proposal for the dam led to major constitutional litigation between the Commonwealth and Tasmania and to one of the foundation cases in Australian constitutional law: *Commonwealth v Tasmania* (1983) 158 CLR 1.

11 (1982) 153 CLR 270 at 276-277 per Mason J.

12 *Sankey v Whitlam* (1978) 142 CLR 1.

borrowings.[13] Finally, there was the important question that Mason J "passed by"[14] about whether the Commonwealth could validly legislate to impose a regime of this kind on the Loan Council, even though, clearly, it could achieve its policy goals in other ways.

This then, in general terms, is the problem.

The paper uses two groups of federations, or federal-type systems, for the purposes of comparison with Australia. The first comprises the Germanic federations: the Federal Republic of Germany, Austria and Switzerland. While there are many substantive differences between them,[15] for present purposes the approach of these federations to the organisation of public power is sufficiently distinctive to justify their treatment as a group. Relevantly, the structure of the German federation is reflected in the model for European Union as well.[16]

The second federal-type arrangement examined for the purposes of comparison is the asymmetrical devolution of power now in place in the United Kingdom in relation to Scotland,[17] Wales[18] and Northern Ireland.[19] In the case of both Scotland and Wales, it is premature, and may never be accurate, to describe the arrangements as federal. The position in Northern Ireland potentially is different, to the extent that the British-Irish agreement can be treated as, in effect, an entrenching instrument that precludes unilateral alteration of the autonomy of the region inconsistently with the treaty.[20] The precise character of the relationships that have been created by devolution in the United Kingdom is not significant for present purposes, however. The inter-governmental issues to which devolution gives rise are sufficiently comparable to those in undisputed federal systems to make comparison worthwhile.

The principal hypothesis that the paper seeks to establish is that there are conceptual and structural differences between these groups of federal-type systems that affect, or may affect, review of administrative decisions under inter-governmental schemes. To the extent that these differences are fundamental, a comparative exercise is unlikely to identify precise solutions to current problems that can readily be transferred from one to another. Comparison can assist individual jurisdictions to a better understanding of their own systems, however, by providing a new perspective on them. In that way it can contribute indirectly to the identification of issues and the resolution of problems. The presence of fundamental differences between jurisdictions also enhances the interest of the intellectual challenge, from the standpoint of the methodology of comparative public law.

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13 Commonwealth Budget Paper No 7 1982-1983 at 35; C Saunders, above n 4 at 214.

14 (1982) 153 CLR 270 at 277.

15 C Hadley, M Morass and R Nick, "Federalism and Party Interaction in West Germany, Switzerland, and Austria" (1989) 19(4) *Publius* 81.

16 R C Van Caenegem, *An Historical Introduction to Western Constitutional Law* (1995) at 225.

17 Scotland Act 1998.

18 Government of Wales Act 1998.

19 Northern Ireland Act 1998; British-Irish Agreement 1998.

20 B O'Leary, "The British-Irish Agreement of 1998: Results and Prospects" presented to the Conference on Constitutional Design 2000, University of Notre Dame, December 1999. This analysis is not necessarily affected by the suspension of self-government in February 2000, (subsequently restored in June 2000) although it demonstrates its limitations.

In addition, there is a sub-text. In Australia, a constitutional principle of co-operative federalism has been drawn from the observation that co-operation is a "positive objective" of the Constitution.[21] The use to which the principle might be put, in cases dealing with the validity of inter-governmental co-operative schemes, has been explored in different contexts.[22] Until recently, it was unclear whether the effect of the principle was to encourage a more benevolent attitude towards inter-governmental schemes by courts, or whether it merely established that there is no "general constitutional barrier"[23] to co-operative schemes that otherwise are within power. In 1999, in *Re Wakim; Ex parte McNally*,[24] a majority of the High Court placed the principle towards the more limited end of this spectrum.[25] The decision brought an end to complementary cross-vesting of jurisdiction in Australia and has been criticised on doctrinal as well as practical grounds.[26]

This paper questions the premise on which the principle of co-operation is based and to that extent tends to support the majority view in *Re Wakim*. Comparison with other federal models suggests that co-operation can be described as an objective of the Australian Constitution only in a superficial sense. The structure of the Australian federation and the assumptions on which it is based are not readily conducive to certain forms of co-operation. In relation to these, even if the constitutional hurdle is surmounted, tension persists in the difficulty of providing mechanisms for scrutiny and review. If this analysis is correct in relation to Australia, it may have implications for co-operation between jurisdictions in the United Kingdom as well, given the substantially shared constitutional traditions of the two countries.[27]

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21 *R v Duncan; Ex parte Australian Iron and Steel Pty Ltd* (1983) 158 CLR 535 at 589 per Deane J.

22 *Duncan's* case itself dealt with a tribunal jointly established by the Commonwealth and New South Wales. Other contexts include the operation of s 51(xxxviii) (*Port MacDonnell Professional Fishermen's Association v South Australia* (1989) 168 CLR 340); and the cross-vesting of jurisdiction between Commonwealth, State and Territory courts (*Gould v Brown* (1998) 193 CLR 346. For an earlier example, dealing with complementary taxation legislation, see *Moran Pty Ltd v Deputy Federal Commissioner of Taxation* (1940) 63 CLR 338.

23 *R v Duncan; Ex parte Australian Iron and Steel Pty Ltd.*, (1983) 158 CLR 535 at 589 per Deane J.

24 (1999) 163 ALR 270.

25 Ibid at 280 per Gleeson CJ, 288-289 per McHugh J, 304-305 per Gummow and Hayne JJ.

26 For example, M Whincop, "Trading Places: Thoughts on Federal and State Jurisdiction in Corporate Law after Re Wakim" (1999) 17 *Companies and Securities Law Journal* 489; D Rose, "The Bizarre Destruction of Cross-vesting" (1999) 11 *Aus Jo Corp Law* 1.

27 Whether the analysis has significance for other common law federations as well depends in part on the constitutional framework and institutional structures of each. In South Africa, for example, the National Council of Provinces is modelled more closely on the German federation than any other; the Constitution of South Africa also makes specific provision for co-operation. In Canada, the Minister of Inter-governmental Affairs has argued that features of the Canadian federation make inter-governmental relations of "great importance" in contradistinction to federations elsewhere: S Dion "Governmental Interdependence in Canada", a paper presented to a Canadian Study of Parliament Group Conference, June 11, 2000.

AUSTRALIA

Characteristics

Australia is a federation in the common law mould. The federal system that came into effect on 1 January 1901 was built upon a foundation of pre-existing common law principles and institutions[28] and was designed as nearly as possible to be consistent with them. Typically, the common law does not recognise an abstract legal concept of the state as the source of authority to govern, distinct from the government itself or from both government and society.[29] The absence of a "state tradition" is attributable in part to the historical continuity and long course of slow evolution of British constitutional institutions.[30] In place of the impersonal state as the locus of undivided sovereignty, the development of the common law led to the sovereignty of Parliament, legitimised in political theory, but not law, by its status as trustee for the people.[31] Dominant though the principle was, the sovereignty of Parliament was more readily divided than that of the abstract state by pragmatic common lawyers when creating federations. The same history and the same process of constitutional evolution accounts for a second characteristic of common law constitutional systems, relevant for present purposes: the assumption that there is an umbilical link between legislature, executive, administration and courts. There were echoes of this view in the observation by Gummow and Hayne JJ in *Re Wakim* that "the authority to decide comes from the sovereign authority concerned".[32]

The framers of the Australian Constitution modelled the structure of the new Commonwealth sphere of government largely on British institutions for representative and responsible government, as understood through the experience of colonial self-government. In designing the federal features of the Constitution, however, the framers drew on the Constitution of the United States, itself based on common law principles. Like the United States, Australia is a dual federation.[33] Powers are divided vertically between the Commonwealth and the States across all three arms of government—legislative,[34] executive[35] and judicial.[36] With one qualification, each jurisdiction is institutionally complete, a characteristic which may explain the emphasis on institutions in the Australian federal immunities doctrines.[37] Each jurisdiction has its own Parliament, from which the Government is drawn and to which the Government, at least in principle, is responsible. Each jurisdiction has a representative of the Crown, performing the functions of head of state. Each has an

28 Owen Dixon "The Common Law as the Ultimate Constitutional Foundation" in Owen Dixon *Jesting Pilate* (1965) at 203.

29 M Loughlin, "The State, the Crown and the Law" in M Sunkin and S Payne (eds), *The Nature of the Crown* (1999) 33 at 43.

30 Ibid.

31 Ibid at 47.

32 *Re Wakim* (1999) 163 ALR 270 at 302 per Gummow and Hayne JJ. Their reasons were adopted by Gleeson CJ (at 276) and Gaudron J (at 281).

33 T Fleiner, "Federalism and Society during the 19th century" in J Kramer and H-P Schneider (eds), *Federalism and Civil Societies* (1999) 69 at 73.

34 Australian Constitution, s 51.

35 Australian Constitution, s 61.

36 Australian Constitution, ss 75 and 76.

37 *Melbourne Corporation v Commonwealth* (1947) 74 CLR 31 at 82 per Dixon J.

administrative arm, organised in portfolios, each serving a Minister of the Government. In each jurisdiction the executive branch is subject to a range of scrutiny mechanisms. Mechanisms internal to the processes of responsible government itself include parliamentary public accounts committees and Auditors-General. External mechanisms include judicial review of the lawfulness of administrative action by the courts of the jurisdiction concerned, varieties of administrative review, Ombudsman investigation and rights of public access to government information.

The qualification concerns the courts. The Australian Constitution departed from the United States judicial model in two ways that are relevant for present purposes. First, the High Court provides a final court of appeal from both federal and State courts.[38] Secondly, the Constitution expressly enables the conferral of federal jurisdiction on State courts[39] although, following *Re Wakim*,[40] the converse is not allowed.

These distinctive features of the Australian judicature were adopted for pragmatic reasons. The position of the High Court remains a significant qualification of the dualist character of the Australian federation, providing a mechanism for securing the ultimate uniformity of judge-made law and justifying claims of the unity of the Australian common law.[41] The "autochthonous expedient"[42] is less significant for present purposes, however. The Constitution entrenches separate concepts of federal and State jurisdiction, one consequence of which is a degree of Commonwealth control over the exercise of federal jurisdiction by State courts.[43] The authority to confer federal jurisdiction in this way, used extensively during the first 75 years of federation, has become increasingly less important since growth of the volume of Commonwealth legislation and administration encouraged the establishment of a separate hierarchy of federal courts,[44] on which federal jurisdiction increasingly is conferred. Review of Commonwealth administrative action, in particular, is a carefully guarded preserve of federal courts.[45] Despite intermittent concern about the potential inconvenience to litigants of distinct federal and state court hierarchies, the option of establishing a single system of courts has never approached reality. Consistently with dualist assumptions, it was rejected by the relevant advisory committee to the Constitutional Commission in 1987, in part because of the importance of the link between Parliament, the executive and the courts.[46]

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38 Constitution, s 73.

39 Constitution, s 77 (iii).

40 (1999) 163 ALR 270.

41 *Kable v DPP for New South Wales* (1996) 189 CLR 51 at 112 per McHugh J; *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 562-566; *Lipohar v The Queen* [1999] HCA 65 at [43-44] per Gaudron, Gummow and Hayne JJ.

42 *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254 at 269 per Dixon CJ, McTiernan, Fullagar and Kitto JJ.

43 Judiciary Act 1903 (Cth), s 39.

44 Family Court Act 1975 (Cth); Federal Court of Australia Act 1976 (Cth); now, Federal Magistrates Act 1999 (Cth).

45 Judiciary Act, s 38(e); Administrative Decisions (Judicial Review) Act 1977 (Cth), s 9; Jurisdiction of Courts (Cross-vesting) Act 1987 (Cth), ss 6 and 3(c),(e); Federal Magistrates (Consequential Amendments) Act 1999 (Cth).

46 Advisory Committee to the Constitutional Commission, *Australian Judicial System* (1987) at 38.

Co-operation

An extensive and varied network of inter-governmental arrangements affects the operation of the Australian federal system in practice. The vast bulk of these arrangements are extra-constitutional, in the sense that the Constitution makes no specific provision for them. Some are specifically authorised by the Constitution.[47] If terms and structure are the guide, however,[48] these are too few and too limited in their scope to stamp co-operation generally as an objective of the Constitution[49]. If anything even the most prominent of the constitutional co-operative mechanisms, the reference power in section 51(xxxvii), tends to reinforce the dualist character of the Constitution.

Dualism affects the accountability of governments for decisions taken in the course of inter-governmental arrangements in a variety of ways.[50] The combination of dualism and inter-governmental co-operation also contributes to the duplication and overlap of administration which governments struggled, with limited success, to diminish over the decade of the 1990s.[51]. The present issue, however, is the implications of the dualist structure of the Constitution for the application of the mechanisms of public law to co-operative arrangements. These are summarised below as raising questions of principle, justiciability and jurisdiction.

The central problem of principle is normative: to determine which jurisdiction's public law procedures should apply to decisions taken in the course of an inter-governmental scheme. The rule of law assumes that judicial review, at least, should be available, in general if not in all cases. Where decisions are made within a single jurisdiction, whether Commonwealth or State, the avenues are relatively straightforward. Where multiple jurisdictions are involved, however, it may be necessary deliberately to choose the review procedures of one or another on the basis of mutually acceptable criteria that do as little violence as possible to traditional accountability principles. So far, the choice has tended to be made on a case by case basis, without a clear position in principle about what the preferred criteria should be. On one view, it may be argued that federal procedures should be used, so far as possible, in the interests of uniformity, simplicity or equity; or simply because they are more accessible and, in that sense, better than the worst of the State procedures for review. On another view, it may be argued that the answer should depend, rather, on the relative contribution of each jurisdiction to the scheme, in terms of authority, people, money or some other factor.

There are several characteristics of many inter-governmental arrangements that complicate the justiciability of decisions taken pursuant to them. One is the nature of the forum in which decisions are made. Australian law has long since accepted the justiciability of decisions of Ministers,[52] and even of vice-regal representatives[53] or

47 Section 51(xxxiii), (xxxiv),(xxxvii) and (xxxviii); ss 77 (iii), 105A and 120.

48 *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 566-567.

49 Compare *R v Hughes* [2000] HCA 22 at [53] per Kirby J, referring to co-operation as an "elemental feature of the federal system of government".

50 C Saunders, "Accountability and Access in Intergovernmental Affairs: A Legal Perspective" in M Wood, C Williams and C Sharman, *Governing Federations* (1989) at 123.

51 C Saunders, "Intergovernmental Relations: National and Supranational" in P Carroll and M Painter (eds), *Microeconomic Reform and Federalism* (1995) at 52.

52 *Murphyores Inc Pty Ltd v Commonwealth* (1976) 136 CLR 1 at 6, 8, 9 and 26.

Cabinets in appropriate cases.[54] The justiciability of decisions of Ministers of different jurisdictions, acting collectively, however, is another matter. The collective body may not have a discrete legal identity.[55] Proceedings against individual members of it may be ineffective. There is a tendency in any event to accept that inter-governmental activity should have a degree of immunity from scrutiny and review, by rough analogy with international arrangements.[56] A further hurdle to justiciability may be the uncertain legal effect of decisions taken by jurisdictions collectively, even though these decisions may be operative in fact.

Finally, review of decisions under inter-governmental arrangements will not be possible unless a court or other agency has the necessary jurisdiction. Some jurisdictional boundaries depend on statute.[57] These can be varied, if governments and parliaments are willing to do so. Boundaries imposed by constitutions or constitutional principle are less readily moved, however. Recourse to the federal judicature is constrained by the heads of jurisdiction in ss 75 and 76 of the Constitution, including the doctrine of separation of judicial power.[58] In general, before jurisdiction can be conferred on a federal court for the purposes of judicial review, there must be a decision of an "officer of the Commonwealth"[59] or a matter "arising under" a valid law of the Commonwealth Parliament.[60] Broadening of the jurisdiction of other federal review agencies to encompass inter-governmental decision-making may be inhibited by limits on the Commonwealth's legislative powers, the effect of the paramountcy of Commonwealth law and some immunity of Commonwealth agencies from State law.[61] Boundaries of a constitutional nature relating to, for example, State extraterritorial capacity or a degree of immunity of State organs,[62] may affect the use for inter-governmental purposes of State courts and agencies as well.

The actual significance of these potential difficulties for review of administrative action depends on the degree to which inter-governmental arrangements respect the essential duality of the Australian federation. To demonstrate this, I consider two types of arrangements at the extreme ends of a spectrum of mechanisms designed to achieve uniformity short of alteration of the Constitution itself. The first of these is the reference of power, pursuant to s 51(xxxvii) of the Constitution. The second I have

53 *R v Toohey; Ex parte Northern Land Council* (1981) 151 CLR 170; *FAI Insurances Ltd v Winneke* (1982) 151 CLR 342.

54 *South Australia v O'Shea* (1987) 163 CLR 378; *Minister for Arts, Heritage and Environment v Peko-Wallsend Ltd* (1987) 15 FCR 274.

55 Although, see the suggestion by Deane J in *R v Duncan; Ex parte Australian Iron and Steel Pty Ltd* (1983) 158 CLR 535 at 587: "It is competent for the legislature to constitute or to authorize the constitution of an entity of a type unknown to the common law."

56 *Sankey v Whitlam* (1978) 142 CLR 1; Freedom of Information Act 1982 (Cth), s 33A. For discussion about the release of Australian Transport Advisory Council documents, see *Cyclists Rights Action Group v Department of Transport* (1994) 35 ALD 187; compare *Re Cyclists Rights Action Group and the Department of Transport* [1995] WAIC mr 16 (20 June 1995).

57 For example, Administrative Decisions (Judicial Review) Act 1977 (Cth), s 3.

58 *Re Wakim; Ex parte McNally* (1999) 163 ALR 270.

59 Constitution, s 75(v).

60 Constitution, s 76(ii).

61 *Re Wakim; Ex parte McNally* (1999) 163 ALR 270; C Saunders, "In the Shadow of Wakim" (1999) 17 *Companies and Securities Law Journal* 507-517.

62 *Re Cram; ex parte NSW Colliery Proprietors' Association* (1987) 163 CLR 117 at 128.

described as "template" schemes—a highly sophisticated and integrated mechanism for securing uniformity without a legal transfer of power.

There are many other kinds of arrangements, at different points on the complex matrix of inter-governmental co-operation in Australia, which also could be examined for consistency with the essential character of the constitutional design. These include, for example, grants by the Commonwealth to the States on specified conditions, pursuant to s 96 of the Constitution[63] and the "rolling-back" of Commonwealth legislation in States with statutory regimes of their own that comply with basic Commonwealth criteria.[64] That is a more detailed and lengthy exercise, however, which will not be attempted here.

References of power

The Constitution itself provides a mechanism through which the Commonwealth and the States, acting together, can vary the operation of the constitutional distribution of power. The "reference" power, in s 51(xxxvii) of the Constitution, enables the Commonwealth to make laws with respect to "matters referred...by the Parliament or the Parliaments of any State or States...". On its face, it offers flexibility in a form consistent with the assumptions on which the Australian federation is based. A reference endows the Commonwealth with a new head of power in relation to a State as long, at least, as the reference lasts. A Commonwealth enactment pursuant to a reference creates executive power within the meaning of s 61. A justiciable matter arising under such a law will constitute federal jurisdiction within the meaning of s 76(ii).

In these circumstances, review of decisions taken under arrangements based on a reference of power normally is straightforward. At least in relation to a simple reference, no novel questions of principle arise. Justiciability presents no greater hurdle than usual. The jurisdictional options are the same for legislation pursuant to a reference as for any other head of Commonwealth power.

Nevertheless, complications may arise. In many cases a reference is underpinned by an inter-governmental agreement, seeking to set conditions on its use. Whatever the conditions, they could not legally affect exercise of the power by the Commonwealth Parliament as long, at least, as the reference continues. An agreement might have implications for review if, for example, it provided for the involvement of State officers in the administration of the Commonwealth legislation. This would not preclude the use of Commonwealth review mechanisms, but it might raise questions of principle about which review arrangements should apply.

A second complication is exemplified by the special case of the mutual recognition arrangements. They are described below in some detail, because they also illustrate the versatility of the reference power, assuming that the techniques used for the purpose are valid.

The mutual recognition scheme requires States and Territories to accept each other's standards for goods and occupations. Although the original scheme did not necessarily

63 Administrative Review Council, *Administrative Review and Funding Programs* (Report No 37 1994).

64 Environment Protection and Biodiversity Conservation Act 1999 (Cth).

involve the Commonwealth,[65] it was considered desirable to base the arrangements on Commonwealth legislation[66] to ensure that the obligation of each State to comply with the mutual recognition principles overrode subsequent State law. The reference power was the chosen mechanism. Some States referred to the Commonwealth the precise legislation that they sought to have enacted.[67] Once the Commonwealth law was enacted, in accordance with the mutual recognition agreement,[68] the remaining States adopted the Commonwealth law, using the procedure provided in s 51 (xxxvii).[69] The referring States and Tasmania also referred to the Commonwealth power to amend the legislation "in terms which are approved by the designated person of each of the then participating jurisdictions".[70] The remainder of the adopting States reserved the right to refer additional power to amend, if the occasion arose.[71]

Despite use of the reference power, mutual recognition essentially is a State regime. State officers take administrative action under the scheme, in the course of State administration. Justiciable disputes under the Act nevertheless arise in federal jurisdiction. A difficult policy question, of how to review decisions of individual State registration authorities not to accept occupations as sufficiently "equivalent", was ultimately resolved by conferring jurisdiction on the Commonwealth Administrative Appeals Tribunal[72] as a means of ensuring consistency. This is a good outcome from the standpoint of the effectiveness of the scheme, although it is a substantial departure from the norm for the AAT. A declaration of "equivalence" by the AAT for mutual recognition purposes has some of the characteristics of a primary decision.[73] In addition, an alternative procedure allows Ministers of two or more participating jurisdictions to make a declaration of equivalence that prevails over an inconsistent declaration of the AAT.[74]

Mutual recognition is a practical example of a referral of power by the States to the Commonwealth in a way that enables the States to retain substantial control over the arrangements, even if the power to amend the referred Bill is referred as well. In this instance, the scheme raised a question of principle about how review should occur. Once that question was resolved, however, there were no legal impediments to implementation of the answer.

Notoriously, the reference power is seldom used or even considered as a vehicle for implementation of a decision by all governments that a uniform law is needed. Given

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65 The Commonwealth was necessarily a party once New Zealand became involved: Trans Tasman Mutual Recognition Act 1997 (Cth).

66 Mutual Recognition Act 1992 (Cth).

67 Mutual Recognition (New South Wales) Act 1992; Mutual Recognition (Queensland) Act 1992.

68 Intergovernmental Agreement on Mutual Recognition 1992. Although the terms of the Agreement affect the operation of the legislation, the Agreement is not scheduled in the legislation, an all-too familiar treatment of agreements of this kind.

69 Mutual Recognition (South Australia) Act 1993; Mutual Recognition (Tasmania) Act 1993; Mutual Recognition (Victoria) Act 1993 ; Mutual Recognition (Western Australia) Act 1995.

70 Mutual Recognition (New South Wales) Act, s 4; Mutual Recognition (Queensland) Act, s 5.

71 Victoria, South Australia and Western Australia. Victoria and South Australia also limited their adoption to a fixed period of years: see now Victoria (Mutual Recognition) Act 1998.

72 Mutual Recognition Act 1992 (Cth), s 34.

73 Mutual Recognition Act 1992 (Cth), s 31.

74 Mutual Recognition Act 1992 (Cth), ss 30, 32.

its compatibility with the rest of the constitutional system, it may be worth reflecting again on why this is so. The received wisdom is that the States are reluctant to refer power that they may not be able to retrieve, as a matter of practice or law.[75] An attempt to resolve any legal uncertainty by a change to the Constitution failed at referendum in 1984,[76] following a cynical political campaign.

Even so, State reluctance to use the principal constitutional mechanism for joint action is difficult to justify on these grounds alone. Practical inhibitions on recall of a referred power are unlikely to be greater than in the case of withdrawal from any other co-operative scheme on which Australians have based their affairs. State governments and parliaments have become adept at designing references that limit the potential for unexpected interpretation or use, or that will revert to the referring State on the occurrence of particular events. The High Court has not yet had the opportunity to consider whether a reference of an entire Bill constitutes a "matter" on which the Commonwealth Parliament may make laws pursuant to s 51(xxxvii). This was the mechanism used to good effect in the mutual recognition scheme. No doubt the lack of clear judicial approval suggests a need for some caution in relying on it in the future to prevent untoward use of a reference.[77] Otherwise, however, the concerns based on earlier cases, always overstated, appear increasingly exaggerated with the passage of time.[78] If these questions were to be adjudicated again, it is to be hoped that the Court would resolve any ambiguity in favour of the effectiveness of the agreed co-operative arrangements for referring the power. If necessary, it might develop and apply a new co-operative principle to enhance the use of one of the few sections of the Constitution to which such a principle can be attributed.

Template schemes

A second type of arrangement, also used to secure uniformity of legislation and administration, involves amalgamation of the powers of the participating jurisdictions in accordance with an inter-governmental agreement, of which a ministerial council has oversight. The central characteristic of these arrangements is the enactment by one jurisdiction of base legislation in an agreed form, as a template to be applied by the others. For convenience, arrangements of this kind are referred to here as "template" schemes.[79]

Typically, a template scheme has several component parts. Uniformity of the principal legislation and any other ancillary laws[80] is achieved through the template

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75 C Saunders, "The Interchange of Powers Proposal, Part I" (1978) 52 *ALJ* 187.

76 Constitution Alteration (Interchange of Powers) Act 1984 (Cth).

77 Compare the argument that only a specific Bill may be referred: *R v Public Vehicles Licensing Appeal Tribunal (Tas); Ex parte Australian National Airways Pty Ltd* (1964) 113 CLR 207. The argument was dismissed: at 225.

78 *Graham v Paterson* (1950) 81 CLR 1 at 19, 22 and 24-25; *R v Public Vehicles Licensing Appeal Tribunal (Tas); Ex parte Australian National Airways Pty Ltd* (1964) 113 CLR 207; *Airlines of New South Wales Pty Ltd v New South Wales* (1964) 113 CLR 1 at 38 and 53.

79 Sometimes also described as schemes for the application or adoption of laws: Western Australian Legislative Assembly, Standing Committee on Uniform Legislation and Intergovernmental Agreements, *Report of Activities 1996-1999* at 57.

80 In particular, Acts Interpretation legislation. For example, Road Transport Reform (Vehicles and Traffic) Act 1993 (Cth), s 14 importing the Acts Interpretation Act of the Commonwealth.

mechanism itself. Usually, the enacting jurisdiction is the Commonwealth. This is likely to be more acceptable to the States collectively than enactment of the template by one of their own number, particularly if the forum for adjudication is an important element of the scheme. Nevertheless, on occasion, a State template has been used.[81] Often, when the Commonwealth provides the template, it relies for this purpose on the territories power in s 122 of the Constitution, enacting a law that in legal form is a law for one or more of the territories alone.[82] Self-government for the Northern Territory and the Australian Capital Territory has complicated use of this technique, politically although not legally. Typically, the Commonwealth template now applies only to the former and may involve bilateral arrangements between the Commonwealth and ACT governments.[83] For the purposes of the Gas Pipelines Access scheme, the Commonwealth application legislation applied only to Jervis Bay and the external territories,[84] leaving the mainland Territories to become participants in their own right. While South Australia enacted the template for the Code itself in this case, the scheme also conferred authority on a range of Commonwealth instrumentalities.[85]

To ensure uniformity of the administration of template scheme legislation, template arrangements often involve the establishment or use of a common agency as well. More than one agency may be created if, for example, a scheme also is deemed to require a tribunal to adjudicate disputes.[86]

This aspect of the template mechanism draws creatively on an earlier precedent for co-operation between the Commonwealth and New South Wales in relation to the coal industry. Itself described as an "ingenious legislative device",[87] the coal industry scheme attracted repeated litigation from the time of its establishment in 1946 until some of the key questions were settled in the 1980s.[88] The scheme involved the

81 The Financial Institutions Code 1992 and the Australian Financial Institutions Commission Act were enacted by Queensland. See also the Gas Pipelines Access Law, enacted by South Australia as schedules 1 and 2 to the Gas Pipelines Access (South Australia) Act 1997 (SA).

82 Corporations Act 1989 (Cth), s 5; Agricultural and Veterinary Chemicals Act 1994 (Cth), s 3; Road Transport Reform (Vehicles and Traffic) Act 1993 (Cth), ss 2 and 13; Road Transport Reform (Dangerous Goods) Act 1995 (Cth), s 4; Road Transport Reform (Heavy Vehicles Regulation) Act 1997 (Cth), s 2.

83 Reference to these was made in a speech by Chief Minister Rosemary Follett to an ANU Public Policy Seminar "How the ACT makes Public Policy", 21 September 1992. Query whether the position of the ACT is improved or worsened by the prescription in the Road Transport Reform (Dangerous Goods) Act 1995 (Cth) that it was to be "taken to be a law made by the ACT Legislative Assembly" which that Assembly, however, could not amend: s 4.

84 Gas Pipelines Access Act (Cth) 1998

85 Including the Australian Competition and Consumer Commission and the Australian Competition Tribunal. See, for example, Gas Pipelines Access (South Australia) Act 1997 (SA), s 13.

86 The financial institutions scheme, for example, provided for the creation of both the Australian Financial Institutions Commission and an Appeals Tribunal. The gas pipelines access arrangements provide for the conferral of scheme authority on Ministers, the ACCC, the NCC and the Australian Competition Tribunal.

87 *R v Lydon; ex parte Cessnock Collieries Ltd* (1960) 103 CLR 15 at 20.

88 *Australian Iron and Steel Ltd v Dobb* (1958) 98 CLR 586; *R v Lydon; Ex parte Cessnock Collieries Ltd* (1960) 103 CLR 15; *R v Duncan; Ex parte Australian Iron and Steel Pty Ltd* (1983) 158 CLR

creation of three joint agencies, one of which, the Coal Industry Tribunal, was the subject of most of the litigation. The Tribunal was established by complementary mirror legislation of the Commonwealth and New South Wales.[89] Each Act conferred power on the Tribunal to the extent of the constitutional authority of the enacting jurisdiction.[90] In the case of the Commonwealth, relevant powers included at least those with respect to interstate and overseas trade and commerce and conciliation and arbitration.[91] In *Duncan*[92] the High Court unanimously dismissed a challenge to the validity of the Tribunal in which it was argued that an authority established by the Commonwealth could not also exercise exclusively State power.[93] As long as any problems arising from s 109 were avoided,[94] there was no constitutional rule "that would prevent the Commonwealth and the States from acting in cooperation, so that each, acting in its own field, supplies the deficiencies in the power of the other".[95] Despite the equal contribution of each Act to the scheme, the Court was inclined to the view that their combined effect was to establish one tribunal rather than two, a conclusion later described in *Cram*[96] as "inescapable".[97] The possibility that "bifurcation" might be necessary for the resolution of questions concerning, for example, enforcement was acknowledged by several judges, but not pursued.[98]

More recent co-operative arrangements have modified this structure. Typically now, the common agency is established by one jurisdiction and invested with additional powers by others. As with the template mechanism itself, the initiating jurisdiction generally is the Commonwealth.[99] In the absence of any other obvious head of power,[100] such a Commonwealth Act tends again to rely on the territories power, although often less explicitly than does the template Act itself.[101] Where the Commonwealth establishes the common agency, the constituent legislation necessarily

535; *Re Cram; Ex parte NSW Colliery Proprietors' Association* (1987) 163 CLR 117; *Joint Coal Board v Cameron* (1988) 24 FCR 204.

89 Coal Industry Act 1946 (Cth); Coal Industry Act 1946 (NSW); *R v Duncan; Ex parte Australian Iron and Steel Pty Ltd* (1983) 158 CLR 535 at 554 per Gibbs CJ.

90 Coal Industry Act 1946 (Cth), s 32; Coal Industry Act 1946 (NSW), s 38.

91 Constitution, s 51(i) and (xxxv), respectively.

92 *R v Duncan; Ex parte Australian Iron and Steel Pty Ltd* (1983) 158 CLR 535.

93 Ibid at 553 per Gibbs CJ.

94 As they were in this case, at least by the evident intention in the Commonwealth Act that the Tribunal should exercise State powers.

95 (1983) 158 CLR 535 at 553 per Gibbs CJ.

96 *Re Cram; Ex parte NSW Colliery Proprietors' Association* (1987) 163 CLR 117.

97 Ibid at 131.

98 *R v Duncan; Ex parte Australian Iron and Steel Pty Ltd* (1983) 158 CLR 535 at 583 per Brennan J and at 593 per Deane J.

99 For example, Australian Securities Commission Act 1989 (Cth), Agricultural and Veterinary Chemicals (Administration) Act 1992 (Cth), National Road Transport Commission Act 1991 (Cth), Gas Pipelines Access (Commonwealth) Act 1998 (Cth).

100 Some agencies including, most obviously, the Australian Securities and Investment Commission, can be supported in large part by a range of Commonwealth powers. See also *R v Hughes* [2000] HCA 22 at [40] per Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ.

101 For example, the Road Transport Commission Act 1991 (Cth), s 8 and the Agricultural and Veterinary Chemicals (Administration) Act 1992 (Cth). The possibility of reliance on the nationhood power is raised by the remarks of Mason J in *Duncan* (1983) 158 CLR 535 at 560.

must recognise the possibility of the conferral of powers on the agency by the other participating jurisdictions. A familiar formulation for this purpose provides that the agency "has any functions and powers expressed to be conferred on it" by a law of another jurisdiction.[102] One effect of *Re Wakim*,[103] was to focus attention on the purpose served by such provisions and whether they must be supported by a head of power[104]. Tackling these questions in *R v Hughes*, the majority judges drew a distinction between laws which "permit" Commonwealth officers to hold appointments under State law and those which "impose" duties.[105] The law in *Hughes* itself was taken to be an example of the latter. Both the executive power and the financial resources of the Commonwealth were engaged and a head of power was required.[106] It is not clear from *Hughes* whether in the longer term the distinction between powers and duties can be maintained and whether in any event it makes any difference beyond, perhaps, more ready acceptance on the part of the Court that the incidental power can be used.[107] Nor is it clear whether, in either case, the power incidental to the executive power may be prayed in aid. *Hughes* involved a prosecution by the Commonwealth Director of Public Prosecutions for an offence against the prescribed interest provisions under State corporations law. The particular transaction involved investment offshore and the prosecution could be sustained under either the overseas trade and commerce power (s 51(i)) or the external affairs power (s 51(xxix)).[108] The majority noted that the alternative of reliance on the executive power "remains open to some debate and this is not a suitable occasion to continue it".[109]

Schemes of this kind are truly inter-governmental in character. On the face of it, they are national, belonging neither to the Commonwealth nor to any one State. They ensure the creation and maintenance of completely uniform legislation through continuing co-operation. And they also provide a co-operative mechanism for the effective uniformity of the administration of the resulting law. In the end, however, under the Australian federal model, it is impossible to divorce a governmental

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102 Agricultural and Veterinary Chemicals Act 1992 (Cth), s 7(2), Australian Securities Commission Act 1989 (Cth), s 11(7). But cf the different formulation for the conferral of functions on the ACCC for the gas pipelines access arrangements, which provide that the Commission "may perform" conferred functions but "must not" do so in a way that is contrary to competition principles: Gas Pipelines Access (Commonwealth) Act 1998 (Cth), schedule 1, cl 25.

103 (1999) 163 ALR 270.

104 In *Re Wakim* Gummow and Hayne JJ held that Commonwealth conferral was necessary for the exercise of jurisdiction by federal courts, for reasons that pertained specifically to courts: ibid at [108]. An analogous argument might be developed for other agencies. Equally, however, their position could be distinguished. In *Duncan*, Mason J identified the relevant consideration as "intention rather than capacity" but saw, at least in that context, no significant distinction between a section that expressed intention as opposed to one that positively conferred power: (1983) 158 CLR 535 at 564.

105 *R v Hughes* [2000] HCA 22 at [31] and [34]; cf at [124] per Kirby J.

106 Ibid at [35]; cf at [108] per Kirby J.

107 Ibid at [31] where the majority refers to the use of the incidental power to permit Commonwealth officers to hold appointments. The majority leaves open the possibility that the imposition of a duty was a "constitutional imperative": at [34].

108 Ibid at [42]; at [115] per Kirby J.

109 Ibid at [39].

program from one or other of the spheres of government, as several judges had earlier foreseen.[110] The system assumes that each jurisdiction is substantially complete in itself. The point could be illustrated by reference to parliamentary scrutiny[111] or, with some qualification, the jurisdiction of courts.[112] For the purposes of the present paper, it also can be demonstrated by review of administrative action.

Co-operation in relation to corporations law offers a convenient case-study. Each of the two most recent corporations schemes has relied on a template model. The first of these operated for most of the decade of the 1980s.[113] Template laws were enacted by the Commonwealth, pursuant to the territories power and adopted by each of the States.[114] Commonwealth law also established a National Companies and Securities Commission (NCSC) as a central regulator[115] on which State laws also conferred power. Under the umbrella of the NCSC, however, the scheme was deliberately decentralised. Separate but subordinate State commissions were established to administer the legislation in each State. The supporting State legislation provided that the NSCS itself was to represent the Crown in right of the State when exercising power conferred by the States.[116] Administrative arrangements were settled separately, in a specific agreement.[117] Essentially, this provided for review to take place in accordance with the law and procedures of the jurisdiction the exercise of whose power was in issue, to the extent that it took place at all.[118] The Ministerial Council for Companies and Securities had overall responsibility for the scheme "to the exclusion of individual Ministerial direction and control...".[119] At the end of the decade, this approach to the accountability of the regulator was discredited in the context of more general concern about the accountability of the NCSC to multiple masters, following the corporations scandals of the 1980s.[120]

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110 *R v Duncan; Ex parte Australian Iron and Steel Pty Ltd* (1983) 158 CLR 535 at 583 per Brennan J and at 593 per Deane J.

111 In *Joint Coal Board v Cameron* (1988) 24 FCR 204 Davies J canvassed the application of a range of accountability mechanisms to the Joint Coal Board. See also Senate Standing Committee for Constitutional and Legal Affairs, *The Role of Parliament in relation to the National Companies and Securities Commission* (Parliamentary Paper 113, 1987).

112 *Re Wakim; Ex parte McNally* (1999) 163 ALR 270.

113 The Formal Agreement was signed on 22 December 1978. The scheme was superseded by the present corporations scheme in 1990.

114 The Commonwealth Acts were the Companies Act 1981, the Companies (Acquisition of Shares) Act 1980 and the Securities Industry Act 1980. The scheme is described in *The Broken Hill Proprietary Co Ltd v National Companies and Securities Commission* (1986) 160 CLR 492.

115 Clause 32(1) of the Agreement provided that the Commission was to have "responsibility for the entire area of policy and administration with respect to company law and the regulation of the securities industry".

116 National Companies and Securities Commission (State Provisions) Acts, s 4(1).

117 Administrative Remedies Agreement 1982. The text is reproduced in C Saunders, "The Co-operative Companies and Securities Scheme" Information Paper 4, Intergovernmental Relations in Victoria Program, The University of Melbourne, 1982, Appendix B.

118 C Saunders, ibid at 29.

119 Formal Agreement 1978, cl 38.

120 Senate Standing Committee for Constitutional and Legal Affairs, *The Role of Parliament in relation to the National Companies and Securities Commission* (Parliamentary Paper 113, 1987).

The next, still current inter-governmental co-operative scheme for corporations was put in place after an attempt at unilateral Commonwealth legislation failed, on constitutional grounds.[121] The principal mechanisms for achieving uniformity of law and administration were essentially the same. In accordance with the Agreement,[122] the scheme was significantly more centralised, however. The Commonwealth government had predominant control over decisions about its form and operation and the new Australian Securities Commission[123] was accountable to the Commonwealth Parliament alone, to the exclusion of State Parliaments and the Northern Territory legislature. In addition, greater depth of uniformity of all aspects of implementation of the scheme was sought, through a technique that became known as "federalisation".[124] The purpose of this technique was to give decisions taken under the scheme all the characteristics of federal decisions so as to attract the jurisdiction of relevant federal courts and agencies, including those providing for review. The laws were to be "enforced on a national basis" as if they constituted "a single law of the Commonwealth".[125] Commonwealth administrative law was applied to State provisions "as if those provisions were laws of the Commonwealth and were not laws" of the State in question.[126]

The difference between these two approaches to the application of review procedures essentially is one of policy. It may be noted in passing that the policy choices made in relation to the NCSC, in particular, had the effect of putting some scheme decisions beyond review at all. More instructive for present purposes, however, have been the jurisdictional issues encountered in the course of the implementation of both policies.

These have taken a variety of different forms. In *Pancontinental*[127] the question was whether a decision of the ASC, presumably in the exercise of State power, could be said to have been taken "under an enactment", for the purposes of the Administrative Decisions (Judicial Review) Act 1977 (Cth). In *Allan*[128] the question was whether a decision of the NCSC was "made in...the exercise of a power conferred...by State law" so as to attract exclusion from the jurisdiction of the AD(JR) Act.[129] In *BHP*[130] there was a question whether the NCSC was "the Commonwealth" for the purposes of s 75(iii) of the Constitution. In *Boys*[131] the question became whether a decision of the

121 *New South Wales v Commonwealth* (1990) 169 CLR 482.

122 Alice Springs Agreement 1990, setting out the heads of agreement: Commonwealth Parliamentary Debates, Senate, 11 December 1990, at 5380. See now the Corporations Agreement 1997 to which reference was made in *R v Hughes* [2000] HCA 22 at [61] by Kirby J.

123 Now the Australian Securities and Investment Commission.

124 Lionel Bowen, Commonwealth Parliamentary Debates, House of Representatives, 8 November 1990, at 3665.

125 Corporations Act 1989 (Cth), s 37.

126 For example, Corporations Act (South Australia), s 35.

127 *Pancontinental Mining Ltd v Australian Securities Commission* (1994) 124 ALR 471.

128 *Allan v National Companies and Securities Commission* No WA G 25 1986.

129 Schedule 1(m).

130 *The Broken Hill Proprietary Co Ltd v National Companies and Securities Commission* (1986) 160 CLR 492.

131 *Boys v Australian Securities Commission* (1997) 24 ACSR 1. Cf *Avamure Pty Ltd v Fletcher Jones and Staff* (1996) 22 ACR 256, *Enterprise Sheet Metal Pty Ltd (in liq) v Queensland Steel and Sheet Pty Ltd* [1995] 1 Qd R 511.

ASC was a matter "arising under a law of the Parliament" for the purposes of the new s 38B(1A) of the Judiciary Act 1903 (Cth). In several cases there was an underlying question whether action had been taken by an "officer of the Commonwealth".[132] In the different context of the Joint Coal Board, a further question arose: whether the Board could be said to be an authority established "by, or in accordance with the provisions of an enactment" so as to require release of information under the Freedom of Information Act 1992 (Cth).[133]

In general, the outcome on each of these issues has tended to promote review under federal review procedures. To this end, Commonwealth provisions acknowledging the conferral of State power and authority on bodies established by the Commonwealth have been used to conclude that the decisions in question were taken under a Commonwealth enactment[134] or that the issues for determination have arisen under Commonwealth law.[135] Following the logic in *Cram*,[136] it generally has been assumed that members of bodies that "derive their existence" from a Commonwealth Act that "confers or authorises the conferral" of powers upon them are "officers of the Commonwealth", in the exercise of all powers, whatever their ultimate source.[137] Occasionally the result has seemed perverse: in *Cameron*, for example, documents apparently exclusively within the sphere of the State operations of the Joint Coal Board were held to be subject to the Freedom of Information Act (Cth).[138] Otherwise, apart from their complexity, there had been no cause to question the continuing evolution of these arrangements until a constitutional obstacle was encountered in *Re Wakim*. The immediate implications of *Re Wakim* for the validity of the application of the AD(JR)Act to decisions taken under inter-governmental schemes may be overcome by the extension of the AD(JR)Act to decisions of officers of the Commonwealth as long, at least, as the present analysis holds. The decision in *Re Wakim* also had other implications for the validity of template schemes. These were confirmed, but only partly clarified in *Hughes*.

These questions of constitutionality are relevant for present purposes to the extent that they provide further evidence of the difficulty of accommodating co-operative schemes of this kind within the general structure of the Australian federation. It may be noted in passing, however, that the general effect of the cases dealing with review of decisions under co-operative schemes has been to emphasise the operative character of the Commonwealth legislation. Logically, this further enhances the need to identify the head of power on which the relevant Commonwealth provisions are based. *Duncan* and *Cram* may be taken to suggest that the incidental power provides sufficient authority where the Commonwealth has a substantial constitutional interest in the

132 *Bond v Sulan* (1990) 98 ALR 121; *Hong Kong Bank of Australia Ltd v Australian Securities Commission* (1992) 108 ALR 70; *Mercantile Mutual Life Insurance Co Ltd v Australian Securities Commission* (1993) 112 CLR 463; *Attorney-General v Oates* [1999] HCA 35. Cf Kirby J in *R v Hughes* [2000] HCA 22 at [121].

133 *Joint Coal Board v Cameron* (1988) 24 FCR 204. For a different context, and an issue of yet another kind, see *Harris v Bryce* (1993) 113 ALR 726.

134 *Pancontinental Mining Ltd v Burns* (1994) 124 ALR 471 at 480 per von Doussa J.

135 *Boys v Australian Securities Commission* (1997) 24 ACSR 1.

136 *Re Cram; Ex parte New South Wales Colliery Proprietors' Association* (1987) 163 CLR 117 at 128.

137 See authorities cited above n 132.

138 *Joint Coal Board v Cameron* (1988) 90 ALR 208 at 211 per Davies J.

scheme, attributable to substantive heads of power.[139] It may be more difficult to invoke the incidental power if the Commonwealth's only constitutional interest lies in the territories power in relation to the Australian Capital Territory or, perhaps, only to Jervis Bay and the external territories.[140] Hughes demonstrates that the question of supporting power falls to be to be determined in relation to each scheme and may depend on the context in which the issue is raised before the Court. Whether a Commonwealth Act implementing an inter-governmental agreement by facilitating common administration of a co-operative scheme might be found to be incidental to the nationhood power, following the analysis of Mason J in *Duncan*,[141] is still unclear.

THE GERMANIC FEDERATIONS

The Germanic federations comprise the Federal Republic of Germany, Austria and, in relevant respects, Switzerland. All three share similar assumptions about the nature of the state and the role of the judiciary and to this extent adopt a similar approach to the organisation of public power. For the purposes of comparison, the German federation is the most distinctive of the three and is the primary focus of this part.

Characteristics

Germany, Austria and Switzerland are federations in the civilian legal sphere, based on the civilian approach to law and to government. Three influences on the form and operation of these federations, filtered through the civilian tradition, are particularly relevant for present purposes.

The first is historical and has particular reference to Germany. The present German federal constitutional structures clearly are the products of the terms on which progressive degrees of unification of the independent German principalities were achieved through the German confederation of 1815, the North German confederation of 1867 and the German Empire of 1871.[142] Distinctive features of these unions included a central legislature in which the member states were directly represented and by 1871, under the influence of Bismarck, extensive central regulatory capacity leaving administration with the constituent states.[143]

A second important influence was the abstract and impersonal concept of the state, elaborated through a succession of theorists from Sieyes[144] to Kelsen,[145] and spread

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139 In the case of co-operation in the coal industry, at least s 51(i) and (xxxv): *R v Hughes* [2000] HCA 22 at [46].

140 In *Hughes* Kirby J observed that it would be impossible to uphold the validity of the law under challenge in that case "based on no more than the operation of the Corporations Act in the Australian Capital Territory and matters incidental thereto": ibid at [112].

141 (1983) 158 CLR 535 at 560.

142 G Lehmbruch, "Institutional Linkages and Policy Networks in the Federal System of West Germany" (1989) 19 *Publius* 221 at 226; W Renzsch, "German Federalism in Historical Perspective: Federalism as a substitute for a National State" (1989) 19 *Publius* 17 at 18-20.

143 W Renzsch, ibid at 18 and 20-22. On this period in Germany generally, see R C Van Caenegem, *An Historical Introduction to Western Constitutional Law* (1995) at 224-229.

144 E Sieyes, *Qu'est ce que le Tiers Etat?* Paris, PUF, "Quadrige" 1989, cited in Elizabeth Zoller, *Droit constitutionnel*, Paris, PUF. (2nd ed 1999) at 41-43.

145 H Kelsen, *General Theory of Law and State* (1961).

throughout Europe, initially with some assistance from Napoleon.[146] Use of the concept of a state for national integration through social equality and pursuit of the general good[147] has obvious implications for a federal structure. In the case of Germany, it also raised the prospect that, while powers might be divided, the state itself was not. In particular, there was for a time a view that the German federation embodied three spheres, with the "whole state" separate and distinguishable from the Bund and the Laender.[148] While this rather formalistic analysis no longer appears to be accepted,[149] it may continue to influence both judicial and political federalism in subtle ways.[150]

The third influence lies in the distinctively civilian approach to the concept of a separation of powers, which denies to the general judiciary the authority to intrude into the areas of responsibility of either the legislative or the executive branches.[151] The result is a more limited role for the general judiciary than is the case in common law countries and the creation of specialist processes for adjudication in matters of public law. These developments were a product of the French revolution[152] and of the enlightenment,[153] although in Germany they have taken distinctive forms.[154]

In consequence of these influences, the German federation divides powers horizontally as well as vertically. The Basic Law confers extensive exclusive[155] and concurrent[156] legislative powers on the Bund. There are relatively few substantive Laender legislative powers, with local government, police powers, culture and education being the principal exceptions.[157] At the same time, however, the Basic Law confers power on the Laender to implement most federal legislation "in their own right"[158] subject to supervision by the Bund within constitutional limits.[159] Federal

146 G Lehmbruch, above n 142 at 223. See generally J M Kelly, *A Short History of Western Legal Theory* (1992) chs 7-9. For a discussion of the influence of Rousseau, see J W F Allison, *A Continental Distinction in the Common Law* (1996) at 50-52.

147 R C Van Caenegem, above n 143 at 126.

148 G Kisker, "The West German Federal Constitutional Court as Guardian of the Federal System" (1989) 19 *Publius* 35 at 48.

149 W Heun, "The Evolution of Federalism" in C Starck (ed), *Studies in German Constitutionalism* (1995) 168 at 172.

150 See also in relation to Austria, T Ohlinger, "Unity of the Legal System or Legal Pluralism: the Stufenbau Doctrine in Present Day Europe" in A Jyranki (ed), *National Constitutions in the Era of Integration* (1999) at 163. In relation to Switzerland, see T Fleiner, *Theorie General de l'Etat* (1986) at 213.

151 J H Merryman, "The Public Law-Private Law Distinction in European and United States Law" in J H Merryman, *The Loneliness of the Comparative Lawyer* (1999) 76 at 83.

152 Ibid.

153 R C Van Caenegem, above n 143 at 128 ff.

154 In particular, with the creation of a Constitutional Court and the range of specialist court hierarchies.

155 Article 73. The Laender may be empowered to legislate on these: Article 71.

156 Articles 72, 74 and 74A.

157 W Heun, above n 149 at 176.

158 Article 83. In practice, 80% of the administration is carried out by local governments: W Heun, above n 149 at 178.

159 Articles 87-90.

administration is limited to "traditional objects",[160] which primarily include foreign affairs, defence, finance, postal and telecommunications services, railways and waterways, social insurance and aviation.[161] The horizontal approach to the division of powers applies also in Austria[162] and in Switzerland,[163] although the former is more centralised and the latter more decentralised than Germany.[164]

The German court system is characterised by specialisation and decentralisation.[165] Adjudication is carried out through hierarchies of specialist courts, one of which deals with administration.[166] Courts lower in the hierarchy fall within the jurisdiction of the Laender.[167] The court at the apex of each hierarchy is a federal court; in the case of administrative law, the Federal Administrative Court, or Bundesverwaltungsgericht. Land ministers are involved in the selection of judges for federal courts[168] but the Laender have responsibility for the staffing and maintenance of other courts.[169] Consistently with the pattern of the division of legislative power, court procedure is principally a responsibility of the Bund.[170] The uniformity of the interpretation and application of federal law is ensured by the federal courts.[171]

While there is a debate in Germany about dual federalism,[172] in context the term has different connotations. Characterisation of the German federation as dual denies the somewhat formalistic notion of a third sphere[173] and provides a useful analytical base for arguments either for[174] or against[175] central power. Germany is not a dual federation in the common law sense, however, in which each sphere of government is institutionally complete in itself. There are cultural differences between the two, presumably in part dependent on structure.[176] The principal structural difference concerns administration, which is carried out primarily by the Laender. Further, while the German model in fact makes provision for both federal and Land courts, the courts constitute a series of discrete hierarchies, and the structure does not depend for its

160 Ibid. See the more general Article 87(3), however, making the creation of new federal agencies possible, subject to the agreement of the Bundesrat.

161 "...one looks in vain for a federal building in the Land capitals": H-G Wehling, "The Bundesrat" (1989) 19 *Publius* 53 at 58.

162 Federal Constitution of Austria, articles 11 and 12.

163 Federal Constitution of Switzerland, article 46.

164 In relation to the vertical separation of powers in continental federations generally, see T Fleiner, above n 150 at 221.

165 N Foster, *The German Legal System and Laws* (2nd ed 1996) at 38.

166 Ibid at 44; Basic Law, article 95. For comparative statistics on the volume of jurisdiction at each level, see J Massot et T Girardot, *Le Conseil d'Etat* (1999) at 56. For the comparable situation in Austria, see K Heller, *An Outline of Austrian Constitutional Law* (1983) at 57-61.

167 For administrative law: Verwaltungsgerichte and Oberverwaltungsgerichte.

168 Basic Law, article 95.

169 N Foster, above n 165 at 39.

170 See Administrative Courts Act.

171 W Heun, above n 149 at 179.

172 Ibid at 172.

173 G Kisker, above n 148 at 47-49.

174 Ibid at 49.

175 W Heun, above n 149 at 172.

176 G Kisker, above n 148 at 46 referring to the "spirit of confrontation that tends to go with dual federalism".

rationale on links between courts and other institutions of government.[177] Rather, it is consistent with an overall scheme in which "the competences for legislation, administration and adjudication are assigned to different levels of government".[178]

The model for the German federation, which Austria and Switzerland mirror to a degree, is relevant here for several purposes. First, it both presupposes and encourages inter-governmental co-operation to an extent that highlights the relatively superficial character of the few co-operative procedures in the Australian Constitution. Secondly, it has implications for the procedures for review of administrative decisions taken in the course of co-operative arrangements. Each of these aspects of the German model is examined more closely below.

Co-operation

At least three different forms of co-operation find a place in the German federal system. They may be characterised as follows.

Intra-state co-operation

Intra-state co-operation involves the establishment of organs of co-operation within a single sphere of government. In the case of Germany, the prime example is the Bundesrat or Federal Council, which acts as an Upper House of the Federal Parliament. Through the Bundesrat, the Laender exercise their unalterable[179] constitutional right to "participate...in the legislative process and administration of the Federation".[180] The Bundesrat is comprised of members of Land cabinets and the votes for each Land are cast as a block.[181] The Bundesrat has an absolute veto on bills and proposed treaties that affect the Laender, including legislation that the Laender must administer[182] and legislation with implications for Land revenues.[183] In 1983-1987, more than 60 per cent of legislation introduced into the German Parliament was subject to Bundesrat veto.[184] In other words, while the German federation gives the centre greater capacity to achieve uniformity, co-operation is mandated at the point where federal policy is put in place. The Bundesrat is both the *quid pro quo* for the centralisation of policy-making and a mechanism for the co-ordination of policy, implementation and administration.

Other important but less substantial examples of co-operation in this category might be given as well. They include the procedure for the election of the German President by a Federal Convention that includes members of Land legislatures[185] and the participation of Land Ministers in the appointment of judges to federal courts.[186]

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177 Ibid at 37: "The fear that Land courts might abuse their jurisdiction in cases involving federal questions...is alien to German judicial thinking."

178 Ibid at 176.

179 Article 79(3).

180 Article 50.

181 Article 51.

182 H-G Wehling, above n 161 at 58.

183 Articles 105(3) and 106.

184 H-G Wehling, above n 161 at 57 quoting P Schindler, "Deutscher Bundestag 1949-1987: Parlaments und Wahlstatistik" *Zeitschrift fuer Parllamentsfragen* 18 (1987) at 200.

185 Basic Law, article 54.

186 Basic Law, article 95. See also the involvement of the Bundesrat in the appointment of judges to the Federal Constitutional Court: article 94.

There is no Australian equivalent of these arrangements, institutionally or culturally. The Senate is not designed and was never intended to play the co-operative and co-ordinating role of the Bundesrat. The only provision for the involvement of State governments in appointments to federal courts is in the statutory requirement for consultation in relation to High Court appointments, the effectiveness of which is variable.[187] The possibility that the States might play a role in the selection of a single Australian President was not even considered, much less taken seriously, during the republican debate that culminated in the failed referendum in 1999.

Inter-state co-operation

Inter-state co-operation is as familiar a feature of the German federation as of most others at the end of the 20th century. Heun has sketched the range of "numerous informal forms of cooperation" differing in "form, extent and intensity" involving "over 1,000 administrative boards and committees".[188] These give rise to the usual concerns about executive federalism, already endemic to the German federal model from the standpoint of Land legislatures. Other grounds for criticism include excessive centralisation, lowest common denominator decision-making and blurred lines of responsibility.[189]

In some cases, however, where "mixed administration" is required, inconsistently with the general constitutional scheme, the framework for the arrangements has been constitutionalised. The substance of the key constitutional provision, moreover, provides some guidance in terms of structure and accountability. Under article 91(a) "joint responsibilities" in the specified areas must be dealt with in a federal law setting out "general principles governing the discharge of responsibilities". The law must provide the procedures and institutions for joint planning. The Bund must provide at least one half of the costs in each Land. Information about the activities must be provided to the Government and the Bundesrat on request. Other articles authorise, albeit in more general terms, cooperation in education, research and projects of supra-regional importance[190] and the apportionment of expenditure on shared activities.[191]

Again, with the possible exception of s 105A of the Australian Constitution, there is no Australian equivalent. The reference power is an alternative constitutional mechanism, which fits Australian constitutional circumstances well, but ironically is seldom used. The grants power in s 96 in fact provides a base for shared programs without identifying principle or allocating responsibility and therefore tends to confuse rather than to advance accountability. Section 105A, inserted into the Constitution 27 years after federation, authorises the making of agreements about State debts between the Commonwealth and the States and most nearly approximates the nature of the German provisions.

187 High Court of Australia Act 1979 (Cth), s 6.
188 W Heun, above n 149 at 186.
189 Ibid at187.
190 Article 91b.
191 Article 104a.

Federal principle

Finally, at least arguably, the operation of the German federation is affected by a principle of co-operation.[192] The principle of "bundestreue", or federal comity, requires the partners to the federation to "behave like loyal members of a union",[193] by respecting each other's interests. In Switzerland it has been given explicit form in the Constitution of 1999 which requires the Confederation and the Cantons to "support each other" and to resolve disputes, if possible, through negotiation and mediation.[194]

In relation to Germany, the principle of bundestreue variously has been traced to a "legal institute" during the German Empire,[195] to the stipulation in the Basic Law that "Germany shall be a...federal state"[196] and to the "general civil law duty of an obligor to act in good faith".[197] While its legal significance remains unclear, it has been invoked by the Constitutional Court from time to time in rulings that have been described as tending "to cross the borderline between enforcing the law and preaching good behaviour".[198] Both Laender and Bund have fallen foul of the principle, including in the context of the need for assistance to Laender in serious financial difficulties in 1992.[199] In 1995, the Court relied on the principle to identify the Bund as "trustee of the Laender" in negotiations with the European Union.[200]

Reference has been made already to observations in the High Court about a principle of co-operation in Australia. It differs from the German principle, being entirely a judicial doctrine directed to the manner in which the Court will interpret the Constitution. While claims for a broader effect have been made, following *Wakim* and *Hughes*, it is clear that the principle presently means little more than that "co-operation on the part of the Commonwealth and the States may well achieve objects that could be achieved by neither acting alone".[201]

Judicial review

It follows from what has been said that judicial review of administrative action under inter-governmental schemes is relatively straightforward in the Germanic federations or, at least, no more complicated than they might otherwise have been.[202] There is a single hierarchy of administrative courts with federal influence exercised through the highest court. Most administration takes place at the sub-national level and is reviewed at first instance and, on appeal, by levels of the administrative court system within sub-national authority. In carrying out their review function, however, the courts

192 Another principle, concerning equality, has some effect on the distribution of federal grants and on decision-making rules in inter-governmental bodies: W Heun, above n 149 at 174.
193 G Kisker, above n 148 at 40.
194 Article 44.
195 W Heun, above n 149 at 175.
196 Article 20.
197 D P Currie, *Constitution of the Federal Republic of Germany* (1994) at 77.
198 G Kisker, above n 148 at 40.
199 D P Currie, above n 197 at 78-80.
200 92 BverfGE 203 (1995), translation by J Kokott.
201 *R v Hughes* at [2000] HCA 22 at [46]
202 In Germany, as everywhere else, there are challenges to traditional public law principles from corporatisation and privatisation: K Goetz and P Cullen, "The Basic Law after Unification: Continued Centrality or Declining Force" in K Goetz and P Cullen (eds), *Constitutional Policy in United Germany* (1995) 1 at 27-29.

follow procedures prescribed by the Federal Parliament with the approval of the Bundesrat.[203] They also apply a single body of general principles of administrative law that have been developed "as a sort of common law".[204] The basic features of these principles are derived directly from the Basic Law. Relevant provisions include a constitutional right to access to justice "where rights are violated by a public authority"[205] and the principles associated with the rule of law.[206]

THE UNITED KINGDOM

Characteristics

The United Kingdom is the quintessential common law polity. The history and traditions of constitutional arrangements in the United Kingdom are the origins of the assumptions about the relationship between Parliament, the executive government, the administration and the courts that are embedded in the constitutional law of Australia and most other common law countries.

Unlike Australia, the United Kingdom has a unitary system of government, at least in the sense that the Parliament at Westminster has legal sovereignty over all the component parts of the polity: England itself, Scotland, Wales and Northern Ireland. Nevertheless, there has always been a degree of institutional diversity. Scotland has a distinctive legal system and court structure below the House of Lords. A separate civil service has existed in Northern Ireland since the partition of Ireland in the 1920s. The degree of its autonomy has varied, depending on the current governing arrangements for that still troubled region.

Since 1998, extensive and more systemic devolution has taken place in the United Kingdom in relation to Scotland,[207] Wales[208] and Northern Ireland.[209] Both the extent and form of devolution differs between the three regions. For present purposes, Scotland may be used as an example.

The Scotland Act 1998 devolves legislative power to a Scottish Parliament, subject to matters specifically retained by the Westminster Parliament. Schedule 5 "reserves" powers by reference to subject matter, ranging from the Constitution and foreign affairs to aspects of employment and the regulation of the professions. Schedule 4 lists enactments protected from modification by the Scottish Parliament, including the Union with England Act 1706 and the Scotland Act 1998 itself. Other statutory inhibitions on the law-making power of the Scottish Parliament include a form of extra-territorial restriction.[210] Otherwise, however, the Scottish Parliament may make laws for Scotland in relation to a reasonably wide range of matters, including health,

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203 Administrative Courts Act, Administrative Procedure Act, Enforcement of Administrative Judgements Act: N Foster, above n 165 at 136.
204 N Foster, above n 165 at 45.
205 Article 19(4).
206 Article 28(1); S Michalowski and L Woode, *German Constitutional Law* (1999) at 25-26.
207 Scotland Act 1998.
208 Government of Wales Act 1998.
209 Northern Ireland Act 1998.
210 Scotland Act 1998, s 29(2)(a).

education, housing, aspects of economic development and civil and criminal law.[211] Executive power, including the prerogative, is transferred to Scotland as well, in parallel with the legislative competence of the Parliament.[212] The Act also authorises the Scottish executive to carry out "devolved" executive functions in relation to areas otherwise reserved to Westminster[213] and to share power with United Kingdom Ministers in certain matters.[214]

Institutionally, following devolution, Scotland has its own Parliament, elected within Scotland under a form of proportional representation.[215] It also has its own executive government, known as the "Scottish Ministers".[216] In relation to some matters at least, the First Minister of Scotland gives advice directly to the Crown.[217] Devolution has not, however, caused the creation of a separate civil service either for Scotland or for Wales, although the arrangements in Northern Ireland are retained.[218] The decision to retain a single civil service was rationalised as follows in a revision of the Civil Service Code in 1999:

> Civil servants are servants of the Crown. Constitutionally, all the Administrations form part of the Crown and, subject to the provisions of this Code, civil servants owe their loyalty to the Administrations in which they serve.[219]

Any difficulties that might arise as a result of this arrangement were left to resolution by "mutual understandings".[220] This raises the issue of the role of co-operation, to which I now turn.

Co-operation

Co-operation in a federal type system may take a variety of forms and serve a variety of purposes. One such purpose, currently in vogue,[221] is to settle disputes between the spheres of government amicably, or at least privately, without the cost and publicity of litigation. Another is to co-ordinate the activities of the various governments. Both have been adopted as goals in relation to devolution in the United Kingdom.

The most likely form of dispute between spheres of government is in relation to the boundaries of power. As a matter of law, this will not affect the Westminster Parliament which retains ultimate sovereignty. Legal disputes may arise, however, in relation to an exercise of power by a regional legislature.[222] And politically, at least, the

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211 House of Commons Library, "Devolution and Concordats", Research Paper 99/84 (1999) at 10.

212 Scotland Act 1998, s 54(2) and (3).

213 Section 63. An example is the administration of European Structural Funds: House of Commons Library, above n 211 at 12.

214 Section 56. An example is the provision of road safety information and training: House of Commons Library, above n 211 at 11.

215 Scotland Act, s 1.

216 Section 44.

217 House of Commons Library, above n 211 at 12.

218 Cf the limited definition of the "Scottish administration" in Scotland Act 1998, s 126.

219 Quoted in House of Commons Library, above n 211 at 12.

220 Ibid.

221 The Constitution of the Republic of South Africa, s 41(1)(h)(vi) (obligation to avoid "legal proceedings against one another"); Constitution of the Federal Republic of Switzerland, article 44(3) (resolution of disputes through negotiation or mediation).

222 For example, Scotland Act 1998, s 29.

boundaries of power are an issue for the Westminster Parliament also. The United Kingdom government has announced that it:

> will proceed in accordance with the convention that the UK Parliament would not normally legislate with regard to devolved matters except with the agreement of the devolved legislature.[223]

A range of measures has been included in the legislation to prevent such disputes arising. In Scotland, for example, both the Presiding officer of the Parliament and a member of the Scottish executive must consider and report on the validity of proposed legislation before enactment.[224] Law officers of either Scotland or the United Kingdom may ask the Privy Council for, in effect, an advisory opinion before a measure receives royal assent.[225] These mechanisms are reinforced by principles laid down in the Memorandum of Understanding between the Governments of the United Kingdom, Scotland and Wales.[226] But, in the event that doubt remains about the validity of legislation after enactment, jurisdiction is conferred on the Privy Council.[227]

The goal of co-operation to secure the co-ordination of executive and legislative action inevitably is nebulous. In an effort to preclude disunity, however, two mechanisms already have been put in place.

The first is the introduction of inter-governmental agreements or "concordats". These are not statutory, nor subject to parliamentary approval, but will be publicly available. Their purpose is described as "administrative co-operation and exchange of information". The first such group of agreements was released in October 1999 in the form of a Memorandum of Understanding, a supplementary agreement on a Joint Ministerial Committee and four concordats on the co-ordination of European Union policy issues, financial assistance to industry, international relations and statistics, respectively. It is envisaged that other, bilateral, concordats will be released.[228] The Memorandum of Understanding itself sets out general principles for communication, consultation and co-operation, including principles concerning the confidentiality of information exchanged between governments.

The second mechanism is institutional. The Memorandum of Understanding establishes a Joint Ministerial Committee (JMC) to "consider non-devolved matters which impinge on devolved responsibilities, and devolved matters which impinge on non-devolved responsibilities".[229] The JMC offers yet another forum for the resolution of disputes. Members of the Committee are drawn from the United Kingdom government and the executives of Scotland, Wales and Northern Ireland. Plenary meetings, chaired by the Prime Minister, are to be held annually.[230] Following the European Union model, the Committee also may meet in "functional formats".[231] A

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223 Memorandum of Understanding between the United Kingdom Government, Scottish Ministers and the Cabinet of the National Assembly for Wales, 1999, para 13.
224 Scotland Act 1998, s 31.
225 Section 33.
226 Cmd 4444, paras 22, 25 and 26.
227 Scotland Act 1998, s 103.
228 House of Commons Library, above n 211 at 24-25.
229 Memorandum of Understanding, para 23.
230 Agreement on the Joint Ministerial Committee, para A1.3.
231 Ibid, para A1.4.

further inter-governmental body, the British-Irish Council,[232] includes representatives also of the Irish Government and from the Isle of Man, Guernsey and Jersey and is intended to perform a co-ordinating role on matters of mutual interest between them all.

Observations

It is too early to predict the implications of these developments with confidence. A few general observations may be made, however, on the basis of the behaviour of common law institutions and systems of government generally, and by reference to the Australian experience in particular. Despite some cultural differences between the public services of Australia and the United Kingdom, it seems likely that the civil service in Scotland and Wales will, over time, develop regional loyalties. This will be encouraged, indeed, by the principles and practices of Westminster style parliamentary government. The boundaries of power are likely to be contested and disputes are likely to arise in unexpected ways, raising issues that may not have been predicted. Fragmentation of both policy and administration is inevitable, at least by the standards of the former, more classically unitary, state. The Joint Ministerial Committee will not necessarily be the instrument for harmony that is hoped. The dominant position of the government of the United Kingdom in relation to the Committee may be counterproductive if it leads to a culture of resentment between the centre and the regions, rather than encouraging a sense of shared enterprise.

The issue of particular relevance for present purposes, however, is the relationship of these arrangements to review of administrative action. It appears already to have been accepted, within government as well as academic circles, that the new co-operative procedures might provide a basis for judicial review, to the extent that they "create a legitimate expectation of consultation".[233] This has not been the Australian experience so far, possibly because of the relative inaccessibility of many inter-governmental agreements. Developments along these lines in the United Kingdom might have implications for judicial review here. On the other hand, the question whether inter-governmental activity might impose an impediment to review appears not to have been considered overtly. This must be a possibility, however, especially in cases where authority is jointly exercised or different sources of authority are apparently involved.[234] Differences between court systems, and in the principles and procedures for review, may raise jurisdictional issues as well.[235]

CONCLUSION

This essay has sought to show that differences between federations may be more profound than Constitutions or institutions suggest. True comparisons between federations require an understanding of their respective histories, traditions and

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232 Established under the British Irish Agreement.

233 Lord Falconer of Thoroton, then Solicitor-General, JL Deb April 1998 vol 588 21 c1132, quoted in House of Commons Library, above n 211 at 22.

234 For example, under the Scotland Act 1998, ss 56 and 63.

235 See generally, C M G Himsworth, "Judicial Review in Scotland" and P Maguire, "The Procedure for Judicial Review in Northern Ireland" in B Hadfield (ed), *Judicial Review: A Thematic Approach* (1995) at 288, 370, respectively.

cultures, including the principles of constitutional government on which they are based.

Co-operation in some form is a feature of all modern federations. Sometimes principles and procedures for co-operation are provided in a federal Constitution. More often than not, however, co-operation is extra-constitutional in character. In a few cases, such arrangements encounter constitutional obstacles and are found to be invalid for this reason, but this is relatively rare. For the most part co-operative arrangements are designed with the explicit provisions of the Constitution in mind. Even in this event, however, co-operation may present difficulties for the underlying principles of the constitutional system unless these are adequately taken into account. Relevant principles include legal and political accountability for administrative action.

Australia is a federation of a dualist kind, consistently with the common law tradition. While some provisions in the Constitution provide for co-operation, they do not fundamentally alter its dualist character; indeed, if anything, they reinforce it. The nature of the Australian constitutional system needs to be borne in mind in designing co-operative procedures. The issues at stake essentially are questions of principle. Where principles conflict, priorities may be affected by pressing practical considerations. A wide variety of co-operative mechanisms in fact is used in Australia, some of which are generally compatible with its dualist constitutional character and which enable undue conflict to be avoided. One of these, under which the Commonwealth may exercise power referred by the States, is mandated by the Constitution itself.

Another, uniquely Australian co-operative mechanism recently has encountered constitutional difficulties. Whether these ultimately are overcome or not, the template mechanism also fits somewhat uneasily into the Australian framework for public accountability and review of administrative action. One explanation for these difficulties is that it is inconsistent with the dualist character of the Australian federation. These difficulties might in part be met by providing a constitutional framework for such mechanisms that settles questions of jurisdiction and power. Whether this is necessary, given the presence in the Constitution of the reference power, is a question for governments, and perhaps the High Court, to answer.