The Hughes Case: The Reasoning, Uncertainties and Solutions

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The High Court judgments in R v Hughes *have created serious uncertainties about the administrative powers of Commonwealth authorities under the Corporations Law and other Commonwealth-State co-operative schemes. The uncertainties are regrettable. There are solutions involving State references to enable the enactment of Commonwealth legislation under section 51(xxxvii) of the Constitution. However, references on the subject matter of a co-operative scheme, such as those recently agreed by the States in relation to the Corporations Law, are not necessary: much more limited references would suffice to overcome the problems created by* Hughes.

VERY serious uncertainties have been created by the judgments of the High Court in *R v Hughes*[1] concerning the exercise by Commonwealth authorities, such as the Australian Securities and Investments Commission and the Director of Public Prosecutions, of functions and powers purportedly conferred upon them by State legislation with Commonwealth consent.

Up to the time of writing, the Corporations Law had been the main focus of efforts by Commonwealth and State governments to remove the uncertainties created by *Hughes* and an agreement had been reached between the Commonwealth

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1. (2000) 171 ALR 155.

and States on the legislation to be sought.[2] However, the administration of the many other co-operative Commonwealth-State schemes is suffering from similar problems.[3] This paper will outline the reasoning in *Hughes* and the uncertainties created by it, canvass various proposed solutions including the agreed measures concerning the Corporations Law, and suggest a simple and quick solution for the other schemes.

THE CASE LAW BEFORE HUGHES

For many decades States have, with Commonwealth consent, conferred a variety of non-judicial powers and functions[4] on Commonwealth officers[5] and authorities. The decision of the High Court in *R v Duncan; Ex parte Australian Iron and Steel Pty Ltd*[6] in 1983 has been relied upon as confirming the validity of those co-operative schemes. The Commonwealth and States had every reason to be confident that the High Court would not destroy such manifestly useful arrangements.

However, that confidence was shaken by some of the fallacious reasoning in the majority judgments in *Re Wakim; Ex parte McNally*,[7] which struck down State legislation[8] seeking to 'cross-vest' judicial powers in federal courts. The majority reasoning has been criticised elsewhere by the present author as —

> deeply and pervasively flawed ... based on striking non sequiturs, a failure to take account of essential provisions of the legislation and of written and oral submissions to the court, unjustified interpretations of important provisions, and a failure to address contrary reasoning in *Gould v Brown*.[9]

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2. See A-G (Cth) and Minister for Financial Services and Regulation 'Historic Agreement on Corporations Law', Joint News Release, 25 Aug 2000. The News Release is available at <http://www.law.gov.au/aghome/agnews/2000newsag/jointAGHockeyCorps.htm>.
3. The many co-operative schemes listed in the Commonwealth submission in *Hughes* included (in addition to ASIC and the DPP) the Australian Competition and Consumer Commission, the National Registration Authority (for agricultural and veterinary chemicals), the National Crime Authority, the Aboriginal and Torres Strait Islander Commission, civil aviation authorities, the Australian Federal Police, the Australian Prudential Regulation Authority and the Therapeutic Goods Administration.
4. For convenience, references below to 'functions' will include the performance of duties.
5. Note the early provisions in the Public Service Act 1902 (Cth) s 38.
6. (1983) 158 CLR 535.
7. (1999) 163 ALR 270.
8. The Jurisdiction of Courts (Cross-vesting) Act 1987 of each State.
9. D Rose 'The Bizarre Destruction of Cross-vesting' in A Stone & G Willliams (eds) *The High Court at the Crossroads: Essays in Constitutional Law* (Sydney: Federation Press, 2000) ch 6, 186. This chapter is an expanded version of a paper with the same title in (1999) 11 Aust Jnl of Corp Law 1.

It is proposed here to refer to the judgments in *Wakim* only in so far as they are relevant to the conferral of State non-judicial functions and powers on Commonwealth bodies.

In *Wakim*, Gummow and Hayne JJ in a joint judgment (the 'joint judgment'), with which Gleeson CJ and Gaudron J agreed, dealt with the question whether the Commonwealth had power to consent to the vesting of State jurisdiction in, and its exercise by, federal courts.[10] Even if there had been no objection under Chapter III of the Constitution, such consent would have been constitutionally essential to prevent inconsistency with Commonwealth legislation such as the Federal Court of Australia Act 1976 (Cth),[11] and to overcome the implied immunity of Commonwealth bodies from the imposition of State duties, if not also the conferral of State powers, without Commonwealth consent.

The joint judgment asserted that the vesting of State jurisdiction in federal courts was not 'necessary' to their exercise of federal judicial power and was not 'reasonably necessary to carry it into effect', and so was not within the Commonwealth's 'incidental' powers in relation to federal jurisdiction.

That conclusion in *Wakim* on the scope of the Commonwealth's 'incidental' powers ignored a broader criterion to which the joint judgment itself referred — namely, whether the provisions in question were 'conducive to the success of the legislation'. In particular, the joint judgment ignored the effect of cross-vesting in eliminating or reducing the delays and expense that arise, in the exercise of federal jurisdiction, from disputes over the boundaries between State and federal jurisdiction. The joint judgment also ignored submissions that the Commonwealth's 'incidental' powers supported legislation allowing federal courts to spend time and resources on the exercise of State judicial powers limited to 'matters' and subject to section 73 of the Constitution (in relation to appellate jurisdiction). The joint judgment also failed to take account of the decision in the second *Fringe Benefits Tax Case* [12] that the implied powers of the Commonwealth include the power to waive its implied immunities.

The joint judgment in *Wakim* also held[13] that the implied nationhood power did not support the giving of Commonwealth consent to the exercise of State functions and powers in areas beyond those in which the Commonwealth could itself have conferred those functions and powers.[14] Furthermore, the joint judgment

10. *Wakim* supra n 7, 305-309.
11. See eg *Duncan* supra n 6, Brennan J 579; *Hughes* supra n 1, Kirby J 177 and 185.
12. *State Chamber of Commerce v Cth* (1987) 163 CLR 329, Mason CJ, Wilson, Dawson, Toohey and Gaudron JJ 357, Brennan J 358, Deane J 363.
13. *Wakim* supra n 7, 308-309.
14. Ibid, 309. The relevant passage by Gummow and Hayne JJ impliedly misrepresented the cogent reasons given by Kirby J for relying on this power: see Rose 'The Bizarre Destruction of Cross-vesting' supra n 9, 200 n 62.

rejected submissions that the unchallenged decision in *Duncan* supported the validity of Commonwealth provisions consenting to the vesting of State powers in Commonwealth bodies. This case will be considered further below.

McHugh J (with whom Callinan J agreed)[15] went so far as to say that the vesting of State jurisdiction had 'nothing to do with federal jurisdiction'.[16] With respect, it is impossible to see how that can be reconciled with the matters stated in the preambles to the 1987 State cross-vesting Acts.[17]

These reasons in *Wakim* concerned a shortfall in the Commonwealth's powers as a matter of characterisation. They did not depend on considerations peculiar to judicial powers. They therefore implied danger for the exercise of non-judicial functions and powers by Commonwealth bodies such as the Australian Securities and Investments Commission and the Australian Competition and Consumer Commission. If a Commonwealth law consenting to the vesting of State judicial powers in Commonwealth courts was not wholly a law 'with respect to' a matter within the Commonwealth's express or implied legislative powers, it seemed likely that the vesting and exercise of State non-judicial functions and powers in Commonwealth administrative bodies would encounter similar problems.

THE JUDGMENTS IN HUGHES

A challenge was soon brought to the purported exercise by the Commonwealth Director of Public Prosecutions of State powers under a Corporations Law. In *Hughes,* the accused were charged with having, in Western Australia, made available 'prescribed interests' contrary to section 1064(1) of the Corporations Law. The alleged conduct involved the raising of money from investors in Western Australia, the making of arrangements in the United States to invest in US securities, and the remission of the profits to the investors in Australia.[18]

The challenge failed because the alleged conduct could have been prohibited by the Commonwealth in the exercise of its overseas trade and commerce power and external affairs power in sections 51(i) and 51(xxix) respectively of the Constitution.[19] The Commonwealth legislation was read down distributively.[20] Hence it was held valid in its application to the particular charges in *Hughes*. However, the High Court expressly left several fundamental questions unanswered, thereby

15. *Wakim* supra n 7, 345.
16. Ibid, 293.
17. Supra n 8.
18. *Hughes* supra n 1, 159.
19. Ibid, 166.
20. Ibid, 166-167.

creating serious uncertainties concerning the powers of Commonwealth bodies to exercise functions and powers that the Commonwealth itself could not have conferred.

The reasoning in the joint judgment[21] in *Hughes* was essentially as follows:[22]

(a) (i) In order for a Commonwealth body to be able to exercise State functions and powers, there *might* be a 'constitutional imperative' for the Commonwealth body to be subject to a Commonwealth *duty* to exercise those functions and powers.[23]

(ii) Such a Commonwealth duty is imposed on the DPP by section 47 of the Corporations Act 1989 (Cth).[24]

(iii) It is therefore unnecessary to decide whether there is a 'constitutional imperative' to impose such a duty on the DPP.[25]

(b) (i) Such a Commonwealth duty can be validly imposed[26] in respect of any State functions or powers that the Commonwealth itself could have conferred[27] — for example, the DPP's power with respect to charges such as those in *Hughes* that are within the scope of the Commonwealth's overseas trade and commerce power and external affairs power.

(ii) It is therefore unnecessary to consider whether the Commonwealth's imposition of such a duty, in respect of State functions and powers that the Commonwealth could not itself have conferred, would be a valid exercise of the Commonwealth's general 'incidental' powers under section 51(xxxix) of the Constitution.[28] The joint judgment does not advert to the implied nationhood power, but presumably one should infer that it was considered insufficient on the grounds stated in *Wakim*.

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21. Kirby J delivered a separate judgment agreeing with the conclusion in the joint judgment and with the expression of uncertainties.
22. A strong impression left by the hearing is that several Justices believed that the Corporations Law scheme was too complicated and also too uncertain on important aspects (such as jury trial), and that it would be very desirable if a simpler scheme were substituted by means of comprehensive State references: see also the judgment of Kirby J, 170. However, it is not suggested here that the reasoning in *Hughes* was affected by any desire to stimulate such a legislative outcome. If it had been so affected, there would, of course, have been a gross abuse of judicial power.
23. *Hughes* supra n 1, 164.
24. Ibid.
25. Ibid.
26. If a Commonwealth duty is purportedly imposed but is not constitutionally necessary, it does not follow that its validity is irrelevant. This is because the Commonwealth consent to the State imposition and conferral of duties and powers might be inseverable from the imposition of the Commonwealth duty and so ineffective if that duty is not validly imposed.
27. *Hughes* supra n 1, 166.
28. Ibid.

1. The duty discovered in section 47 of the Corporations Act 1989 (Cth)

Section 47 of the Corporations Act 1989 (Cth) provides as follows:

> Regulations under section 73 may provide that prescribed authorities and officers of the Commonwealth have prescribed functions and powers that are expressed to be conferred on them by or under corresponding laws.

The regulations made under section 73 are the Corporations (Commonwealth Authorities and Officers) Regulations.

The relevant provision in regulation 3(1)(d) does not, in express terms, impose any duty on the DPP: it simply provides (in the terms of section 47) that the DPP shall 'have' the functions and powers expressed to be conferred by or under a 'corresponding law'. The language is similar to that in section 32 of the Coal Industry Act 1946 (Cth), held in *R v Lydon; Ex parte Cessnock Collieries Ltd*[29] and *Duncan* to constitute part of the valid co-operative scheme relating to industrial disputes in the New South Wales coal industry. No suggestion was made in either of those cases that the Commonwealth provisions imposed any duty in respect of State functions and powers. Nor does the explanatory memorandum on the Bill that inserted section 47 in the Corporations Act 1989 (Cth) suggest that any duty was intended.

The only ground on which the High Court discovered the Commonwealth duty in section 47 was that such a duty was necessary 'lest there be an abdication of State authority with no certainty of its effective replacement'.[30] Elsewhere in the judgments,[31] mention was made of the decision in *Re Cram; Ex parte NSW Colliery Proprietors' Association Ltd*[32] that the remedies under section 75(v) of the Constitution are available in respect of decisions by 'officers of the Commonwealth' in the exercise of State powers. Hence the remark in the joint judgment about the lack of 'certainty of ... effective replacement'[33] of the State laws must be directed at matters outside the scope of section 75(v). Presumably too the availability of other legal remedies was not overlooked.[34]

The remark can perhaps be taken to imply that a Commonwealth duty would not have been discovered if the relevant State powers had not been made exclusive

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29. (1960) 103 CLR 15.
30. *Hughes* supra n 1, 164.
31. Ibid, nn 33, 93.
32. (1987) 163 CLR 117.
33. *Hughes* supra n 1, 164.
34. For example, actions against Commonwealth bodies for damages. These would, at least usually, be within federal jurisdiction: see Constitution ss 75(iii) and 77.

to the Commonwealth DPP.[35] The remark, however, takes no account of the forms of parliamentary and executive accountability envisaged by the Commonwealth and State parliaments. Conduct by Commonwealth bodies in the performance of State functions could be raised in any of those parliaments. In the last resort, State parliaments could amend their legislation if dissatisfied with the Commonwealth administration. With respect, the High Court's remark seems to be an intrusion into matters that are properly those for decision by elected parliaments and governments.

Later in the joint judgment there is a hint that the need for a Commonwealth duty might be limited to '[State powers] coupled with duties adversely to affect the rights of individuals'.[36] However, even powers of bodies such as the Australian Wheat Board come within that description. Moreover, in view of some of the majority reasons in *Wakim*, it is difficult to see why there is not also a problem with Commonwealth power to consent to the conferral of the full range of relevant State non-judicial powers even where they are not 'coupled with [State] duties'.[37]

By refraining from a decision on whether imposition of a Commonwealth duty was a 'constitutional imperative' in respect of the prosecutor's powers in *Hughes*, the High Court left uncertain the question whether a Commonwealth duty is constitutionally essential in all co-operative schemes, or in none of them, or only in particular kinds of such schemes, and, if so, in which ones.

2. The validity of a Commonwealth duty to exercise State functions and powers

As mentioned above, the High Court found that the DPP's duty under regulation 3(1)(d) of the Corporations (Commonwealth Authorities and Officers) Regulations was validly imposed in so far as it applied to the power to prosecute the particular offences alleged in *Hughes* since they were within the Commonwealth's external affairs and overseas trade and commerce powers. The court stated that the duty would be similarly valid in relation to State functions and powers falling within other Commonwealth heads of power such as banking. The joint judgment suggests that perhaps the great majority of offences created by the State legislation which adopts the Corporations Law will be valid by reason of the Commonwealth's power in section 51(xx) of the Constitution with respect to '[f]oreign corporations, and trading or financial corporations formed within the limits of the Commonwealth'.[38] It is true that the provisions of a Commonwealth law with respect to 'corporations' generally

35. Corporations Act 1990 of each State s 33.
36. *Hughes* supra n 1, 168.
37. Ibid.
38. Ibid, 166.

could be read down so as to be valid in its application to section 51(xx) corporations.[39] However, unless and until the High Court overrules the *Incorporation Case*,[40] the corporations power would not support the imposition of a Commonwealth duty on the Australian Securities and Investments Commission to register companies for the purposes of their incorporation.[41]

Moreover, it is uncertain whether the corporations power would fully support the prescribed interest provisions even in relation to section 51(xx) corporations. It may well be that it does not support a law of the form, 'No person other than a licensed corporation may sell prescribed interests'.[42]

It was submitted in *Hughes* that the Commonwealth legislation was valid on the unchallenged authority of *Duncan*. In a remarkable passage, the joint judgment asserts that *Duncan* was not inconsistent with what had been said:

> This is because the several judgments of Mason, Murphy, Brennan and Deane JJ in that case support the proposition that the powers in section 51(xxxv) and section 51(xxxix) support legislation to establish a tribunal to exercise federal and State powers where this may better achieve the object of preventing and settling interstate disputes in the coal industry.[43]

With respect, the joint judgment was clearly mistaken in giving such a limited effect to *Duncan*. It is true that all except one of the claims in the disputes in *Duncan* were claims for the variation of a Commonwealth award made in settlement of an interstate[44] dispute. One issue in *Duncan* was whether these claims were within the ambit of the interstate dispute so as to enable the award to be varied by an exercise of the Coal Industry Tribunal's Commonwealth powers. Another issue was whether, if they were not within that ambit, the Commonwealth award could be varied by the exercise of State powers. That was not an easy question and most of the judgments are taken up with it. However, another claim — made by the NSW Colliery Officials' Association (Illawarra District)[45] — sought a variation of an earlier award made in exercise of the State powers to settle a purely intra-State dispute. The High Court in *Duncan*[46] had no difficulty in upholding the Tribunal's exercise of the State powers to vary the award.

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39. *Victoria v Cth* (1996) 187 CLR 416, 501-503.
40. *NSW v Cth* (1990) 169 CLR 482.
41. This power is currently under challenge in a case that has been removed to the High Court: *GPS First Mortgage Securities Pty Ltd v Lynch; Ex parte A-G (Cth)* (removed 23 Jun 2000).
42. *Hughes* supra n 1, 166.
43. Ibid, 167 (footnote omitted).
44. In this context, 'interstate' is used, in a colloquial sense, to mean 'extending beyond a State'.
45. Referred to in the judgment, and below, as the 'Deputies' Association'.
46. Supra n 6, Gibbs CJ 543, 557, Mason J 564-566, Murphy J 567, Wilson and Dawson JJ 567-568, Brennan J 579-580, Deane J 592-593.

Nothing in *Duncan* suggests that the validity of the award variation sought by the Deputies' Association depended at all upon any tendency of that variation to assist in settling the interstate dispute involving the other claims, or in settling or preventing any other interstate dispute. Nor did the judgments in *Duncan* suggest that there was any significance in the mere fact that the claim by the Deputies' Association arose out of concurrent dismissal notices, at the same collieries, to members of the unions that had been involved in the interstate dispute. Furthermore, *Lydon,*[47] which was expressly confirmed in *Duncan,*[48] upheld the exercise of State powers in proceedings that had never involved any interstate dispute.

In relation to *Duncan*, there is another very significant defect in the joint judgment in *Hughes*. Its reference to the judgment of Brennan J in *Duncan* omits any reference to his statement that it was within the competence of the Commonwealth parliament to permit the Coal Industry Tribunal to have and to exercise State powers, not only where this was 'conducive' to the achievement of the object of the vesting of the federal powers, but also where it was 'consistent with' the achievement of that object.[49]

For these reasons it is clear that the judgments in *Duncan* in relation to the claim by the Deputies' Association were directly in point in *Hughes* and were inconsistent with the reasoning in that case.

The statutory language in *Duncan* was similar to that in *Hughes*, but there was no suggestion in *Duncan* that it imposed any Commonwealth duty in relation to State functions and powers. In some future case, if the High Court, after a careful consideration of *Duncan,* concluded that the legislation there did impose a Commonwealth duty in relation to the Tribunal's State functions, *Duncan* would be authority for the validity of that duty in relation to State powers that the Commonwealth could not itself have conferred. On the other hand, if the High Court were to hold that there was no Commonwealth duty in *Duncan,*[50] the latter decision would be authority for the lack of any 'constitutional imperative'[51] to have such a Commonwealth duty in respect of the purely State powers considered in that case. If the court did not overrule *Duncan*, but discovered a need to have a Commonwealth duty in all or some other co-operative schemes, it would need to distinguish them from the legislation in *Duncan.*

There seem to be no convincing grounds for doing so. It is true that the legislation in *Duncan* differed from other co-operative schemes in that the Coal

47. Supra n 29, 20.
48. Supra n 6, Gibbs CJ 555 (with whom Wilson and Dawson JJ agreed on this aspect at 567), Mason J 561, Murphy J 566, Brennan J 577, Deane J 588.
49. Ibid, 579-580.
50. The remark in *Hughes* supra n 1, 167 about *Duncan* and other cases seems to suggest that no duty was imposed in *Duncan*.
51. Cf *Hughes* ibid, 164.

Industry Tribunal was established, not by or under a Commonwealth law alone, but as a joint body pursuant to an agreement between the Commonwealth and New South Wales.[52] Appointments were made jointly by the two governments. However, the judgments in *Duncan* did not draw any distinction between the Tribunal and Commonwealth bodies such as the Australian Wheat Board and individuals such as Commonwealth fisheries inspectors.[53] It is clear that the High Court in *Duncan* (as in *Lydon,*[54] which, as stated, was expressly confirmed in *Duncan*[55]) would have upheld the exercise of State powers by such bodies. On that basis Commonwealth and State governments have acted for the last 40 years in legislating for such schemes.

If the High Court, in future cases, did happen to rely on the different nature of the Tribunal in *Duncan* rather than confirm its mistaken remarks in *Hughes*, the various co-operative schemes could be reconstructed along the lines of the Coal Industry legislation. This would be a nuisance for parliaments and governments but not an insuperable inconvenience.

A decision by the High Court to strike down co-operative schemes in the face of *Duncan* would be justified only on the basis of the strongest reasoning. Unfortunately, *Wakim* shows only too clearly that the possibility of adverse decisions based on fundamentally flawed reasoning cannot be dismissed.

THE CORPORATIONS LAW SOLUTION

The confusion created by the regrettable judgments in *Hughes* has been considered by the Commonwealth and State governments for some months. The States agreed on 25 August 2000 to give references to the Commonwealth, for a period of five years for the purposes of section 51(xxxvii) of the Constitution.[56] These references would enable the Commonwealth parliament to reproduce the precise terms of the existing Corporations Law[57] and to amend it, with the consent of at least four States, with respect to the 'formation of corporations, corporate regulation and the regulation of financial products or services'.[58] It appears that the

52. Coal Industry Act 1946 (Cth) s 30(1); Coal Industry Act 1946 (NSW) s 36(1) (repealed).
53. *Duncan* supra n 6, Gibbs CJ 552-553 (with whom Wilson and Dawson JJ agreed on this aspect at 567), Mason J 561-562, Murphy J 566.
54. Supra n 29, 20.
55. Supra n 6, Gibbs CJ 555 (with whom Wilson and Dawson JJ agreed on this aspect at 567), Mason J 561, Murphy J 566, Brennan J 577, Deane J 588.
56. Joint News Release supra n 2.
57. This can be validly done: in *R v Public Vehicles Licensing Appeals Tribunal (Tas); Ex parte Australian National Airways Pty Ltd* (1964) 113 CLR 207, 224-225, the High Court held unanimously that s 51(xxxvii) was not *limited* to a power to convert a specified text into a law.
58. See Joint News Release supra n 2.

requirement for State consent would be effected solely by means of the Corporations Agreement between the Commonwealth and States, and not by any provisions in the legislation.[59]

Presumably 'corporate regulation' is intended to include all the matters, other than formation, that are dealt with by the Corporations Law. (A reference drafted in terms of 'corporate regulation' would, of course, cover much more, including topics on which the States could not have intended the Commonwealth to have legislative powers. But such legislation would presumably not receive the consent of at least four States.) Jurisdiction in matters arising under the Commonwealth legislation would be federal jurisdiction and so could be vested in the Federal Court, thus restoring the Corporations Law jurisdiction denied by *Wakim*.

The references have not yet been published and the changes are not to be implemented before 1 January 2001. In the meantime prudent people will act on the assumption that the Commonwealth legislation will operate retrospectively or, alternatively, that State legislation will be enacted in order to remove any doubts in respect of events before that date. However, in the meantime, affected persons will be able to seek injunctions to restrain investigations and other enforcement measures. As to amendments, it seems that the references are to be given for a fixed period of five years and are not subject to earlier termination by a State even if the Commonwealth fails to comply with the restrictions in the Corporations Agreement.

In view of the decision to rely only on the Corporations Agreement, the question whether legally enforceable restrictions could be devised is only theoretical. However, the question is an interesting one. It certainly would not seem possible to include a requirement for consent by at least four States in the description of a referred 'matter'. Moreover, it would not be enough to require the consent of at least four States to legislation in terms of a Commonwealth Bill, since that would not allow for amendments to the Bill in the Commonwealth parliament. The State consents would need to be given to legislation in terms of what had been enacted by the Commonwealth parliament.

One possible solution would be for each State to give a severable reference of the matters on which the Commonwealth is to be allowed to amend the Corporations Law,[60] and to provide that, for the purposes of any Commonwealth legislation pursuant to it, the reference shall not have effect until at least four States have

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59. Under this arrangement the States would have no sanction for non-compliance other than the options available to them at the expiration of the references. However, the States presumably accept that the Commonwealth would not commit any clear breach, and that the business certainty given by the fixed term is preferable to having powers to revoke the references within the five years on the basis of a unilateral State view that the Commonwealth was in breach.

60. So that, even if Commonwealth amendments were held invalid, the reference supporting the initial Commonwealth legislation in terms of the existing Corporations Law would not be affected.

consented to legislation in those terms. This solution would depend on the reasonably arguable view that, under section 51(xxxvii) of the Constitution, the Commonwealth parliament can pass an Act before the time when the relevant reference takes effect, so long as the Act does not *commence* before that time.[61] Moreover, it was established in *R v Public Vehicles Licensing Appeals Tribunal (Tasmania); Ex parte Australian National Airways Pty Ltd*[62] that the expression 'Matters referred' in section 51(xxxvii) covers matters 'referred for a time which is specified or which may depend on a future event', including an event that 'involves the will of the State Governor-in-Council and consists in the fixing of a date by proclamation'.[63] Although that case concerned the fixing of a date for termination of a reference, there seems no reason to distinguish such a date from a date for the commencement of a reference (eg, the date of a Commonwealth proclamation that could be made only after at least four States had given the requisite consent)[64] and for its suspension until the making of a proclamation for its re-commencement.

It should be added that State references of a matter would not give the Commonwealth exclusive power with respect to that matter.[65] However, a Commonwealth Act pursuant to a reference would, of course, override any State law to the extent of any inconsistency[66] and there could be questions as to whether, and if so how far, it covered any particular 'field' of legislative power. Such questions would need to be resolved on general principles in the absence of a special provision on inconsistency.[67] Some kinds of special provision would clearly be inappropriate. One inappropriate kind would be a provision to the effect that State laws would not be affected if capable of operating concurrently with the Commonwealth legislation[68] since this would, for instance, allow States to regulate the marketing of securities concurrently with Chapter 7 of a Commonwealth Act reproducing the current Corporations Law. Whether, and if so what, special provisions should be included will require careful consideration in the drafting of the Commonwealth and State legislation.

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61. There is a close analogy with the external affairs power in s 51(xxix) of the Constitution which has been held to support legislation enacted before a relevant treaty comes into force for Australia, where the legislation is expressed not to come into operation until a later date: *R v Australian Industrial Court; Ex parte CLM Holdings Pty Ltd* (1976) 136 CLR 235.
62. Supra n 57.
63. Ibid, 226.
64. The State legislation could provide that a recital in the proclamation that such consent had been duly given would be evidence of that fact.
65. *Graham v Paterson* (1950) 81 CLR 1.
66. Constitution s 109.
67. It should be noted that the original Corporations Act 1989 (Cth) did not contain any such provision: it was held invalid in *NSW v Cth* supra n 40.
68. Cf *R v Credit Tribunal; Ex parte General Motors Acceptance Corp Ltd* (1977) 137 CLR 545.

WHAT SOLUTIONS ARE THERE FOR THE OTHER CO-OPERATIVE SCHEMES?

1. Await further High Court decisions

One possible course would be to wait for more High Court decisions before legislating on the matter or developing referendum proposals.

It is possible that, after further examination of the issues, the High Court will find that the uncertainties expressed in *Hughes* lacked sufficient foundation. For instance, the court might hold that Commonwealth duties are not a 'constitutional imperative' in any co-operative scheme, and that the Commonwealth, in the exercise of its 'incidental' powers, can validly consent to the conferral of any State powers and functions on Commonwealth bodies. Alternatively, the court might find that Commonwealth duties are not required for certain kinds of co-operative schemes, such as schemes using jointly-established bodies as in *Duncan,* or schemes (unlike the Corporations Law scheme) in which the State powers and functions are not conferred exclusively on the Commonwealth bodies.[69] If the court decided that a particular scheme was invalid in any of its purported applications, remedial legislation could be prepared in the light of the reasoning. However, in relation to at least some co-operative scheme legislation, the need for certainty in administration might be important enough to make it inappropriate to wait for further High Court decisions.

2. State references

States might not be willing to refer to the Commonwealth the *subject matters* of all the schemes.

However, a simple and quick solution to these problems seems to be available.[70] It is that the States should give the Commonwealth references that are no wider than needed to fill the possible shortages of Commonwealth power suggested in *Hughes* and in the remarks in *Wakim* in so far as they were relevant to non-judicial powers. The references would be limited so as to enable the Commonwealth only to enact legislation imposing duties to exercise State functions and powers where the Commonwealth had given its consent. The State references could be drafted in terms permitting retrospective Commonwealth legislation. Alternatively, the State reference legislation could contain validating provisions.

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69. See the Corporations [Name of State] Act 1989 s 33.
70. See the comment by D Rose & G Lindell 'Modest Proposal to Fix Corporations Law' *Australian Financial Review*, 22 Aug 2000, 41 (an edited version of the paper submitted).

Pursuant to the references suggested above, the Commonwealth could enact general, [71] ambulatory legislation imposing duties on Commonwealth bodies to exercise any[72] State functions and powers to the vesting and exercise of which the Commonwealth had consented. This would result in the Australian Securities and Investments Commission, for example, having clear power to register companies.

Such references would satisfy any requirement that a matter referred for the purposes of section 51(xxxvii) of the Constitution must be a matter with respect to which the State itself could make laws. A State would have *power*[73] to make a law imposing the duty in question, though it would not be *effective* without the Commonwealth consent needed to 'roll back' the Commonwealth legislation, dealing with the operations of the Commonwealth bodies, that would otherwise be inconsistent with the State legislation.[74] If a State could not give such a reference, it would be impossible to have a co-operative scheme if a Commonwealth duty was a 'constitutional imperative' and the Commonwealth had no power outside section 51(xxxvii) to impose it. Since the text of the Constitution does not clearly preclude such schemes, their desirability should be taken into account in resolving any uncertainties in favour of validity.[75]

As mentioned above, the majority judgments of the High Court in *Wakim* held that the Commonwealth had no power even to *consent* to the vesting and exercise of State judicial powers in federal courts. Those doubts were partly founded on characterisation arguments that, in principle, are equally applicable to the vesting and exercise of State non-judicial powers in Commonwealth administrative bodies in matters outside the express heads of Commonwealth legislative power. However, the uncertainty created by *Wakim* in respect of non-judicial powers seems to have been dispelled by the following statements in the joint judgment in *Hughes*:

> It may be accepted that, subject to what may be the operation of negative implications arising from the Constitution, for example Ch III, in the exercise of the incidental power the parliament may permit officers of the Commonwealth holding appointments by or under statute to perform functions and accept appointments in addition to their Commonwealth appointments.[76]

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71. It should be in general terms, not limited to functions and powers under specified State legislation. The Commonwealth would always be able to choose whether to consent to the conferral and exercise of any particular State functions and powers.
72. It should not be limited to functions under what are colloquially referred to as 'co-operative schemes': such functions can be conferred in more limited contexts (eg, upon an individual Commonwealth officer) that would not be described as 'schemes'.
73. *Butler v A-G (Vic)* (1961) 106 CLR 268.
74. See eg *Duncan* supra n 6, Brennan J 579.
75. See eg the Foreword by the Hon Justice Ronald Sackville to Stone & Williams supra n 9, vii-viii.
76. *Hughes* supra n 1, 163.

> *Duncan* is one of a number of decisions which recognise that co-operation on the part of the Commonwealth and States may well achieve objects that could be achieved by neither acting alone. Nothing in these reasons denies that general proposition.[77]

There seems to be no relevant negative implication in the Constitution affecting non-judicial powers. Nevertheless, if sufficient uncertainty on this aspect still remained, State references could counter it.

In seeking to satisfy a requirement that a referred matter must be one with respect to which the State itself has power to make laws, there would be some oddity in saying that a State itself has power to 'consent' to its own conferral of functions and powers on Commonwealth bodies. However, Commonwealth consent in this context is in substance a law to the effect that relevant Commonwealth bodies may have and exercise the State functions and powers. A State has *power* to make such a law, just as it would have power to make a hypothetical law imposing the duties referred to above.[78] It would be irrelevant to section 51(xxxvii) that such a hypothetical law would be ineffective in the absence of Commonwealth consent.

Of course, if this were incorrect, and if the Commonwealth lacked power outside section 51(xxxvii) to consent to the vesting and exercise of the full range of State functions and powers, no comprehensive co-operative schemes administered by Commonwealth bodies would be possible. The two statements quoted above from *Hughes* would then have been highly misleading. It seems unlikely that the High Court would decide that this is the position, given the decision in *Duncan* (concerning the claim by the Deputies' Association) and the remarks in *Hughes*. The fallacious reasoning in *Wakim* on judicial powers should not be invoked in relation to non-judicial powers.

The correct view, it is respectfully submitted, is that the Commonwealth has an unlimited power to give the relevant consents, either as an exercise of its incidental powers to 'roll back' the otherwise inconsistent Commonwealth legislation or as an exercise of its implied power to waive its implied constitutional immunities. As with the question of a Commonwealth duty, on the issue of Commonwealth consent the desirability of co-operative schemes should be taken into account in resolving any uncertainty in favour of validity.

3. Implications for federal jurisdiction

The suggested references would not only avoid invalidity based on *Hughes* in respect of State powers and duties, but would also have advantages in respect of

77. Ibid, 167 (footnote omitted).
78. *Butler* supra n 73.

the Federal Court's jurisdiction. If the Commonwealth duties were imposed only where they were a 'constitutional imperative' for the validity of a co-operative scheme, legal proceedings concerning the exercise of the State functions or powers by a Commonwealth body under that scheme would probably involve matters 'arising under' the Commonwealth legislation[79] and so be within federal jurisdiction. This jurisdiction could be given to the Federal Court, thereby making up a significant part of the jurisdiction denied to it in *Wakim*.

However, under such legislation it would be necessary in any Federal Court proceedings to decide whether Commonwealth duties were a 'constitutional imperative' in relation in the particular co-operative scheme involved — a point on which no guidance was given in *Hughes*. The need to decide this issue could be avoided if the State legislation provided that *no* conferrals of State functions or powers were to have effect in the absence of Commonwealth duties to exercise and perform them. The Commonwealth duties would then be an essential element (as a statutory prerequisite if not a 'constitutional imperative') in a claim or defence in so far as it was based on a State function or power. Such a claim or defence would probably therefore be within federal jurisdiction. In order to achieve this result the States would, of course, need to refer to the Commonwealth the matter of the imposition of duties in relation to all the State functions and powers under any co-operative scheme, not just those that were the subject of a Commonwealth 'constitutional imperative'.

Comprehensive State references (or successful referenda) would still be needed to give the Federal Court jurisdiction to the full extent of the jurisdiction that was denied by the High Court's decision in *Wakim*. However, this is not the most pressing problem given that State courts are available to deal with the matters.

CONCLUSION

The uncertainties created by *Hughes* are not justified. They can be avoided by State references to enable the enactment of Commonwealth legislation under section 51 (xxxvii) of the Constitution. References of the subject matter of a co-operative scheme are not needed in order to avoid the *Hughes* problems, though they are needed (in view of *Wakim*)[80] if the Federal Court is to be given jurisdiction in all matters arising under the legislation.

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79. See *WA v Cth* (1995) 183 CLR 373, 412, where federal jurisdiction was held to exist in common law native title claims even though the Native Title Act 1993 (Cth) was not an essential element in establishing the rights claimed.
80. Supra n 7.