Co-operative federalism in Australia – an intellectual resource for Europe? I

by Justice R S French

This two-part article is taken from a lecture given at the Institute of Advanced Legal Studies on February 22, 2006.

INTRODUCTION

The European Union has, in recent times, been much pre-occupied with the adoption of a constitution. That pre-occupation may be seen as a response to the demands placed upon community governance by the increasing number of Member States. It may also be seen as an attempt to mitigate the perceived tension between effective and representative government sometimes referred to as the democratic deficit.

The rejection of the proposed new constitution by referendum in France and Germany last year was a blow to the development of a document which could arguably be called a constitution as distinct from "an aggregate of treaties, case law and political convention" (Ford, J (2004), "The Age of Constitutions, Reflecting on the New Faith in Federal Constitutions" (National Europe Centre, Canberra Paper No 132, May 2004) citing G Puig (2003) "The European Constitution: Past and Future" (National Europe Centre, Canberra Paper No 115, November 2003)). And yet that aggregate of proto or pre-constitutional arrangements has delivered much. They might even boldly be described as reflecting a species of co-operative federalism without a federation.

In Australia, with a written constitution over a century old, the demands of the global market place and the challenges of trans-national crime and terrorism have required national responses with the co-operative exercise of powers divided between the polities of the federation. Some of these responses are specifically provided for by the constitution. Others are adopted by consensual mechanisms for which the constitution does not specifically provide but which the parties to the federation are left free to use. All come under the general rubric of co-operative federalism.

The achievement of common or coordinated responses by groups of polities, whether in federation or not, may attract similar solutions and give rise to similar problems. Although operating on vastly different population sizes and across vastly different ranges of diversity, Europe and Australia may benefit by mutual consideration of the approaches taken by each other in co-operative arrangements between their Member States.

Recognition of the benefits that Australia can derive from a consideration of European approaches to the challenge of community governance is reflected in the establishment of the National Europe Centre at the Australian National University in Canberra. In an address given in November 2005 at the ANU, Professor Simon Pronitt, Director of the Centre, remarked upon the utility of drawing lessons from Europe and the European Union relevant to Australia. The absence of any principle of subsidiarity and the guarding by Australian States of their traditional competencies, particularly in the area of criminal justice, were pointed out as obstacles to national coordination.

On the other hand in his 2001 Robert Schuman Lecture, Chris Patten, the European Commissioner for External Relations, pointed to the lessons that Europe could draw from the process by which the Australian Federation was created. He referred in particular to the way in which those who drove that process "… made sure all Australia's people had an emotional bond to the constitution and government." For Europe he saw a need to "… connect national political institutions to supranational ones. To win over the hearts and minds of those alienated by the whole process." (Patten, "Sovereignty, democracy and constitutions: finding the right formula", National Europe Centre Paper No 1, Canberra April 19, 2001).

Australia, although operating under a written constitution as a fully fledged federation, has had to find co-operative mechanisms including delegations and referrals of legislative power, intergovernmental agreements backing interlocking legislation, cooperation at executive levels and in the application of judicial power.

These are all things that Europeans may perhaps consider in the evolution of their own community processes as, for its part, Australia may find inspiration in European solutions to problems requiring transnational cooperation.

Against that background a consideration of co-operative federalism in Australia is undertaken.

FEDERATION AND COOPERATION

Federation is and remains a widespread family of responses to the problem of combining people from distinct political communities into viable national polities. The idea dates back at least to the 17th century and the writings of Johannes Althusius. He proposed a theory of federations in which the various kinds of human associations such as family, guild, province and state had its own function in allowing the living of a full life. He proposed that such associations in effect enter into agreements, *pactum foederis*, to co-exist to their mutual benefit (*Stanford Encyclopaedia of Philosophy,* http://plato.stanford.edu/entries/federalism at February 16, 2006). Many other political philosophers have considered the actual and desirable forms of association that fall within the large family of federalism – see for example in the 18th and 19th centuries Montesquieu, *The Spirit of the Laws* (1748); Hume, *Idea of a Perfect Commonwealth* (1752); Rousseau, *A Lasting Peace through the Federation of Europe* (1761); Kant, *On Perpetual Peace* (1796); Madison, Hamilton and Jay, *The Federalist Pape*rs; J S Mill, *Considerations of Representative Government* (1861); PJ Proudhon, Du Principe Federatif (1863)

The distinguished Australian constitutional scholar, Professor Geoffrey Sawer, writing in 1976, thought it a futile exercise to try to define 'federalism'. He considered it appropriate to speak of 'the spectrum of federalism'– that is the range of reactions to the situation in which:

> *…geographical distribution of the power to govern is desired or has been achieved in a way giving the several governmental units of the system some degree of security – some guarantee of continued existence as organisations and as holders of power (Sawer,* Modern Federalism*, Pitman (1976) at 2).*

The words "co-operative federalism" have been used to describe a range of mechanisms to manage the conflict, duplication, costs and inefficiencies that can arise in the concept of federation. The importance of such mechanisms to its effective functioning is obvious.

The distribution of power between Commonwealth and States set out in the Australian constitution reflects the objectives of what Sawyer called "coordinate federalism". It involves the transferring of particular responsibilities and powers to the central government leaving the balance of the regions. That distribution of power however brings into existence the boundaries which define it. Limits are placed on the powers of the centre and of the regions, in this case of the Commonwealth and the States. Because it involves divided powers the constitution gives Australia no standard gauge railway for good government across the country and across the component parts of the federation. To solve national problems which cannot be covered by the legislative powers of either the Commonwealth or the States alone demands the coordinated and therefore co-operative use of governmental power from all units of the federation. This is co-operative federalism.

Having so stated the general problem it is helpful to consider briefly how the Australian federation came to be, how the constitution creates options for co-operative federalism and how co-operative arrangements can be effected without any specific constitutional sanction.

THE MAKING OF AUSTRALIA – A POTTED HISTORY

In 1768 the Royal Society of London for the Improvement of Natural Knowledge engaged Captain James Cook to lead a scientific expedition to observe the transit of Venus across the Sun from a vantage point in Tahiti. After the observations were made on June 3, 1768, Cook continued his voyage in search of a postulated southern continent of Terra Australis. On that voyage Cook found New Zealand and, in April 1770, the south eastern coast of Australia. He mapped the eastern coast of Australia to Cape York and claimed it for the British Crown.

Following the loss of Britain's American colonies, New South Wales was designated, in 1786, as a place to which British convicts might be transported (Declaration by Order in Council in 1786 pursuant to 24 Geo III c 56 (1784)). On October 12, 1786 Arthur Phillip was commissioned by the British Government as Governor of the proposed new colony of New South Wales. He arrived at Sydney Cove on January 26, 1788 as the embodiment of the authority of the British Crown. It was the same year that 13 American colonies voted on the constitution of the United States. The fleet that accompanied Governor Phillip brought with it 717 convicts. Australia was, of course, already occupied by Aboriginal people. However under the common law doctrine of the times they were not recognised as having any legal rights or entitlements to the land which they inhabited (enunciated 100 years later in *Cooper v Stuart* [1886] App Cas 286). This was a doctrine not overturned until much later by the High Court in *Mabo v Queensland (No 2)* (1992) 175 CLR 1 – a common law judgment of great importance influenced by principles of international law.

One constitutional historian has written that European Australia began as a gaol which covered half a continent. New South Wales covered all of Australia east of the 135th meridian together with the adjacent islands (see McMinn, *A Constitutional History of Australia,* Oxford University Press (1979) at 1). It was of course much more than a prison and much larger than was necessary to constitute a prison. In

1823 the first appointed local legislative body was created and a Supreme Court established. In 1825 Tasmania was carved out of New South Wales as a distinct colony. In 1842 the Australian Constitutions Act 1842 (UK) created a representative Legislative Council for New South Wales. The transportation of convicts continued into Tasmania until it acquired representative government in 1854.

In 1850 the Australian Constitutions Act 1850 (UK) was passed by the British Parliament. It followed a report by a committee of the Privy Council in 1849 which had inquired into the constitutional position of the Australian colonies. Under that Act colonial legislatures were empowered to make and alter their own constitutions. The 1850 Act also provided for the colony of Victoria to be separated out from New South Wales. That separation took effect in January 1851.

The Legislative Council of Tasmania, which was established in 1854, passed a Constitution Act in the same year. Constitutions were enacted for New South Wales and Victoria in 1855. Those constitutions required express statutory authorisation by the United Kingdom Parliament because they conferred on the colonial legislatures powers in respect of the waste lands of the Crown which had not been conferred by the Australian Constitutions Act 1850 (UK). As a matter of convention these constitutions adopted a framework of responsible government.

Queensland was created out of New South Wales as a separate colony in 1859. This was done by an Order in Council under the Australian Constitutions Act 1850 (UK). So the colony began its life with a constitution defined by the Order in Council which was similar in terms to the 1855 New South Wales constitution. South Australia came into existence as a province in 1834 by direct Imperial statute. In 1851 a representative government with a Legislative Council was established in South Australia and in 1855 the South Australian Constitution Act 1855 was passed by the South Australian legislature.

Western Australia, which was never part of the colony of New South Wales, was established as a colony in 1829. It achieved representative government in 1890 following the authorisation of the Constitution Act 1889 (WA) by an Imperial statute. It set up a bicameral legislature which included a nominated Legislative Council. This was replaced by an Elective Council in 1893. A Constitution Acts Amendment Act 1899, passed by the West Australian Parliament, consolidated the earlier enactments.

By 1890 there was one continent with six colonies with representative governments, each independent of the other and each deriving all of its powers from the authority conferred upon its legislature by the British Parliament. The impetus for federation came from within those colonies. It was apparent as Professor Darryl Lumb has observed:

> *The coexistence of six colonies on the Australian continent independent of each other in local policies, although united by common law, nationality and similar institutions of government, could not be the basis for a permanent constitutional system* (Lumb RD, *Australian Constitutionalism* (Butterworths 1983) at 47).

The term "nationality" referred to the common status of the colonists as British subjects. It also referred to a wider perception of a people or race. At the turn of the nineteenth century Australians used the term "people" and "race" interchangeably (see Birrell, *Federation: The Secret Story*, Duffie and Snellgrove (2001) at 287). "Nationality" fed into early approaches to immigration restriction and the white Australia policy. When Alfred Deakin introduced the Immigration Restriction Bill 1901 he spoke of a desire to be one people without the admixture of other races. The historian Bob Birrell characterised his words as reflecting an aspiration for "a shared sense of peoplehood... to be expected from a nationalist initiating the process of nation building". It was reflected in Henry Parkes' statement during the Constitutional Conventions of the 1890s when the Australian constitution was being drafted that: "*The crimson thread of kinship runs through us all.*"

The constitution eventually adopted was drafted through a number of Conventions of the colonial delegates in the 1880s and 1890s. It was accepted by a referendum and given legal force by a Statute of the British Parliament, the Commonwealth of Australia Constitution Act 1900. The Commonwealth of Australia came into existence on January 1, 1901. The distribution of powers between the Commonwealth and the States reflected in the constitution was the emanation of an essentially co-operative vision adopted by the delegates of the Australian colonies. Its function and its content reflected an agreement reached by the six colonies. Against that background the question arises "How does the constitution specifically recognise and create opportunities for co-operative federalism?" And after that, there is the further question – "What mechanisms of co-operative federalism are available independent of specific constitutional reference?"

Before considering them, it is useful to have regard to the ways in which the constitution specifically allows for co-operative or consensual arrangements within the framework of distributed powers for which it provides.

TEXTUAL MARKERS OF CO-OPERATIVE FEDERALISM

The constitution effected an agreed transfer of powers from colonial governments to the new Commonwealth covering a range of subject matter areas set out, for the most part in section 51 – (see Annexure 1 at the end of the second part of this article). It also has plenary legislative power with respect to Australian Territories, such as the Northern Territory and the Australian Capital Territory. Within the areas of Commonwealth power specified in

section 51 there are indicators of opportunities for co-operative federalism in the exercise of legislative powers. So the Commonwealth Parliament may make laws for the peace, order and good government of the Commonwealth with respect to:

> *(xxiv) The service and execution throughout the Commonwealth of the civil and criminal process and the judgments of the courts of the States.*
>
> *(xxv) The recognition throughout the Commonwealth of the laws, the public Acts and records, and the judicial proceedings of the States.*
>
> *(xxxiii) The acquisition with the consent of the State, of any railways of the State on terms arranged between the Commonwealth and the State.*
>
> *(xxxiv) Railway construction and extension in any State with the consent of that State.*
>
> *(xxxvii) Matters referred to the Parliament of the Commonwealth, by the Parliament or Parliaments of any State or States, but so that the law shall extend only to States by whose parliaments the matter is referred or which afterwards adopt the law.*
>
> *(xxxviii) The exercise within the Commonwealth, at the request or with the concurrence of the Parliaments of all the States directly concerned, of any power which can at the establishment of this Constitution be exercised only by the Parliament of the United Kingdom or by the Federal Council of Australasia.*

Chapter III of the constitution, dealing with the judicature, contains provisions under which the courts of the various States are to be repositories for the exercise of such federal jurisdiction as is conferred upon them by the Commonwealth Parliament. This is in addition to the power that the Commonwealth Parliament has to create its own courts and define their jurisdiction. Section 77 of the constitution authorises the Parliament to make laws defining the jurisdiction of federal courts and laws:

> *77(iii) Investing any court of the State with federal jurisdiction.*

So too community law can be administered in national courts as well as in the Courts of the Community.

Section 80 of the constitution, which requires that the trial on indictment of any offence against any law of the Commonwealth be by jury, also requires that "... every such trial shall be held in the State where the offence was committed, and if the offence was not committed within any State, the trial shall be held at such place or places as the Parliament prescribes." It is also linked to the Commonwealth's ability to use State courts for the exercise of federal jurisdiction arising under the criminal law of the Commonwealth. It also is linked to the Commonwealth's ability to use State prisons.

In Chapter IV there are provisions mandating distribution of Commonwealth revenue to the States – see ss 87, 89, 93 and 94. Section 96, which provides for conditional financial grants from the Commonwealth to the States, supports the uniform income tax scheme. The Commonwealth Parliament passed an Act to grant general revenue to the States on the condition that they did not impose their own income tax. Grants made under section 96 have, by way of the conditions attaching to them, allowed the Commonwealth to exercise powers with respect to education, health, housing, the environment and other areas not covered by its legislative responsibilities. It is in form, if not in substance, a provision which requires cooperation in the limited sense that no State is obliged to accept a financial grant under s 96 on conditions which it does not regard as acceptable.

Section 105 of the constitution allows for the Parliament of the Commonwealth to take over from the States their public debts. Although initially limited to debts existing at the time of federation, that limitation was removed in 1910 by referendum. In 1928 section 105A was added to the constitution by referendum. It authorises the Commonwealth to make agreements with the States with respect to their public debts.

The constitutions of the States reflecting, in the case of Western Australia, its pre-federation colonial constitution, are continued by section 106 of the Commonwealth Constitution. The powers of the State Parliaments are saved by section 107, as are the laws of the various States by section 108.

States may surrender territory to the Commonwealth under section 111, again an essentially co-operative exercise. It was by such a surrender that the Australian Capital Territory was created and similarly the Northern Territory of Australia. Section 118 provides for full faith and credit to be given throughout the Commonwealth to the laws, public Acts and records and judicial proceedings of every State. Every State is required by section 120 of the constitution to make provision for the detention in its prisons of persons accused or convicted of offences against the laws of the Commonwealth and for the punishment of the persons convicted of such offences. Other exercises of power which require the consent of the States, include the alteration of their limits and the creation of new States (ss 123 and 124).

As may be seen from this review the constitution provides for what can properly be described as co-operative federalism under which, by making suitable arrangements, Commonwealth and States, acting together, can "... achieve objects that neither alone could achieve" (*Deputy Federal Commissioner of Taxation (NSW) v WR Moran Pty Ltd* (1939) 61 CLR 735 at 774 (Starke J). Such cooperation may relate to the exercise of legislative, executive or judicial power. Importantly, and in addition to the specific co-operative arrangements for which the

constitution provides, there is a record of intergovernmental agreements between the Commonwealth, the States and the self-governing territories to deal with national problems which need to be attacked by legislation from each of them. Such agreements form the political foundation for schemes of complementary and interlocking legislation by all the polities concerned.

MECHANISMS OF CO-OPERATIVE FEDERALISM

Specific mechanisms of co-operative federalism in Australia include:

1. Intergovernmental agreements providing for:
   - uniform legislation enacted separately by each participating polity;
   - interlocking legislation by Commonwealth, State and Territory parliaments which may involve adoption of a standard law enacted by one polity.
2. Delegation of legislative power:
   - by the Commonwealth under the territories' power;
   - by the Commonwealth under section 51(xxxviii) of the constitution.
3. Referral of State legislative power to the Commonwealth on a particular subject or to support a particular statute.
4. Executive cooperation.
5. Judicial cooperation.

INTERGOVERNMENTAL AGREEMENTS PROVIDING FOR UNIFORM OR COMPLEMENTARY LEGISLATION

A well known example of uniform legislation was the enactment of uniform Companies Acts of 1961. Under a co-operative scheme agreed between them, each State Parliament passed its own Companies Act which mirrored the terms of the Companies Act of every other State. The scheme was simple in concept but susceptible to the growth of misconformity over time because of pressures brought to bear upon particular State legislatures. The law in each State under such arrangements had application only within the territorial limits of the jurisdiction of that State. Jurisdiction under the Companies Act of a State was exercised by the courts of that State. There was a mosaic of similar laws throughout the country, rather than one law covering the whole country.

In 1989 the Commonwealth Parliament attempted to enact a national Corporations Law relying upon its constitutional power under section 51(xx) to make laws with respect to 'trading and financial corporations formed' within the limits of Australia. However the law was found by the High Court in *New South Wales v The Commonwealth* (1990) 169 CLR 482 to exceed the power conferred upon the Commonwealth. Because of the word 'formed' which appears in the statement of that power in section 51(xx) of the constitution it was held not to extend to the formation of such corporations. There was therefore a lacuna in the Commonwealth power with respect to corporations which could only be filled by State parliaments. The decision was much criticised. It was described by Kirby J in *Byrnes v R* (1999) 164 ALR 520 as a "narrow constitutional decision" which computed it to the "grotesque complications that exist in the regulation of corporations under Australian law." But the failure of the unilateral attempt to create a comprehensive national Corporations Law led to a new form of co-operative arrangement. This involved the adoption by the States of a Commonwealth statute passed under its plenary power in section 122 of the constitution to make laws with respect to the Australian Capital Territory.

The new co-operative scheme was adopted reflecting heads of agreement signed between the Commonwealth and the States at Alice Springs on June 29, 1990. A Commonwealth Corporations Act 1989 and an Australian Securities Commission Act 1989 were enacted as laws for the Australian Capital Territory. Each State then passed its own Corporations Act and Australian Securities Commission Act applying the provisions of the Territory Acts as laws of the State. Each State Corporations Act conferred jurisdiction on the Federal Court with respect to civil matters arising under the Corporations and ASIC laws. Like jurisdiction was conferred by each State Act on the Supreme Court of the State and the Supreme Court of the Australian Capital Territory. The Commonwealth Corporations Act itself directly conferred jurisdiction on the Federal Court of Australia with respect to civil matters arising in the Australian Capital Territory. This scheme which was, in essence, a mirror legislation scheme, embodied another kind of co-operative arrangement, namely the cross-vesting of jurisdiction in State and federal courts so that any matter arising under a Corporations Law or ASIC Act anywhere in Australia could be dealt with without territorial limitation.

The investing of federal jurisdiction in State courts is expressly authorised by the constitution. But the High Court held in *Re Wakim; Ex parte McNally* (1999) 198 CLR 511 that this long-standing co-operative mechanism is asymmetrical as the constitution does not authorise the investing in federal courts of jurisdiction arising under laws of the States. That is, of course, subject to the proposition that federal jurisdiction may incorporate, as an element of a matter before the Court, claims arising under the laws of the States and under the common law (*Fencott v Muller* (1983) 152 CLR 570 at 608; *Stack v Coast Securities (No 9) Pty Ltd* (1984) 154 CLR 261 at 294–295; *PCS Operations Pty Ltd v Maritime Union of Australia* (1998) 153 ALR 520 at 524–25).

In *Re Wakim* McHugh J observed (at 556):

> *...co-operative federalism is not a constitutional term. It is a political slogan, not a criterion of constitutional validity or power.*

This, with respect, seemed an unduly dismissive statement. The constitution is the product of an historic exercise in co-operative endeavour by the pre-federation colonies that became the States. It provides a framework which requires a degree of co-operation if it is not to be unworkable. In any event, as will be seen below, the difficulties generated by the *Wakim* decision were overcome by resort to referral of relevant powers from the States to the Commonwealth.

The difficulties which led to the invalidation of the cross-vesting of jurisdiction under the co-operative corporations law scheme were compounded by a restrictive approach adopted in the High Court, to the construction of laws made under the scheme in so far as they conferred functions under State law upon the Commonwealth Director of Public Prosecutions and the Australian Securities and Investments Commission (see *Byrnes v R* (1999) 199 CLR 1; *Bond v R* (2000) 201 CLR 213; *R v Hughes* (2000) 202 CLR 535 and *Macleod v The Australian Securities and Investments Commission* (2002) 191 ALR 543 and see De Costa, *The Corporations Law and Co-operative Federalism after the Queen v Hughes* (2000) 22 Syd Law Rev 245 and McConvill and Smith, *Interpretation and Co-operative Federalism; Bond v R from a Constitutional Perspective* (2000) 29 Fed Law Rev 75).

These difficulties however raised questions of statutory rather than constitutional interpretation and so have a less intractable quality about them. Other examples of this kind of co-operative federalism include the adoption by the States of gene technology legislation passed by the Commonwealth and laws relating to research involving human embryos.

Prior to 2000 the use of gene technology was overseen by a Commonwealth Government Committee called the Genetic Manipulation Advisory Committee (GMAC), which advised the Minister for Health. It covered fields including molecular biology research, genetic modification of plants, the production of therapeutic goods, bio remediation and industrial applications of genetic technology. The GMAC did not have any legislative framework. Following an extensive public consultation process which began in 1998 an Intergovernmental Agreement was made between the Commonwealth and the States. A Gene Technology Act was passed through the Commonwealth Parliament in 2000. Complementary legislation was passed in each of the States and Territories and a Ministerial Council set up to create a policy framework for the administration of the national scheme and to oversee periodic reviews of the legislative framework. The first such review was commenced late in 2005.

In 2002 the Council of Australian Governments, comprising the Prime Minister, the Premiers of each of the States and the Chief Minister of the self-governing territories, agreed that all would introduce legislation banning human cloning. They also agreed to establish a national regulatory framework for the use of excess assisted reproduction technology embryos. The system was to be administered by the National Health and Medical Research Council. The Commonwealth Parliament then enacted an Act called the Research Involving Embryos and Prohibition of Human Cloning Act 2002. Each of the States and Territories introduced corresponding laws. The States or Territories could appoint officials from their own jurisdictions to monitor compliance with the Commonwealth and State laws or leave the matter to federal officials if they wished. The scheme also required a review to be carried out after five years. This was done at the end of last year by a committee chaired by a former Federal Court Judge, the Hon John Lockhart QC, who sadly died early in 2006.

It will be noted that these schemes involve not only interlocking or complementary legislation, but the co-operative use of Commonwealth or State officials to administer them and to monitor compliance with them. The technique of adoption by all polities of common form laws passed by one of them is well established.

One commentator has pointed out that the issue of greatest concern about the enactment by States of common form laws is the mechanism for approving amendment to them. This may vary depending upon the terms of the intergovernmental agreement which backs that adoption. Some require the unanimous support of all participating jurisdictions. As has been observed:

> *While the principle of unanimity protects the interests of all involved, it might also result in matters being frozen in time because agreement cannot be reached on changes* (Twomey *The Constitution of New South Wales*, Federation Press (2004) at 822).

It is important to observe that in these difficult areas of genetic technology and stem cell research intergovernmental agreements and cooperative legislative schemes do not spring into existence fully formed from the brows of experts. In Australia, they have been achieved through processes of lengthy negotiations sometimes involving extensive public consultation. The agreements themselves contain provisions for the review and evolution of the schemes which they back and do not permit dominance by the Commonwealth which is undoubtedly the most powerful government in the Federation.

In the area of stem cell research the differing regulatory frameworks of the members of the European Union reflect significant normative differences which militate against cooperative, uniform approaches. In a paper delivered at the National Europe Centre in Canberra, Professor Andrew Webster of the University of York, pointed to the

powerful religious and ethical factors underpinning hostility to therapeutic cloning in some European countries (A Webster, "Pan-European and national perspectives on stem cells: developing a unified regulatory approach?" National Europe Centre, ANU Canberra, February 21, 2006). He pointed also to the different kinds of regulatory structures that exist. Some countries have a loose pluralistic culture through which their policy processes develop. Others have a more centralised directive style. He observed:

> *There are then a diversity of regulatory regimes and political cultures within Europe, a series of overlapping technological 'zones', movement across and mobilisation of different regimes in (public and private) scientific networks. This situation does not lend itself to convergence and a Pan-European regulatory regime that secures support in the European Parliament and member States.'*

The diversity in Europe can be compared with divergences between federal and state-based restrictions in the United States of America. If Professor Webster's observations are correct, then it seems unlikely that in areas of normative contention a legislative approach to a Pan-European regulatory arrangement is imminent. He makes the point however that the European Commission can make progress if it focuses on relatively non-contentious areas such as the development of harmonised technical standards. This is perhaps an area in which a cooperative approach which is slow and incremental and gradually building consensus on such matters as standards and practices, will be the most fruitful. A cooperative approach based on an underlying agreement may yield more common regulatory regimes than a legislated "top down" approach.

ADOPTION BY STATES AND COMMONWEALTH OF STATE ACTS

The obverse to the adoption by the States of Commonwealth legislation is seen in arrangements under which the Commonwealth and States adopt an Act passed by another State Parliament. This has occurred in relation to the regulation of the national electricity market and third party access pricing for gas pipelines in Australia.

In 1989, the Industry Assistance Commission delivered a report to the Commonwealth Treasurer which described Australia's gas and electricity industries as particularly inefficient (Industries Assistance Commission – Government (Non-Tax) Charges Vol 1, 1989). A follow-up report delivered in 1991 found an urgent need for reform of these industries. At a special Premiers' Conference held in that year an agreement was reached that a National Grid Management Council be established to consider arrangements for an interstate electricity network. The National Grid Management Council recommended to the Council of Australian Governments that there be established a competitive market in the trading of electricity. In May 1996 New South Wales, Victoria, Queensland, South Australia and the Australian Capital Territory entered into an agreement known as the National Electricity Market Legislation Agreement. Each of them agreed to enact a National Electricity Law with South Australia as the lead jurisdiction. The National Electricity Law originated as a schedule to the *National Electricity (South Australia) Act 1996* (SA). It was applied as a law of South Australia by section 6 of that Act and was applied and adopted as the law of the other participating States by their own State statutes. The National Electricity Law provides that the Ministers of the participating jurisdictions may approve a Code of Conduct called the National Electricity Code. The participating jurisdictions also established a National Electricity Code Administrator (NECA) as a company incorporated under the Corporations Act 2001 and limited by guarantee. The participating jurisdictions are members of the company. NECA administered the national electricity market in accordance with the requirements of the National Electricity Code. The system was recently reviewed and in 2004 an Australian Energy Regulator set up. The system provided, and continues to provide, an interesting and complex example of co-operative federalism, albeit the Commonwealth was not a party to the original agreement or the relevant legislation.

Following a report in 1993 on National Competition Policy, known as the Hilmer Report, the 1995 National Competition Policy Agreement was made between the Commonwealth, State and Territory Governments. On November 7, 1997 the Natural Gas Pipeline Access Agreement was signed between those Governments. The parties recognised that certain gas transmission pipeline systems are natural monopolies and require regulation in relation to the granting and terms of access. Pursuant to that agreement South Australia enacted a *Gas Pipelines Access (South Australia) Act 1997* (SA) (the SA Gas Act). Schedule 1 to that Act is entitled "Third party access to natural gas pipelines." Schedule 2 sets out the "National Third Party Access Code for Natural Gas Pipeline Systems." Schedules 1 and 2 together comprise what is called the "Access Law." Schedule 2 is referred to as "the Code." The other States, the Northern Territory and the Australian Capital Territory enacted laws which adopted the provisions of the SA Gas Act and applied the Access Law and Code as laws of those States and Territories. The Gas Pipelines Access (Commonwealth) Act 1998 applied to the adjacent area, the external areas (other than Norfolk Island and Antarctica) and the Jervis Bay territory.

The Code came into effect on August 14, 1998. The national regulatory scheme so adopted provides for regulation of access to and use of the pipelines by "relevant regulators." Functions were conferred on the Australian Competition and Consumer Commission (ACCC). The Code also provides for a relevant Appeal Body which, according to the circumstances, can be the Australian Competition Tribunal ("the Tribunal"). The term "service

provider" describes the owner and operator of pipelines. The Code applies to pipelines which are "covered" by it.

The Australian Energy Regulator mentioned earlier as a recent development in the regulation of Australian electricity markets, was established by section 44AE of the Trade Practices Act 1974 (Cth) with effect from June 2005. It was established pursuant to the Australian Energy Market Agreement made between the Commonwealth, the States, the Australian Capital Territory and the Northern Territory. The relevant law governing the Australian energy market is a law of the State of South Australia, applied as a uniform energy law by the other States and by the Commonwealth itself in their respective areas of legislative competence. The Australian Energy Regulator is an authority created by the Commonwealth Parliament but exercising functions conferred upon it by the parliaments of the States. To the extent that those functions involve the exercise of duties by the Regulator, the Commonwealth legislation is framed to ensure the linking of such duties to the widest range of heads of Commonwealth legislative power. This reflects the arrangements reached earlier in the area of access by third parties to privately owned gas pipelines.

In the area of electricity and gas regulation, the co-operative schemes have a degree of complexity which is made more complicated in some cases by State-based price regulators. There is obviously a degree of political sensitivity about energy prices. State governments are unlikely to yield all control of these matters to the Commonwealth, especially when they might feel the political consequences of significant price variations.

Perhaps the least complicated means of giving effect to national legislative schemes is for the States to refer the relevant legislative powers to the Commonwealth. There are obvious concerns about the use of that process. It can lead to an incremental wasting of State legislative power taking Australia further in the direction of a unitary constitution. There are protective devices possible to confine the scope of referrals to statutes of a particular text, to limit them temporally and to terminate the referral in the event of its abuse by the Commonwealth. These devices do however depend for their efficacy on particular constructions of the constitution. The referral technique is considered below.

REFERRAL OF POWERS BY STATES AND COMMONWEALTH – CONTENT AND DRAFTING HISTORY

The referral power is to be found in section 51(xxxvii) which is in the following terms:

> *51. The Parliament shall, subject to this Constitution, have power to make laws for the peace, order, and good government of the Commonwealth with respect to:*
>
> *(xxxvii) Matters referred to the Parliament of the Commonwealth by the Parliament or Parliaments of any State or States, but so that the law shall extend only to States by whose Parliaments the matter is referred, or which afterwards adopt the law.*

Predecessors of this provision may be found in the recommendations of a Committee of the Privy Council which inquired into the constitutional position of the Australian colonies in 1849 and recommended the establishment of a General Federal Assembly. The Committee recommended that the powers of the Assembly include:

> *9. The enactment of laws affecting all the colonies represented in the General Assembly on any subject not specifically mentioned in this list, and on which it should be desired to legislate by addresses presented to it from the legislatures of all the colonies.*

A similar proposal for referral of residual powers from the colonies was recommended by Wentworth's Constitutional Committee of 1853. And the Select Committee which drafted the Victorian constitution in a Report of 9 December 1853 recommended the occasional convocation of a General Australian Assembly to legislate on questions of vital inter-colonial interest as were submitted by the Parliament of any legislature of one of the Australian colonies. The draft bill, prepared by WC Wentworth in 1857, for the creation of an Australian Federal Assembly provided it should have power to deal with specified subjects "and any other matter which might be submitted to it by the legislatures of the colonies represented therein."

The Federal Council of Australasia established by the Federal Council Act 1885 was to be given authority, at the request of the legislatures of two or more of the colonies represented on it, to make laws concerning:

> *(h) Any matter which at the request of the legislatures of the colonies Her Majesty by Order in Council shall think it fit to refer to the Council:*
>
> *(i) Such of the following matters as may be referred to the Council by the legislatures of any two or more colonies, that is to say – general defences, quarantine, patents of invention and discovery, copyright, bills of exchange and promissory notes, uniformity of weights and measures, recognition in other colonies of any marriage or divorce duly solemnised or decreed in any colony, naturalisation of aliens, status of corporations and joint stock companies in other colonies than that in which they have been constituted, and any other matter of general Australasian interest with respect to which the legislatures of the several colonies can legislate within their own limits, and as to which it is deemed desirable that there should be a law of general application: provided that in such cases the Acts of the Council shall extend only to the colonies by whose legislatures the matters shall have been so referred to it, and such other colonies as may afterwards adopt the same.*

In the event the Federal Council failed. New South Wales and New Zealand did not attend any of its meetings. Fiji which was a member came to one and South Australia only participated between 1889 and 1891. Its authority was limited, it had no executive and no revenue and was branded as a Victorian invention foisted on the other colonies (see Sharwood), "The Australian Federal Conference of 1890" in G Craven (ed) *The Convention Debates 1891–1898: Commentaries, Indices and Guide* (Sydney: Legal Books, 1986) vol 6, 41–2).

The General Assembly proposal and the Federal Council did not themselves involve the creation of a federation. Nevertheless, the notion of referral of powers on a consensual basis to a central legislating authority persisted and found its expression in section 51(xxxvii). Substantive debate about the referral clause occurred at the third session of the Federal Convention for the drafting of a Commonwealth Constitution held in Melbourne in 1898. Its form then was much as it is now, although it was verbally amended to its present form later in the session. Delegate, Alfred Deakin, acknowledged the ancestry of the clause in section 15 of the Federal Council Act 1885. He expressed a concern that if allowed to remain in what he called its "present restricted form" it would be altogether unsuitable to the differing conditions of the Federal Parliament. In particular, if something less than all the States referred power he was concerned there might not be power to authorise expenditure or the raising of money by taxation which might be necessary for the exercise of the referred power. He also essayed the view that the laws made under this provision would not be "in the strict sense of the term, federal laws" (see further G Winterton, HP Lee, A Glass & JA Thomson *Australian Federal Constitution Law: Commentary and Materials* (Sydney: Law Book Co, 1999) 411–412, citing JA La Nauze (ed) *Federated Australia: Selections from Letters to the* Morning Post *1900–1910* (Melbourne: MUP, 1968) 97).

This, however, reflected a concern that they would not be laws which applied to the whole of the federation if made pursuant to a referral by some but not all of the States.

Deakin was also concerned about the possibility of revocation of a referred power, as the following passage (from the *Official Record of the Debates of the Australasian Federal Convention* (Third Session), Melbourne, 20 January to 17 March, 1898, 217) makes clear:

> *Another difficulty of the sub-section is the question whether, even when a State has referred a matter to the federal authority, and federal legislation takes place on it, it has any – and if any, what – power of amending or repealing the law by which it referred the question? I should be inclined to think it had no such power, but the question has been raised and should be settled. I should say that having appealed to Caesar, it must be bound by the judgment of Caesar and that it would not be possible for it afterwards to revoke its reference. It appears to me that this sub-section, which is certainly one of the very valuable sub-sections of this clause, affording, as it does, means by which the colonies may by common agreement bring about federal action, without amending the Constitution, needs to be rendered more explicit.*

Doctor John Quick recognised the possibility that the referral of power could effect de facto constitutional change. His principal objection to it (at p 218 – see above) was that:

> *[I]t affords a free and easy method of amending the Federal Constitution without such amendments being carried into effect in the manner provided by this Constitution.*

Isaac Isaacs and others (at p 222, see above) took a longer view:

> *In the course of the existence of the Commonwealth questions may arise that we do not foresee, and without any amendment of the Constitution the States may if they choose refer them to the federal power.*

He was of the view (at p223, see above) that there was no power of revocation:

> *With regard to the other point that a State may repeal a law, I do not agree with that argument. If a State refers a matter to the Federal Parliament, after the Federal Parliament has exercised its power to deal with that matter, the State ceases to be able to interfere in regard to it.*

Richard O'Connor observed (at p223, see above) that a law once passed under this provision would become a federal law. Isaacs replied: *"Yes, and nothing less than the federal authority can get rid of it."*

Justice R S French

Federal Court of Australia; former Inns of Court Fellow, Institute of Advanced Legal Studies