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FEDERALISM IN THE SUPREME COURT OF INDIA AND THE HIGH COURT OF AUSTRALIA

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Introduction

In October 2007 I had the pleasure, as part of a delegation of Australian judges, of meeting with the Chief Justice and Justices of the Supreme Court of India for the first Indo Australian Legal Meet at New Delhi. One of the topics which we discussed concerned the position of freedom of speech and the media under the Constitutions of India and Australia respectively.

I am delighted that we are able to continue our discussions at this first Indo Australian Legal Meet to be held in Australia. On behalf of the Australian delegation I would like to warmly welcome our distinguished visitors from India and hope that they will enjoy both the discussions we have and the hospitality that we offer.

In this session we return to the topic of comparative constitutional law. Now, however, the focus is on the way in which our federal systems are defined by our Constitutions and the decisions of the courts interpreting those Constitutions.

The concept of federalism

One of Australia's leading constitutional scholars, the late Professor Geoffrey Sawer, wrote a book about federalism in which he said:

> [N]o "definition" of federalism will be presented, because the author considers that attempts at defining either the word or the thing are likely to be futile.[1]

Sawer preferred the term "spectrum of federalism". It is a term which, as he saw it, describes the range of responses to the problem of achieving a geographical distribution of the power to govern between units of governments such that they have some guarantee of continued existence as organisations and as holders of power[2]. It was a term taken from a well known paper by W Livingstone published in 1952 in which the author said[3]:

> There is no specific point at which a society ceases to be unified and becomes diversified. The differences are of degree rather than kind. All countries fall somewhere in a spectrum which runs from what we call a theoretically wholly integrated society at one extreme to a theoretically wholly diversified society at the other … But there is no point at which it can be said that all societies on one side are unitary and all those on the other are federal or diversified.

The word "federal" originates with the Latin *foedus* referring to an alliance of individuals or groups to promote specific and common interests. That word was the common root of "confederation" and "federation" which were treated as synonymous

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1 Sawer, *Modern Federalism,* (1976) at 2.

2 Sawer, op cit, at 2.

3 Livingstone, "A Note on the Nature of Federalism", 67 (1952) *Political Science Quarterly*, 81 at 88.

by dictionaries of the 18th and 19th centuries[4]. The notion of confederation is somewhat looser than that of federation. It has been said that in a confederation the common government is dependent upon the constituent governments as it is made up of delegates from them[5]. Even these categories form part of a larger class ranging from alliance to league to confederation, to federal state and to unitary state. The distinctions have been described as "matters of convenience" because "many political forms merge the characteristics of one with those of another"[6].

Professor Wheare's concept of federal government (as distinct from federal societies) is referred to in Justice Kapadia's comprehensive paper. Professor Wheare described India as "quasi federal"[7]. However, recognising the importance of his contribution to our understanding of federal government, it is also necessary to remember again the words of Livingstone[8]:

> The essential nature of federalism is to be sought for, not in the shadings of legal and constitutional terminology, but in the forces, economic, social, political, cultural – that have made the outward forms of federalism necessary … The essence of federalism lies not in the institutional or constitutional structure but in the society itself. Federal government is a device by which the federal qualities of the society are articulated and protected.

There is, of course, a very large literature on the topic of federalism and this paper cannot do justice to its many facets. It is sufficient to acknowledge its

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4 Karmis and Norman, "The Revival of Federalism in Normative Political Theory" in Karmis and Norman, (eds) *Theories of Federalism: A Reader*, (2005) 3 at 6.

5 Watts, "Models of Federal Power Sharing", (2001) 167 *International Social Sciences Journal* 25 cited in Karmis and Norman, op cit, at 5.

6 Burgess, *Comparative Federalism: Theory and Practice*, (2006) at 26 and citing Greaves, *Federal Union in Practice*, (1914) at 11.

7 Wheare, *Federal Government,* 4th ed (1963) at 28.

8 Livingstone, op cit, 81 at 83-84.

existence before turning to some comparative thoughts about federalism in India and Australia. In so doing it is necessary to accept the incompleteness of any consideration limited to the constitutional provisions and institutional structures of the two countries and what their courts have said about them. The courts and their decisions are important but are only part of a mix of societal factors which determine the shape of a federation. That shape itself will change as they change.

The importance of the courts in a federation was propounded by Dicey who wrote:

> Federalism, lastly, means legalism – the predominance of the judiciary in the Constitution – the prevalence of a spirit of legality among the people.

He described the courts in a federation like the United States as "… the pivot on which the constitutional arrangements of the country turn". The bench, he said, "can and must determine the limits to the authority both of the government and of the legislature; its decision is without appeal; the consequence follows that the bench of judges is not only the guardian but also at a given moment the master of the Constitution"[9]. It may be debateable, in the light of experience, whether the courts are quite as central to the shape and evolution of a federation as Dicey's text might have suggested.

India as a federal state

Geoffrey Sawer wrote of India[10]:

> The sub-continent of India was [an] area which by reason of its size, population, regional (including linguistic) differences and

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9 AB Dicey, *Introduction to the Study of the Law of the Constitution*, McMillian 1st ed 1885, 10th ed 1959 at 175.

10 Sawer, *Modern Federalism*, (1976) at 33.

> communication problems presented an obvious federal situation, if not the possibility of several distinct nations.

Nevertheless, there has been judicial consideration of whether and to what extent India is in truth a federation. In *State of Rajasthan v Union of India*[11] Beg CJ described the Indian Constitution as "in a sense … federal" and added[12]:

> But the extent of federalism in it is largely watered down by the needs of progress and development of a country which has to be nationally integrated, politically and economically coordinated and socially, intellectually and spiritually uplifted.

The words "federation" and "federal" do not appear in the text of the Constitution of India. The Preamble recites the nature of India as a Socialist Secular Democratic Republic so constituted by resolution of "the people of India". Article 1 describes India as "a Union of States". By way of contrast the Preamble to the *Commonwealth of Australia Constitution Act* refers to the agreement of the people of the colonies to unite "in one indissoluble Federal Commonwealth."

Rajendra Prasad, one of the leaders of the Constituent Assembly which gave rise to India's Constitution, said of this question[13]:

> [P]ersonally, I do not attach any importance to the label which may be attributed to it – whether you call it a federal Constitution or a unitary Constitution or by any other name. It makes no difference so long as the Constitution serves our purpose.

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[11] [1978] 1 SCR 1.

[12] [1978] 1 SCR 1 at 34; see also *State of West Bengal v Union of India* [1964] 1 SCR 371.

[13] Khanna, *The Making of India's Constitution*, (1981) at 85.

Whatever debate may ensue about its substance, the Indian Constitution in form establishes a federation. The Constitution is divided into 22 Parts, 12 Schedules and 2 Appendices. Its operative provisions, which are contained in the 22 Parts, are divided into topics including "The Union", "The States", "Relations between the Union and the States", "Elections", "Special Provisions Relating to Certain Classes" and "Amendment of the Constitution". The Schedules concern procedural matters and also matters of substantive importance. The seventh Schedule contains lists of subjects within the competency of the Union and State legislatures.

The Indian Constitution makes provision not only for the Union and the States but also for two forms of local government, the Panchayats and Municipalities. All are regulated to varying degrees by the Constitution. The executive legislature and supreme judicial authority are vested in the President, Parliament and Supreme Court respectively at the Union level and the Governor, Legislative Assembly and High Court respectively at State levels.

A former Justice of the Supreme Court of India, Justice Khanna, well known for his dissent in the Habeas Corpus case, has suggested that India was perhaps the first polity to adopt a model of cooperative federalism. This he defined as "the practice of administrative cooperation between general and regional governments, the partial dependence of the regional governments upon payments from the general governments and the fact that the general governments, by the use of conditional grants, frequently promote developments in matters which are constitutionally assigned to the regions"[14]. The words "cooperative federalism" have a familiar ring in Australia although they have only achieved prominence in the discourse of federalism in relevantly recent times. The reference to the use of conditional grants also has a familiar ring. Conditional grants by the Commonwealth to the States, under s 96 of the Constitution, have been seen as part of a mechanism, sanctioned by

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[14] Khanna, op cit, at 89 citing Granville Austin and AH Burch.

the High Court, to allow the Commonwealth to enter, through the conditions it imposes, into fields of regulation otherwise beyond its legislative powers. In this way the Commonwealth has been able to play an important role in areas such as secondary and tertiary education, hospitals, roads and many other areas. It has also been able to use the grants power to cause the States to vacate particular taxing fields[15]. Professor Kenneth Bailey, a former Solicitor-General of the Commonwealth, wrote of s 96[16]:

> A constitution that contains a s 96 contains within itself the mechanism of Commonwealth supremacy.

Any comparative discussions about federalism in India and Australia should be conducted in a consciousness of the substantial differences between our two countries. The first important difference is simply one of scale. India has a population of more 1.1 billion people, which occupies a land area of nearly 3 million square kilometres. Australia has a land area of about 7.7 million square kilometres occupied by 21.05 million people.

Also significant is India's long standing religious and ethnic diversity which includes Hindus, Muslims, Christians, Sikhs and Buddhists. This diversity has been said to give rise to a sense, among some groups, of sub-State nationhood[17]:

> Language combined with regional identity has proved to be the most significant characteristic of ethnic self-definition, and among the 28

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[15] See eg, *Victoria v Commonwealth* (1926) 38 CLR 399 (the Roads case); *WR Moran Pty Ltd v Deputy Commissioner of Taxation (NSW)* [1940] AC 838; *South Australia v Commonwealth* (1942) 65 CLR 373 (the First Uniform Tax case); *Victoria v Commonwealth* (1957) 99 CLR 575 (the Second Uniform Tax case); *Attorney-General (Vic) (Ex Rel Black) v Commonwealth* (1981) 146 CLR 559 (the DOGS case).

[16] Bailey, "The Uniform Tax Plan", (1942-1944) 20 *Econ Record* 170 at 185.

[17] Burgess, *Comparative Federalism Theory and Practice*, (2006) at 123.

> constituent territorial units that constitute India today, the Sikhs in Punjab, the Tamils in Tamil Nadu, the Bengalis in West Bengal and the Nagas in Nagaland are a good representative sample of the strong sense of sub-state nationhood that exists.

The social, ethnic and religious heterogeneity that must be accommodated within the Indian constitutional system poses challenges that do not arise in Australia. While Australia has a degree of cultural diversity which has developed following its post-war immigration program, that diversity is accommodated within a relatively homogeneous envelope of attitudes. Further, Australia's cultural communities tend to be geographically diffuse rather than being concentrated within particular States or regions within States.

In the early days of India's independence the diversity of its communities raised a question about its inherent stability. It is not surprising that the Indian Constitution contains centralising features necessary to maintain the country's integrity[18]. Examples of such features include the ability of the Union government to expand the scope of its legislative power, vis a vis, the States, the emergency rule provisions, the Union's ability to create new States and presidential powers to appoint State governors and State High Court judges. The Indian Supreme Court in *State of West Bengal v Union of India*[19] held that States do not have the right to secede from the Union. That conclusion rested on the proposition that the States were created by the Union, as distinct from the position in Australia and the United States where the States were the federation's constituent elements formed out of the pre-federation colonies whose delegates drafted the Constitution[20].

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18 Dhavan and Saxena, "Republic of India" in LeRoy and Saunders (eds), *Legislative, Executive and Judicial Governance in Federal Countries*, (2006) 165 at 166; Zeenat Ara, *Changing Dynamics of Indian Federalism*, (2008) at 46.

19 [1964] 1 SCR 371.

20 Parthasarathy, "Federalism and Constitutions Processes in India" in Copland and Rickard (eds), *Federalism: Comparative Perspectives From India and Australia*, (1999) 284 at 285.

The strength of the central government under the Indian Constitution may be seen in part as a legacy of history including the centralised administrative control of British colonial authorities and subsequently Nehru's preference for centralised economic planning. Concern about the possible disintegration of newly independent India also supported the concept of a strong central government[21]. Also not to be overlooked as a political factor, is the dominance of a single political party at all levels of Indian government in the first few decades following federation[22].

The relationships between the centre and the States in India has not been static since the adoption of the Constitution. The rise of regional parties has had its own effect in constraining politically the exercise of power by the central government. It has been said[23]:

> Formally, the central government possesses very substantial power, especially powers of intervention and pre-emption, but functions within an ethno-political context that requires those powers to be used to preserve federalism in form and to no little extent in spirit as well.

Another important factor is the diverse composition of the States. State borders in India have been redrawn from time to time to accommodate different cultural identities. In 1956, the country had 15 States and 6 Union territories. Today, it has 28 States and 7 Union territories. Following the rise of regional parties and fragile coalition governments, the federation has had to grow more flexible and conciliatory, particularly in its financial aspects.

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21 Burgess, op cit, at 123.

22 Zeenat Ara, op cit, at 23.

23 Elazar (ed), *Federal Systems of the World: A Handbook of Federal, Confederal and Autonomy of Arrangements*, 2nd ed (1994) at 104. See also Davarn and Saxena, op cit. at 166 and Chaubey, *Federalism, Autonomy and Centre-State Relations*, (2007) at 18.

State diversity has been complicated with the growth in India's population from 360 million in 1950 to well over 1.1 billion today[24]. This raises issues about the nature of parliamentary representation. A question arises as to whether it should be proportional to population or whether States should be able to exert particular influence regardless of their size. The disparity between the largest and smallest Indian States is significant. Uttar Pradesh has a population of 166 million. Sikkim has a population of just over 500,000. This has implications for the election of the President under Articles 54 and 55 of the Constitution.

An important qualification on the federal principle to the extent that it is reflected in the Constitution of India is found in the power of the Union Parliament to alter State boundaries or redistribute State territories among other States. Importantly, it may do so without the consent of the States concerned.

The formation of the Australian Constitution and Australia's movement to nationhood

Prior to federation Australia comprised a number of self-governing colonies of the United Kingdom. Each of the colonies had its own Constitution deriving its legal effect from an Act of the British Parliament. Each of the Constitutions provided for a legislature and a judiciary. Upon federation there were well established and reputable Supreme Courts in each State.

The movement towards the formation of the Australian federation began late in the 19th century. It was driven by the colonists who had concerns about foreign affairs, immigration, defence, trade and commerce and industrial relations, and also about the colonising activities of France and Germany in the region. The concerns could not be met by six separate colonial governments. The federation movement was not an endeavour to escape from British hegemony. There was no move to

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[24] Davarn and Saxena, op cit, at 167.

assert, against government generally or the United Kingdom Government in particular, rights and freedoms for colonists. The rights most intensely debated were those of the individual colonies as the proposed States against the proposed federal government. There was no case of separate ethnic identities to be considered within the federation. The position of the Aboriginal people was politically marginal. This changed over time and, in 1967, the Constitution was amended so that the Commonwealth Parliament would have power to make laws expressly for Aboriginal people.

Colonial delegates met during the 1890s to discuss and draft an Australian Constitution. A draft was adopted in March 1898. Subsequently, referenda were held in each of the colonies and the necessary majorities were secured. The Constitution Bill reflecting the terms of the draft was submitted to the United Kingdom Parliament. It was passed on 9 July 1900. A proclamation establishing the Commonwealth of Australia, pursuant to the *Commonwealth of Australia Constitution Act* 1900 (Imp) was signed by Queen Victoria on 17 September 1900 and took effect from 1 January 1901.

The Australian Constitution is a section of an Act of the United Kingdom Parliament. That Act was regarded as the source of the legal authority of the Constitution. From the outset there were different perspectives on the nature of the Constitution. Some saw it as first and foremost a law declared by the Imperial Parliament[25]. Others saw it as a document whose reading would change as the people changed and saw it in new lights and with different eyes[26].

The characterisation of the Constitution as a statute deriving its authority from the United Kingdom Parliament has retained support for much of its existence.

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[25] Harrison Moore, *The Constitution of the Commonwealth of Australia*, 2nd ed (1910) at 66-67.

[26] Inglis Clark, *Studies in Australian Constitutional Law*, (1901) at 27, quoting Thomas Cooley.

In 1935, Sir Owen Dixon, who would later become Chief Justice of the High Court, described it thus[27]:

> It is not a supreme law purporting to obtain its force from the direct expression of a people's inherent authority to constitute a government. It is a statute of the British Parliament enacted in the exercise of its legal sovereignty over the law everywhere in the King's Dominions.

When the Australian Federation came into existence, Australia had in a formal sense the character of a self-governing colony of the United Kingdom. The United Kingdom Parliament had continued competence to legislate for Australia which remained subject to paramount British legislation. Australia did not have executive independence in the conduct of its foreign relations at the time of federation. These were carried on through the British Government. Executive independence in the conduct of foreign relations was recognised for all Dominions at an Imperial Conference held in 1926. Resolutions passed at that conference secured "… the independence of Dominion executives, in the conduct of both domestic and foreign affairs"[28].

Legislative independence from Great Britain did not occur until the adoption by the Australian Parliament in 1942, retrospective to 1939, of the Statute of Westminster 1931 (UK). That Statute lifted the fetters on the legislative powers of the Dominions imposed by the *Colonial Laws Validity Act* 1865 (UK). It also affirmed the powers of Dominion parliaments to make laws having extraterritorial affect. Interestingly, however, the *Colonial Laws Validity Act* continued to apply to the States of Australia until 1986.

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27 Dixon, "The Law and the Constitution", (1935) 51 *Law Quarterly Review* 590 at 597.

28 Winterton, "The Acquisition of Independence" in French, Lindell and Saunders (eds), *Reflections on the Australian Constitution*, (2003) 31 at 34-35.

It remained theoretically possible for the United Kingdom Parliament to make laws affecting Australia, even after the Statute of Westminster. The final severance of the legislative umbilical cord occurred in 1986 with the passage of the *Australia Act* 1986 (UK) by the United Kingdom Parliament and the enactment of corresponding Australia Acts of the Commonwealth and of the State Parliaments. The last vestiges of judicial dependence then disappeared. Until 1986 a litigant in a State Supreme Court could seek leave of that Court to appeal to the Privy Council in England. Although such appeals were not permitted where they involved matters arising under the Constitution or involving its interpretation, there were for many years effectively two final appellate courts for Australia, the High Court and the Privy Council.

An overview of the Australian Constitution

Section 3 of the *Commonwealth of Australia Constitution Act* 1900 (UK) authorised the Queen to declare by proclamation that the "people" of the Australian colonies:

> … shall be united in a Federal Commonwealth under the name of the Commonwealth of Australia.

Section 4 provides that the Commonwealth would be established and the Constitution of the Commonwealth take effect on a day appointed by the proclamation. That day was 1 January 1901. Section 5 provides that the Act and all laws made by the Parliament of the Commonwealth under the Constitution "… shall be binding on the courts, judges and people of every State and of every part of the Commonwealth, …". The former colonies became and were designated the "Original States" of the Commonwealth (s 6).

Section 9 of the Act sets out the text of the Constitution. It has eight chapters which deal with the following topics:

Chapter 1 – The Parliament

Chapter 2 – The Executive Government

Chapter 3 – The Judicature

Chapter 4 – Finance and Trade

Chapter 5 – The States

Chapter 6 – New States

Chapter 7 – Miscellaneous

Chapter 8 – Alteration of the Constitution

Chapter 1 covers the legislative power of the Commonwealth. That power is vested in the Commonwealth Parliament which consists of "… the Queen, a Senate, and a House of Representatives". The Queen is represented by a Governor-General appointed by her. As a matter of convention the Governor-General is appointed only upon the advice of the Prime Minister. The Governor-General is effectively Australia's ceremonial Head of State, although in a formal sense he or she represents the Queen of Australia. The Queen, through her Governor-General, gives formal assent to legislation passed by the Houses of Parliament.

Section 51 of the Constitution sets out subjects upon which the Parliament of the Commonwealth is authorised to make laws. There are 40 heads of power in that section. Section 52 identifies those matters in which Commonwealth legislative power is exclusive.

Chapter 2 of the Constitution deals with the Executive Government. The key provision of that chapter is s 61 which provides:

> The executive power of the Commonwealth is vested in the Queen and is exercisable by the Governor-General as the Queen's representative, and extends to the execution and maintenance of this Constitution, and of the laws of the Commonwealth.

By convention the Governor-General acts upon the advice of the Australian Ministers of the Crown through the Federal Executive Council which is established under s 62 of the Constitution. The section locates the effective executive power in the Ministers of the Crown.

Chapter 3 of the Constitution deals with the federal judicature. As mentioned

earlier, each colony which became a State already had in place a court system. Those court systems continued after federation and continue today, albeit elaborated by the addition of intermediate courts and specialist courts and tribunals. The judicial power of the Commonwealth is vested in the High Court of Australia, such other Federal Courts as are created by the Parliament and such other courts (eg Courts of the States) as it invests with Federal jurisdiction. The High Court is the final appellate court for all Australian jurisdictions. The Constitution directly confers upon the High Court original jurisdiction in a number of matters. That original jurisdiction extends to all matters in which a writ of mandamus or prohibition or an injunction is sought against an officer of the Commonwealth (s 75(v)). That provision allows any person affected by unlawful action on the part of an officer of the Commonwealth, including Ministers of the Crown and Commonwealth authorities, to seek a remedy in the High Court. It is a jurisdiction which cannot be removed by statute. It is an important element of the rule of law in Australia. It has some similarity to Article 32 of the Indian Constitution which guarantees the right to move the Supreme Court for enforcement of the rights conferred by Part III.

It is a significant difference between the Constitutions of India and Australia that the Constitution of India can be amended by the Parliament, save for certain provisions which have been treated by the Supreme Court as fundamental and not susceptible to amendment. The Constitution of India has been amended more than 90 times since the establishment of the Union. Amendment of the Australian Constitution is more difficult. The amendment provisions are set out in s 128. It requires a proposed law for an amendment to be passed by an absolute majority of each House of the Federal Parliament. The proposed law must then be submitted to electors in each State and Territory. To be adopted, an amendment must attract the support of a majority of electors in a majority of States and an overall majority of electors voting. The Constitution has only been amended eight times since 1901.

The State Constitutions

In speaking of the Australian Constitution it is necessary to have regard to the Constitutions of each of the Australian States. These trace their legal ancestry back to the pre-federation Constitutions of the self-governing colonies. Those Constitutions

derived their legal force from Imperial statutes which either authorised their enactment or directly enacted them. Those Constitutions were continued in force by s 106 of the Commonwealth Constitution. They provide, as it does, for legislative, executive and judicial arms of government although they are easier to amend than the Commonwealth Constitution. Some provisions of State Constitutions are entrenched in the sense that particular procedures must be followed to amend them. These are referred to generically as "manner and form" requirements. The legal foundation for the entrenchment of manner and form requirements was, prior to 1986, found in s 5 of the *Colonial Laws Validity Act* 1865 (Imp). Now it is to be found in s 6 of the *Australia Act* 1986 (Cth). The question of the legal support for manner and form requirements affecting amendments to State electoral laws was considered most recently by the High Court in *Attorney-General (Western Australia) v Marquet* (2003) 217 CLR 545.

The provisions for State governments mark one of the most striking differences between the Australian and Indian Constitutions. While State Constitutions in existence at federation continued under the Commonwealth Constitution, the Constitution of India contains an entire Part which establishes and regulates the structure of State governments. It contains provisions vesting the executive, legislative and judicial power of the States in the Governor, Legislative Assembly and High Court of the State respectively[29].

There are, however, some differences between the Union and State governments under the Indian Constitution. For most States, the Legislative Assemblies are unicameral[30]. While the State Governor exercises executive power on the advice of the State Council of Ministers, he or she is actually appointed by the

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[29] Indian Constitution, Part IV. Historical circumstances explain the inclusion of a "state constitution" in the Indian Constitution: James A Thompson, "Australian and Indian State Constitutional Law: Some Comparative Perspectives" in Ian Copland and John Rickard (eds), *Federalism: Comparative Perspectives from India and Australia*, (1999) 45 at 46-49.

[30] Indian Constitution, Art 168.

President, who acts on the advice of the Union Council of Ministers in making such appointments[31].

It has been said that the intention of having Union appointed State Governors was to create a conduit between the two levels of government[32]. A further important aspect of State government is that State Governors can recommend to the President that emergency rule be imposed due to a failure of constitutional machinery in their State[33]. The effect of this form of emergency rule is that the Union President will assume all the functions of the State executive and the Union Parliament will assume all the functions of the State legislature. In the bulk of cases the emergency rule results in dissolution of the State government to enable fresh elections[34].

The emergency rule provision has been invoked more than 100 times since 1950[35]. A further difference between the Union and the States is that State High Court judges are appointed by the President, not by the State Governor. The President makes such appointments after consultation with the relevant State and with the Indian Supreme Court[36].

The Indian Constitution also provides a framework for the creation of local

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31 Indian Constitution, Art 155.

32 Rajeev Dhavan and Rekha Saxena, "Republic of India: in Katy Le Roy and Cheryl Saunders (eds), *Legislative, Executive, and Judicial Governance in Federal Countries*, (2006) 165 at 185.

33 Indian Constitution, Art 356. The implications of Art 356 for Indian federalism are discussed in greater detail in HP Lee, "Emergency Powers in Australian and Indian Federalism:" in Ian Copland and John Rickard (eds), op cit, at 34.

34 Rajeev Dhavan and Rekha Saxena, op cit, at 186.

35 RK Chaubey, *Federalism, Autonomy and Centre-State Relations* (2007) at 77; Mahendra P Singh, *VN Shukla's Constitution of India,* 10th ed (2001) at 860.

36 Indian Constitution, Arts 243C and 243R.

governments, known as Panchayats in rural areas and municipalities in urban areas[37]. The importance of this level of government is reflected in the fact that 70% of the Indian population live in villages[38]. State legislatures can regulate the composition of Panchayats and municipalities, although the members of those bodies must be directly elected. The ratio between the number of seats in each body and the population represented must be approximately the same throughout the State[39]. The States are responsible for deciding what powers are to be given to these bodies in relation to areas such as public health, primary education and economic development[40].

Judicial review of legislation

Political scientists and the constitutional lawyers may debate whether economic and political factors have been of greater significance to Federal/State relations in Australia than decisions of the High Court. However, the power of the High Court on judicial review to determine whether laws enacted by the Commonwealth Parliament or by State Parliaments are valid under the Commonwealth Constitution has been of major significance. That power is not conferred expressly by the Constitution.

The judicial power of the Commonwealth is vested, by s 71 of the Constitution, in the High Court of Australia and in such other Federal courts as the Parliament creates and in such other courts as it invests with federal jurisdiction. Through the *Judiciary Act* 1903 (Cth) the Parliament has invested the High Court and the Federal Court and the courts of the various States with jurisdiction in matters

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37 Indian Constitution, Part IX and IXA.

38 SK Chaube, "Colonial Context of Regionalism: The Australian and Indian Experience" in Ian Copland and John Rickard (eds), op cit, at 29.

39 Indian Constitution, Arts 243C and 243R.

40 Indian Constitution, Arts 243C, 243G, 243R and 243W.

arising under the Constitution, or involving its interpretation[41]. The use of the State Supreme Courts in particular to exercise jurisdiction in federal matters reflected the standing which they had at the time of federation.

There is no provision of the Constitution which expressly confers upon the courts the power to declare legislation of the Commonwealth or of the States unconstitutional. Nevertheless, the Australian Constitutional Convention Debates and Records indicate that most, if not all, of the delegates assumed that the Courts would be able to declare Commonwealth and State legislation unconstitutional[42].

As Professor Geoffrey Sawer has written it was certain from the beginning that the Australian courts would have the power of judicial review, including the power to hold Acts of Parliament void for unconstitutionality. He said[43]:

> The Australian Constitution does not in specific terms confer this power on the courts, but it has many provisions which are unintelligible unless such a power was intended; for example, the reference to courts and judges as bound by the Constitution (covering Clause 5), the provision for cases involving *inter se* questions (s 74) and the provision for High Court jurisdiction in matters arising under the Constitution or involving its interpretation (s 76).

The High Court asserted, early in its existence and without elaborate exposition, its power to declare legislation invalid[44].

The judicial power of the Indian Union

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41 *Judiciary Act,* s 39B

42 Thomson, *Judicial Review in Australia: The Courts and the Constitution*, (1988) at 166-167.

43 Sawer, *Australian Federalism in the Courts*, (1967) at 76.

44 *D'Emden v Pedder* (1904) 1 CLR 91; *Commonwealth v State of New South Wales* (1906) 3 CLR 807.

Chapter IV of Part V of the Indian Constitution establishes the Union judiciary. The Supreme Court of India sits at the apex of the Indian judicial hierarchy. It consists of no more than 25 judges[45]. The Court has exclusive original jurisdiction in any dispute between Union and State governments or between two or more States[46]. It also has jurisdiction to enforce the fundamental rights guaranteed by Part III of the Constitution[47]. An appeal lies to the Court from any judgment, decree or final order of a State High Court if the High Court certifies that the case involves a substantial question of law as to the interpretation of the Constitution[48]. Appellate jurisdiction is also vested in the Supreme Court in civil matters where the High Court certifies that the case involves a substantial question of law of general importance and the question needs, in the opinion of the High Court, to be decided by the Supreme Court[49]. The Court has appellate jurisdiction in criminal matters where a High Court has reversed an acquittal and sentenced the accused to death and also in those cases which a High Court certifies as fit for appeal to the Supreme Court[50]. Parliament may confer additional appellate criminal jurisdiction on the Supreme Court. The Supreme Court also has a general appellate jurisdiction in all matters, civil or criminal, subject to the grant of special leave to appeal[51]. Unlike the position in Australia, the President can request the Supreme Court to provide an

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45 Indian Constitution, Art 124.

46 Indian Constitution, Art 131.

47 Indian Constitution, Art 32.

48 Indian Constitution, Art 132.

49 Indian Constitution, Art 133.

50 Indian Constitution, Art 134.

51 Indian Constitution, Art 136.

advisory opinion on a question of law or fact of public importance[52]. The separation of powers doctrine is inferred from the structure of the Constitution[53].

Constitutional provisions directly affecting Federal/State relations

The legislative powers of the Commonwealth Parliament are enumerated in the Constitution and are primarily to be found in ss 51 and 52. Heads of powers under s 51 of particular significance in connection with Federal/State relations are:

(i) trade and commerce with other countries, and among the States;

(ii) taxation; but not so as to discriminate between States or parts of States;

…

(xx) foreign corporations, and trading or financial corporations formed within the limits of the Commonwealth;

…

(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;

…

(xxix) external affairs;

…

(xxxi) the acquisition of property on just terms from any State or person for any purpose in respect of which the Parliament has power to make laws;

…

(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

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52 Indian Constitution, Art 143.

53 DJ Elazar (ed), *Federal Systems of the World: A Handbook of Federal, Confederal and Autonomy Arrangements,* 2nd ed (1994) at 108.

States by whose Parliaments the matter is referred or which otherwise 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.

Section 52 confers certain exclusive powers on the Commonwealth, namely to make laws with respect to the seat of government of the Commonwealth and places acquired by the Commonwealth for public purposes, matters relating to departments of the Public Service transferred to the Executive and other matters declared by the Constitution to be within the exclusive power of the Parliament.

One of the other matters declared to be within the exclusive power of the Parliament is the power to impose duties of customs and of excise and to grant bounties on the production or export of goods. This power is conferred by s 90 of the Constitution. The way in which that power has been interpreted by the High Court has tended to restrict the extent to which the States can raise taxes on goods. In *Ha v State of New South Wales*[54] the excise power was construed, adversely to the States, in holding a tobacco licence fee imposed by New South Wales to be invalid as an excise within the exclusive legislative power of the Commonwealth. The majority of the Court was conscious that its judgment had "the most serious implications for the revenues of the States and Territories". However it saw itself as faced with stark alternatives which were either to uphold the validity of a State tax on the sale of goods provided it was imposed in the form of licence fees or to hold invalid any such tax which in operation and effect was not merely a fee for the privilege of selling the goods. Their Honours said[55]:

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[54] (1997) 189 CLR 465.

[55] (1997) 189 CLR 465 at 503.

> Section 90 of the Constitution, by prescribing the exclusivity of the Commonwealth power to impose duties of excise, resolves the question. So long as a State tax, albeit calculated on the value or quantity of goods sold, was properly to be characterised as a mere licence fee this Court upheld the legislative power of the States to impose it. But once a State tax imposed on the seller of goods and calculated on the value or quantity of goods sold cannot be characterised as a mere licence fee, the application of s 90 must result in a declaration of its invalidity.

The importance of Australian economic unity is underpinned by s 92 which provides, inter alia:

> On the imposition of uniform duties of customs, trade, commerce, and intercourse among the States, whether by means of internal carriage or ocean navigation, shall be absolutely free.

In *Cole v Whitfield*[56] which resolved many decades of conflicting judicial exegesis of s 92, the Court said[57]:

> The purpose of the section is clear enough: to create a free trade area throughout the Commonwealth and to deny to Commonwealth and States alike a power to present or obstruct the free movement of people, goods and communications across State boundaries.

Conditional grants under s 96 became a major tool for the centralisation of Commonwealth power within the federation. It provides:

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56 (1988) 165 CLR 360.

57 (1988) 165 CLR 360 at 391.

> During a period of ten years after the establishment of the Commonwealth and thereafter until the Parliament otherwise provides, the Parliament may grant financial assistance to any State on such terms and conditions as the Parliament thinks fit.

As appears from the text of s 96 it was originally intended only to be a transitional provision. The earliest decision on the section concerned the *Federal Aid Roads Act* 1926 (Cth) which authorised the Commonwealth *P*arliament to make agreements with the States for the making and remaking of roads funded by Commonwealth grants under s 96. The funding was to be distributed according to the population and area of the States in question. Two States challenged the validity of the Act. The Court upheld it in 1926 in what became known as the Federal Roads case[58].

Section 96 was again considered in Moran's case[59]. Under the *Wheat Industry Assistance Act* 1938 (Cth) excise on flour was collected from flour millers and the proceeds granted to the States under s 96. It was a condition of the grant that the money be allocated to growers in proportion to their production of wheat. It was designed to maintain a particular price. If the price exceeded the specified figures the growers would be subject to tax and the proceeds applied to recompense millers. Some States would do better than others out of this arrangement. It was argued that the Commonwealth legislation offended against sub-ss 51(ii) and (iii) in discriminating between States or parts of States and failing to provide uniformity in the allocation of bounties on the production or export of goods. The Court upheld the validity of the Act. In his judgment Latham CJ said[60]:

> Section 96 is a means provided by the Constitution which enables the Commonwealth Parliament, when it thinks proper, to adjust inequalities between States which may arise from the application of

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58 *Victoria v Commonwealth* (1926) 38 CLR 399.

59 *Deputy Federal Commissioner of Taxation (NSW) v WR Moran Pty Ltd* (1939) 61 CLR 735.

60 (1939) 61 CLR 735 at 763.

> uniform non-discriminating federal laws to States which vary in development and worth.

And further:

> Section 96 provides means for adjusting such inequalities in accordance with the judgment of Parliament. That section is not limited by any prohibition of discrimination. There is no general prohibition in the Constitution of some vague thing called 'discrimination'. There are the specific prohibitions or restrictions to which I have referred. The word 'discrimination' is sometimes so used as to imply an element of injustice. But discrimination may be just or unjust. A wise differentiation based upon relevant circumstances is a necessary element in national policy. The remedy for any abuse of the power conferred by s 96 is political and not legal in character.

The decision was affirmed by the Privy Council[61]. As was noted earlier in this paper, not only has the section allowed the Commonwealth to enter into fields of regulation otherwise beyond its legislative powers. It has also been able to use the grants power in such a way that the States vacate particular fields of taxation.

The Commonwealth is not to give preference to one State or any part thereof over another State or any part thereof by any law or regulation of trade, commerce or revenue. This prohibition appears in s 99. As noted above, the mechanism for conditional grants under s 96 is not constrained by the prohibitions on discrimination and preference which appear in s 51(ii) and s 99.

The paramountcy of valid Commonwealth laws over State laws is secured by s 109 of the Constitution which provides:

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

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61 *WR Moran Pty Ltd v Deputy Commissioner of Taxation for New South Wales* [1940] AC 838.

The High Court has developed tests for that inconsistency between Commonwealth and State laws which will cause the Commonwealth law to prevail and the State law to be invalid. Inconsistency may be direct. That is to say Commonwealth and State laws may impose conflicting duties so that it is not possible to obey both: *Telstra Corp Ltd v Worthing*[62]. Another form of inconsistency arises where the Commonwealth law is construed as intended to cover an entire field then the intrusion of a State law into that field of regulation would be inconsistent with the legislative intention attaching to the Commonwealth law[63].

There have been cases in both which Commonwealth and State laws deal with the same subject matter concurrently but it has been held that the Commonwealth law is not intended to exclude the operation of the State law[64].

It should be noted that a State law which is invalid for inconsistency with the Commonwealth law, is not invalid for ever. It will become valid if the inconsistent Commonwealth law is repealed, amended in such a way as to remove the inconsistency or, perhaps, ceases to operate by virtue of a sunset clause. It should also be noted that it is not the Commonwealth law which makes the State law invalid. What makes the State law invalid is s 109 of the Constitution.

Section 106 continues the Constitution of each State of the Commonwealth as at the establishment of the Commonwealth "until altered in accordance with the Constitution of the State". The continuing legislative power of the State parliaments is provided for in s 107:

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62 (1999) 197 CLR 61 at [27].

63 *Victoria v Commonwealth* (1937) 58 CLR 618 at 630; *Telstra Corp Ltd v Worthing* (1999) 197 CLR 61 at [28].

64 *R v Credit Tribunal (SA); Ex parte General Motors Acceptance Corporation* (1977) 137 CLR 545; *Bayside City Council v Telstra Corp Ltd* (2004) 216 CLR 595 at [35].

> Every power of the parliament of a Colony which has become or becomes a State, shall, unless it is by this Constitution exclusively vested in the Parliament of the Commonwealth or withdrawn from the parliament of the State, continue as at the establishment of the Commonwealth, or as at the admission or establishment of the State, as the case may be.

In *R v Phillips*[65], Windeyer J said:

> It is on the combined effect of ss 107, 108 and 109 that the theory of concurrent powers and the nature of Australian federalism firmly rests.

Section 114 is a conjunction of two different limits, one on the power of the States and the other on the power of the Commonwealth. It provides:

> A State shall not, without the consent of the Parliament of the Commonwealth, raise or maintain any naval or military force, or impose any tax on property of any kind belonging to the Commonwealth, nor shall the Commonwealth impose any tax on property of any kind belonging to a State.

Section 118 requires that full faith and credit be given throughout the Commonwealth to the laws, public acts and records and the judicial proceedings of every State.

The interpretation of the legislative powers – implied immunities and reserved powers

Soon after Federation the High Court held that both State and Commonwealth legislative powers were limited to the extent that neither could pass a law or confer authority upon the executive which, if valid, would fetter control or

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[65] (1970) 125 CLR 93 at 118.

interfere with the free exercise of the legislative or executive power of the other[66]. The reciprocal immunity was a matter of implication from the Constitution. It was referred to as the doctrine of implied immunities.

A related doctrine of "reserved powers" was enunciated by the first Chief Justice, Sir Samuel Griffith in the Union Label case[67]. He regarded it as a fundamental rule in the interpretation of the Constitution that, when the intention to reserve any subject to the States to the exclusion of the Commonwealth clearly appeared, no exception from that reservation could be admitted which was not expressed in clear and unequivocal words[68]. Put simply, the doctrine required that Commonwealth heads of power capable of either a wide or narrow construction, be given the narrower construction[69].

These two doctrines were set aside in the Engineers' case, decided in 1920[70]. Professor Zines has observed[71]:

> In the Engineers' case, both the doctrines referred to were overruled. Since then, all judges of the High Court have purported to follow that case. After more than 80 years, it probably remains the most important case in Australian constitutional law, at any rate from the point of view of principles of general interpretation. The case was in fact directly concerned only with the doctrine of implied immunities,

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66 (1904) 1 CLR 91; *Federated Amalgamated Government Railway and Tramway Service Association v New South Wales Traffic Employees Association* (the Railway Servants case) (1906) 4 CLR 488.

67 *Attorney-General (NSW) v Brewery Employees Union of New South Wales* (1908) 6 CLR 469.

68 Ibid at 503.

69 *R v Barger* (1908) 6 CLR 41 and *Peterswald v Bartley* (1904) 1 CLR 497 and see Zines, *The High Court and the Constitution*, 5th ed (2008) at 8 and 9.

70 *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd* (1920) 28 CLR 129.

71 Zines, op cit, at 9.

> but the reasoning of the majority resulted in the overthrow of the doctrine of reserved powers as well.

The immediate result of the Engineers' case was that Commonwealth power was to be given a broad interpretation not confined by its apparent effects upon the residual power of the State legislatures[72]. As Sir Victor Windeyer said in the Payroll Tax case[73]:

> … in 1920 the Constitution was read in a new light, alight reflected from events that had, over twenty years, led to a growing realisation that Australians were now one people and Australia one country and that national laws might meet national needs.

He saw the Engineers' case, looked at as an event in legal and constitutional history, as a consequence of developments that have occurred outside the law courts as well as the cause of further developments there. His remarks were referred to, with approval, in the Workchoices case, *New South Wales v Commonwealth*[74].

As a result of the Engineers' case, heads of legislative power conferred upon the Commonwealth were not to be given a restrictive interpretation by reference to their incursion into areas of State legislative power.

A generalisation of the above principle also governs the interpretation of legislative powers *inter se*. Generally one head of power is not seen as limited by another. Professor Zines has written[75]:

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72 Zines, op cit, at 17-18.

73 *State of Victoria v Commonwealth* (1971) 122 CLR 353 at 396.

74 (2006) 229 CLR 1 at 119 per Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ.

75 Zines, op cit, at 33.

> The court has not in any case since the Engineers' case taken the view that the interpretation of a power should be restricted in order to prevent another power from being rendered unnecessary, where the other power does not contain any express restriction or exception.

Expansive interpretations given to various heads of power have had the practical effect that Commonwealth power has grown substantially at the expense of State power in the federation. Three important heads of power in this respect are the taxation power, the external affairs power and the corporations power. The external affairs power has been interpreted widely allowing the Commonwealth to legislate to give effect to Treaties or Convention to which it is a party. This potentially covers a wide range of subject matters not within any other Commonwealth head of power. The laws made with respect to corporations cover a huge range of the commercial activities of the country and since Workchoices also cover industrial relations.

The continuing existence of State governments is protected by the decisions of the Court in *Melbourne Corporation*[76] and more recently in *Austin*[77]. In *Austin* the Court focussed on an impugned law's tendency to interfere with the ability of a State or the Commonwealth to discharge its constitutional functions. In that case Commonwealth laws imposing superannuation tax on State judges were found to be invalid.

Cooperative federalism

The decisions of the High Court in its interpretation of the Constitution have played an important part in the evolution of the Australian federation and the greater concentration of power at the centre. Nevertheless, there is an increasing trend to cooperative arrangements between the Commonwealth and the States in order to

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[76] (1947) 74 CLR 31.

[77] (2003) 215 CLR 185.

secure national objectives which could not readily be secured by the exercise of Commonwealth or State power alone.

The techniques of cooperative federalism directed to national or uniform regulation of particular areas include the following:

1. Intergovernmental agreements providing for:
   (a) uniform legislation enacted separately by each participating polity;
   (b) enactment by one unit in the Federation of a standard law which can then be adopted by other parties to the intergovernmental agreement.
2. The referral of State legislative powers authorising Commonwealth law-making under s 51(xxxvii) on a particular topic or according to the text of a proposed Bill.
3. Executive cooperation by way of intergovernmental agreements.

Of all of these techniques, the referral power offers the possibility of achieving, on a cooperative basis, one law from one source of legislative power, namely the Commonwealth Parliament, but subject to mechanisms to protect referring States from abuse of the power by the Commonwealth.

The extent to which political initiatives, the accident of judicial decisions and other contingencies can affect choices of cooperative schemes is illustrated by the history of corporations law in Australia. That history is a useful case study for a succession of different arrangements endeavoring to effect national consistency in the regulation of companies.

In 1961, under a Uniform Companies Act 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 law in each State had application only within the territorial limits of the jurisdiction of that State. Jurisdiction was exercised by the Courts of the States. There was thus a mosaic of similar laws throughout the country rather than one law covering the whole country. The scheme, although simple in concept, was susceptible to the development of differences over time because of

pressures brought to bear upon particular State legislatures.

In 1981 the Uniform Companies Scheme was replaced by another cooperative scheme based upon the *Companies Act* 1981 (ACT) enacted by the Commonwealth Parliament for the Australian Capital Territory in reliance upon s 122 of the Constitution. Each of the States passed a Companies Code which reflected the provisions of the Commonwealth Act. The Scheme was overseen by a Ministerial Council for Companies and Securities and a national regulator, called "The National Companies and Securities Commission" (NCSC), which worked in conjunction with State regulatory authorities.

In 1989 the Commonwealth, acting unilaterally in reliance upon the corporations power in s 51(xx), passed the *Corporations Act* 1989 imposing a national scheme of corporate regulation. It established the Australian Securities Commission (ASC) under that Act. In 1990 the High Court held elements of the Act invalid because the Commonwealth did not have power to make laws about the incorporation of companies[78]. Under a new cooperative arrangement the Commonwealth then enacted the *Corporations Act* 1989 (ACT) and the *Australian Securities Commission Act* 1989 (ACT), each being a law for the Australian Capital Territory. The States each passed their own statutes which applied the provisions of the Territory Acts designated as the Corporations Law and the ASC Law respectively as laws of the respective States. The States also purported to confer jurisdiction on the Federal Court and the State Supreme Courts with respect to civil matters arising under their Corporations and ASC laws. In 1999 the High Court struck down so much of the legislation as purported to confer jurisdiction on the Federal Court with respect to matters arising under the State laws[79]. The difficulties caused by this invalidation of the cross-vesting of State jurisdiction to the Federal Court were compounded by the High Court's approach to the construction of laws made under the scheme in so far as

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

79 *Re Wakim; Ex parte McNally* (1999) 198 CLR 511.

they conferred functions under State law upon Federal authorities such as the Commonwealth Director of Public Prosecutions and the Australian Securities and Investments Commission[80].

The striking down of the cross vesting arrangements under the cooperative corporations scheme led, after some political contention, to another cooperative solution whereby the States referred to the Commonwealth the power to make laws in terms of the texts of a proposed *Corporations Act* 2001 and an *Australian Securities and Investments Commission Act* 2001. These Bills largely reflected the terms of the former Corporations Law and ASIC Law. Each State also referred to the Commonwealth:

> The formation of corporations, corporate regulation and the regulation of financial products and services ... to the extent of the making of laws with respect to those matters by making express amendments to the corporations legislation.

The latter reference had effect only to the extent that the matter was not already a subject of Commonwealth power. There was a five year sunset clause for each reference.

Following the references by the States the Commonwealth Parliament, relying upon s 51(xxxvii), passed the *Corporations Act* 2001 (Cth) and the *Australian Securities and Investment Commission Act 2001* (Cth). The Commonwealth and the States made an agreement which included undertakings about the use of the referred powers and procedures for the alteration of the statutes and for termination of the references. The agreement required that the operation of the scheme be reviewed every three years. The scheme was powerfully supported by referral agreements made by Victoria and New South Wales directly with the Commonwealth. Other

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[80] *Byrnes v R* (1999) 199 CLR 1; *Bond v R* (2000) 201 CLR 213; *R v Hughes* (2000) 202 CLR 535; *McLeod v ASIC* (2002) 191 ALR 543 and see generally De Costa, "The Corporations Law and Cooperative Federalism after *The Queen v Hughes*" (2000) 22 Syd LR 451; McConvill and Smith, "Interpretation and Cooperative Federalism; *Bond v R* from a Constitutional Perspective" (2001) 29 *Federal Law Review* 75.

States were then left with little option but to fall into line. Queensland did so. Western Australia did so following a change of government in that State. South Australia and Tasmania also joined after the Commonwealth agreed to consider an amendment limiting the degree to which the power could be used to require persons to incorporate.

The development of the comprehensive regulation of corporations in Australia showcases cooperative arrangements which are possible under the Constitution. Referral has the virtue of simplicity. Nevertheless, from the point of view of the States it involves an expansion, be it permanent or temporary, of Commonwealth legislative power on the subject matter referred. Typically safeguards are sought. It is no doubt for this reason that the reference in relation to corporations was limited to the text of a particular Bill and subject to a sunset clause. There is a sense however in which such safeguards may be illusory. The exercise by the Commonwealth of referred power may become widely accepted by the relevant elements of the community. A retreat from the post-reference legislation becomes impossible. So while legally temporary or conditional, the reference may become politically permanent and unconditional.

The complexities and variety of cooperative federal arrangements in Australia can further be appreciated by reference to arrangements currently in place involving interlocking State and Commonwealth laws in relation to competition policy, energy policy and water policy.

Conclusion

The preceding review throws up some of the problems with which courts in federal systems have to grapple in interpreting and applying their Constitutions. India and Australia have significant differences in their constitutional history structure and interpretation. They also have some significant similarities. What they have in common is the judicial tradition and method and, as this Forum illustrates, a common interest in approaches to the problems of constitutional interpretation which does not stop at their borders.