Mechanisms of Intergovernmental Relations: International Experiences and Challenges for Brazil

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Formal and Informal Institutions and Mechanisms of Intergovernmental Relations in Australia

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1. Introduction

Federalism combines self rule with shared rule,[1] or unity with diversity.[2] Typically, this involves creating or preserving two levels of government, each with a direct relationship with the people, and by dividing power between them. Traditionally, unity is achieved through the exercise of power by the central government, in relation to all the people. Diversity comes through the exercise of power by constituent governments representing sections of the people, generally territorially identified. The boundaries of power between the two spheres of government are protected by a written constitution, which is interpreted and applied by a court or courts.

In the course of the twentieth century, the experience of federations throughout the world showed that, whatever the theory, it is neither possible nor in some cases desirable for member governments in a federal polity to exercise their powers entirely in isolation from each other. However carefully powers are allocated between the spheres of government, substantial interaction and co-operation is inevitable,[3] because of the complexity of social organisation, increased economic integration, and the exigencies of politics. Thus developed the metaphor of federalism as a marble cake rather than as a layer cake, in the literature of political science of the 1950s.[4] Thus also an Australian, Professor Geoffrey Sawer, described a spectrum of federalism as extending from co-

ordinate through co-operative to organic systems, shading into unitary arrangements.[5] Since these insights, the phenomenon of co-operation has increased, in response to the pressures of globalisation, and often, the inflexibility of formal federal constitutions.

Co-operation in a federation is not an unqualified good, irrespective of subject and form. Regional diversity is as much a characteristic feature of a federation as central unity. Perversely, globalisation has reinforced the significance of diversity, as a mechanism for avoiding homogeneity and retaining a degree of local control. In addition, the federal components of a constitution are inevitably part of a wider constitutional system, with which federalism must work consistently. In any federation, therefore, there are questions about when co-operation is appropriate and in what form.

In Australia, these questions are topical. Australia is a federation with a long history of co-operation between governments using, for the most part, informal mechanisms. The relative homogeneity of the population and the absence of significant cultural, religious and linguistic differences between states has caused Australia to lean towards unity and uniformity in policy formulation and implementation, rather than towards diversity and self rule. While there has been little formal constitutional change, increasing centralisation has occurred, in part through intergovernmental co-operation. The potential for conflict between particular forms of informal co-operation and broad constitutional principles has been recognised for some time.[6] In the 1990s, the High Court held that aspects of some intergovernmental schemes could conflict with the written Constitution itself.[7]

This essay explains how intergovernmental co-operation in Australia fits within the constitutional framework. It begins with an overview of both the structure of the Australian federation and the forms of co-operation, both formal and informal, which presently are used. It then analyses the reasons why some forms

of informal co-operation have encountered difficulties in relation either to the formal written Constitution or to the institutions and principles of a constitutional nature outside it. Finally, the essay identifies options for the direction that future co-operation may take.

2. The structure of the Australian federation

The Australian federation began with the union of six self-governing colonies. To achieve federation, it was necessary to create a new central government, the Commonwealth of Australia, and to confer specific powers on it. The Constitution allocates legislative power to the Commonwealth in some detail. Albeit less specifically, it divides executive and judicial powers between the spheres of government as well.[8] To exercise these powers, both the Commonwealth and the states have an almost complete set of institutions — legislative, executive and judicial — of their own. Within each polity, the institutions are related to each other in accordance with the principles of parliamentary responsible government and the common law.

In this respect Australia has a 'dual' federation.[9] As in the United States, the underlying structure of the federation assumes that, acting within their allotted power, each jurisdiction makes and implements its own decisions and resolves its own disputes. Each jurisdiction has its own constitution. The constitutions and the principles on which they are based assume a political eco-system within the Commonwealth and each State. The balance of power between institutions is the means by which democratic accountability is achieved and the rule of law assured.

By contrast, federations in the civilian mould are structured more obviously on co-operative lines. The German federation is the best example. The horizontal division of power, which tends to characterise that system leaves most principal questions of policy to the federation. The states (Lander) actively contribute to

the federal decision making process through their participation in the federal council (Bundesrat). Most administration constitutionally is assigned to the sphere of the Lander, obviating the need for federal and state bureaucracies that duplicate each other. The court hierarchy reflects these arrangements, providing a single avenue for the resolution of disputes irrespective of the jurisdiction in which they arise.

There is a degree of integration of parts of the judiciary that detracts from the dualist structure of the Australian federation. It takes place at two points. The first is the role of the High Court as the final appellate court in both federal and state jurisdiction.[10] This feature of the Australian federal design is distinctive. It has ensured a high degree of homogeneity in the common law and rules of statutory interpretation throughout Australia. It now provides a basis for the concept of a single Australian common law, which in turn has implications for other aspects of the system, including the Australian rules of choice of law.[11] The decision to establish the High Court as a court of appeal in state as well as federal jurisdiction had little to do with the famous vision of the federation and a great deal to do with the role of the Privy Council.[12] Nevertheless it is a departure, perhaps the principal departure, from the dual character of the federation.

The second point at which the integration of the judiciary occurs is in relation to the capacity of the Commonwealth Parliament to invest state courts with federal jurisdiction.[13] Again, a constitutional arrangement that allows the courts of one sphere to deal with disputes arising under the laws of another is a potentially significant departure from a dualist model. In practice, however, its significance has diminished over time. From the 1970s, the Commonwealth began to establish its own court system. The process was completed in 2000, with the creation of the Federal Magistrates Court. These developments are consistent with the philosophy of dual federalism. They reflect a desire on the part of the

Commonwealth to have its own courts, with judges appointed by its own institutions, dealing with disputes of a federal character.

The Constitution itself makes some provision for co-operation between the Commonwealth and the states. The three most significant of these are the reference power (Section 51 (xxxvii)), the grants power (Section 96), and the constitutional framework for inter-governmental borrowing (Section 105A). Collectively, these might be described as the formal mechanisms for co-operation.

References. Section 51 (xxxvii) of the Constitution confers power on the Commonwealth Parliament to make laws with respect to matters referred to it by the parliaments of the states. It thus represents a mechanism whereby, through co-operation, complete uniformity of legislation, administration and adjudication can be achieved in areas not otherwise within Commonwealth power. Legislation enacted pursuant to section 51 (xxxvii) has all the properties of a Commonwealth law. Execution of the legislation falls within the executive power of the Commonwealth. Dsputes arise in federal jurisdiction.

Grants. The Constitution assists to create the conditions that make revenue re-distribution necessary.[15] From the outset, the grants power in section 96 has provided the mechanism through which re-distribution might occur. It allows the Commonwealth Parliament to grant financial assistance to any state ‘on such terms and conditions as thinks fit’. By determining the conditions attached to such grants, the Commonwealth can achieve, through the states, many of its own policy goals.

Borrowing. The final example of co-operation authorised by the Constitution is Section 105A. This section was included in the Constitution by referendum in 1928, as authority for joint borrowing arrangements, effected through the Loan Council. The section authorises the Commonwealth to enter into agreements

with the states in relation to their debts. It describes the matters with which such agreements may deal and the legal consequences of such agreements. The section is interesting as an example of a formal mechanism for co-operation that provides a flexible framework for co-operation, which can be altered over time.

3. Forms of co-operation

Co-operation between the component parts of what is now Australia predates federation.[16] Co-operation continued after federation, increasing in range and variety in the latter part of the twentieth century. Sometimes co-operation draws on formal constitutional mechanisms and in particular the grants power in section 96. More often, however, co-operative arrangements are informal, in the sense that they are not specifically mandated by the Constitution although they must, of course, be consistent with it. It is possible to analyse co-operative arrangements in Australia in a variety of ways. In this part I do so by reference, firstly, to their purpose, and then the mechanisms used.

(1) Purpose

As a generalisation, the purposes of co-operation between governments in Australia can be identified as: co-ordination, including consultation; consistency or harmonisation; and financial assistance. There is some artificiality in assigning particular arrangements to particular categories, but the classification is useful enough for present purposes.

There are many reasons why co-ordination is sought. Often, it is useful because programs in different jurisdictions impinge on each other. Examples could be drawn from fields as diverse as fisheries,[17] the provision of services to immigrant communities,[18] and disaster relief.[19] One long-standing example of co-ordination concerns elections. The Australian Constitution (Section 12) confers power on state governors to issue writs for Senate elections. In order to

synchronise elections for the House of Representatives and half the Senate, it therefore is necessary for state governors to issue writs to suit the Commonwealth's election schedule. This almost always happens, following communication between the governor-general and the state governors, on the advice of the prime minister.[20]

A more recent example of co-ordination concerns international treaties. The Commonwealth Government has constitutional power to enter into treaties on behalf of Australia, and the Commonwealth Parliament has power to implement them.[21] Where treaties in fact affect areas that lie primarily in the state sphere, however, good governance (as well as politics) suggests the need for state involvement. This is presently achieved at various points in the process, through an opportunity for state representatives to participate in some treaty negotiations; and through the establishment of a Treaties Council comprising Australian heads of government to take the views and role of the states into account in relation to particular treaty proposals.[22]

Some of the most high profile co-operation takes place to ensure consistency or harmonisation of law. Where the subject matter lies in a field of state constitutional responsibility, the scheme may aim to do no more than to encourage each state to enact law in agreed terms although, as will be seen, more complex solutions are possible as well. Where a Commonwealth responsibility area is also concerned, mirror legislation may be needed, to eradicate the effect of jurisdictional boundaries. At one end of the spectrum, co-operation of this kind may aim to achieve no more than consistency of underlying principle. In this case, variation in detail will be unimportant. At the other end, however, absolute uniformity may be required, not only of primary and subordinate legislation but also of administration, enforcement, adjudication and ancillary procedures. By way of example, this depth of uniformity was sought for Australian corporations law, under a scheme that was in place from 1991 to

2001, which eventually was found to conflict with provisions of the Constitution.

The third purpose of intergovernmental co-operation in Australia is to secure financial assistance. Revenue redistribution has been a feature of the Australian federation for most of the time since the Constitution came into effect. Under current arrangements, more than $AUD 50 billion is transferred from the Commonwealth to the states each year.[23] The total transferred is divided roughly equally between general revenue and specific purpose grants. At present, the former are calculated by reference to the Goods and Services Tax (GST), the proceeds of which are assigned to the states by Commonwealth legislation.[24] Constitutionally, however, both the GST revenues and specific purpose grants are paid to the states under section 96 of the Constitution. Specific purpose grants provide the states with all or part of the revenue to fund programs in areas of state responsibility including health, education and housing. They also provide an avenue through which Commonwealth policy is given effect in these areas, despite the absence of any other constitutional power.

(2) Mechanisms

Another method of categorising aspects of federal-state co-operation is by mechanism. Many mechanisms used for co-operative purposes are ordinary tools for governance. Most obviously, they include legislation and co-ordination through informal consultation and agreement. There are some specific mechanisms as well, however, which may be used individually or in combination.

These include the mechanisms in the Constitution itself. A referral of power by the States to the Commonwealth under Section 51 (xxxvii) achieves absolute uniformity of legislation and administration. Section 96 enables the Commonwealth to control the expenditure of financial assistance it has given to

the states, which it might not otherwise been able to do. Section 105A (5) authorises agreements about borrowing and gives them effect 'notwithstanding anything contained in this Constitution'. In addition to these, there are two other mechanisms, which are familiar in connection with co-operative schemes, but which are not specifically recognised by the Constitution. These are ministerial councils, and inter-governmental agreements.

Australia has a network of ministerial councils, with the Council of Australian Governments (COAG) at its apex, covering almost all areas of government activity.[25] There was a tendency for councils to proliferate in the 1970s and 1980s. From the 1990s, occasional reviews have been partly successful in containing the numbers of Councils and in rationalising their activities.[26] Ministerial councils and their supporting standing committees of officials play a key role in collaborative arrangements. They provide a forum for exchange of information and foster acquaintance between ministers with similar responsibilities in different parts of the country. Ministerial councils are likely to have responsibility for negotiating new arrangements or revising old ones. They may also play a role in the operation of co-operative arrangements, ranging from approving policy initiatives or budgets to suggesting or ratifying appointments. Typically, decisions of ministerial councils require unanimity; increasingly however, a form of majority voting is used, the details of which vary between different schemes.[27]

Most significant co-operative arrangements are formalised through an inter-governmental agreement. A formal agreement is signed by the heads of government or by the responsible ministers. An agreement may establish a ministerial council. Typically, agreements set out the essential terms of the co-operative arrangement in issue, including its purpose, decision-making procedures and duration. Agreements are made in the exercise of executive power. Generally they are not enforceable, either as law or contracts, although exceptions are possible, depending on their terms.[28]

The 1991 Corporations Scheme provides a topical example of the way in which both these mechanisms may be combined. The Australian Constitution gives power to the Commonwealth Parliament to make laws for "trading and financial corporations" but does not enable it to legislate for the formation of companies. As a result, the Commonwealth cannot unilaterally enact a comprehensive corporations law.[29] All governments nevertheless accept that company law in Australia should be uniform. For a time, this was achieved in the following way. Uniformity of the terms of the legislation was achieved through enactment of a plenary Commonwealth law, relying on its existing powers, including the territories power, which was adopted, as altered from time to time, by all participating states. Complete uniformity of the administration of the law was achieved through the conferral of power by all participating jurisdictions on a central regulator, now the Australian Securities and Investment Commission. Effective uniformity was further extended through the novel device of 'federalisation' under which court rulings under state law were given, as far as possible, the character of decisions taken under Commonwealth law. To that end, state jurisdiction was conferred on the Federal Court and state authority on the Commonwealth director of public prosecutions. The wheels of the scheme were lubricated by an inter-governmental agreement that identified the circumstances in which the agreement of participating governments was needed for particular decisions and by a Ministerial Council for Corporations in which these decisions generally were made.[30] The degree of uniformity achievable under the scheme made it an attractive model in other areas as well, though generally minus the refinement of federalisation. It is used in one form or another in relation to, for example, agricultural and veterinary chemicals, national road transport, and access to gas pipelines.[31]

4. Constitutional considerations

The Australian Constitution blends federalism with parliamentary responsible government. The latter assumes that governments are responsible to parliaments and, through parliaments, to voters; that the parliament makes or authorises the making of rules that create or change law; that most of the information necessary for the voters to make their electoral judgement is in the public domain; and that courts review the legality of the exercise of public power within a system of somewhat delicate checks, balances and conventional practices.

All of these assumptions are central to the constitutional system in the sense that they provide the foundation on which it works. All are disturbed, in different degrees, by most forms of co-operation. Grants from one sphere of government to another break the nexus between taxing and spending on which government responsibility to parliament in part depends and which in any event enhances accountability. The role of ministerial councils in committing governments and parliaments to action and in ongoing policy-making pursuant to inter-governmental schemes detracts further from the accountability of governments to parliaments and voters in a way that has been termed ‘executive federalism’. The principles and procedures of judicial and other forms of review of executive action are complicated by co-operative schemes and may be ousted altogether.[32] As a generalisation, information about co-operative schemes is less readily available and may be denied on grounds of inter-governmental confidentiality.[33]

It is possible to minimise these difficulties in the design of schemes by making greater provision for transparency; specifying processes for review; and creating lines of accountability between the parliament and the public that are as clear as possible. Despite decades of concern about these issues, however, relatively little has been done. In the early 1990s, attempts were made to improve the links between cabinet processes and ministerial councils, through protocols that would allow enough lead time in the ministerial council process for individual ministers to consult their cabinets.[34] A critical Senate Committee report on accountability for the Companies Scheme in 1989 was the catalyst for the

Commonwealth's attempt to enact unilateral companies legislation.[35] After this encountered constitutional obstacles, efforts were made to ensure that the new inter-governmental scheme overcame some of the criticisms of its predecessor, at least to the extent of providing for direct accountability of the regulator to Commonwealth institutions. A compendium of ministerial councils is compiled by the Department of Prime Minister and Cabinet and made available on the internet. Successive judicial decisions have held that, one way or another, review of administrative action under inter-governmental schemes lies within federal jurisdiction.[36] Despite these specific developments, however, there has been no general move to tailor inter-governmental schemes in a way that makes them as consistent as possible with traditional constitutional principles.

Until recently, it was rare for inter-governmental schemes to fall foul of the Constitution itself. Successive challenges to the use of the grants power to enable the Commonwealth to influence state policy were rejected.[37] Challenges to the use of co-operative schemes that effectively circumvent constitutional controls on the Commonwealth have also generally failed.[38] There was one notable exception, where land acquired by the states was tied too closely to an inter-governmental agreement, but this was easily avoided by breaking the nexus between the law and the agreement.[39] In time, in fact, a view developed that the co-operative nature of the scheme might provide some shield against constitutional invalidity. This view initially was articulated most clearly in the context of a challenge to the co-operative coal industry arrangements, whereby the Commonwealth and New South Wales combined their respective powers over industrial relations powers to establish a joint Coal Industry Tribunal. Despite some earlier caustic comment by Chief Justice Dixon to the effect that the scheme appeared to be a 'legislative conflation',[40] the validity of the constitution of the tribunal was upheld in the case of *Duncan*.[41] In doing so, the High Court referred approvingly to the co-operative nature of the scheme.[42] In an oft quoted passage, Justice Deane described co-operation as a 'positive objective' of the Constitution.[43]

The arrangements for the coal industry accepted in the *Duncan* ruling provided a model for the more complex arrangements ultimately used for corporations regulation and other schemes in which a single agency is invested with authority by all participating jurisdictions. It will be recalled that for the Corporations Scheme, a desire to deepen the degree of uniformity led to the conferral of state power on other Commonwealth institutions as well, including the director of public prosecutions (DPP), and to the conferral of state jurisdiction on the Federal Court. The latter was recognised to raise potential constitutional difficulties, if only by 'negative implication', in the face of express constitutional authority for federal jurisdiction to be conferred on state courts. However, given the practical utility of cross-vesting, both generally and in connection with the Corporations Scheme,[44] it was hoped and expected that the principle of co-operation would carry the day.

It did not. In one case, *Re Wakim*, a majority ruling of the High Court held that state jurisdiction could not be conferred on federal courts, partly because of the separation of judicial power and partly because the Commonwealth lacked express power to allow such a conferral. The latter ground of objection seemed to have wider implications for the power of the Commonwealth to allow the conferral of state authority on other Commonwealth agencies as well.

The result was a further challenge in the case of *Hughes*, in the context of the power of the DPP to prosecute under Western Australian law. In the end, the challenge was dismissed. The basis for the dismissal was cold comfort, however, at least in the short term. In this particular instance, the High Court found that the Commonwealth had a head of power to authorise the conferral of state power on the DPP, because the offence allegedly involved money laundering overseas. The judgment suggested, however, that there were circumstances in which Commonwealth power would not be sufficient, especially where the Commonwealth officer was subject to a duty, federal executive power was

engaged, individual liberty was at stake, and Commonwealth financial resources were committed.[45]

In both *Wakim* and *Hughes* and other contemporary challenges to the Corporations Scheme,[46] flaws in the drafting and the general complexity of the arrangements were highlighted and were the subject of critical comment by the justices in argument and in the judgements themselves.[47]

The difficulties of accountability, transparency and, ultimately, constitutional power that are associated with uniform schemes of this kind can be avoided by use of the formal co-operative mechanism of the reference power. With hindsight, it is possible to see that the Constitution itself provides a mechanism for co-operation that is compatible with the rest of the constitutional system. Historically, the reference power has been unattractive to the states, for several reasons including the paramount status of a Commonwealth law enacted pursuant to Section 51 (xxxvii). Nevertheless, in the face of the uncertainty about the validity of key aspects of the Corporations Scheme following the decision in *Hughes*, referrals of power were the obvious alternative. After lengthy negotiations, a model for a reference was agreed, as a new basis for the corporations law. Each state parliament referred to the Commonwealth the power to enact the legislation in the form of the 'tabled text' and power to amend the text in certain respects. An accompanying agreement is expected to contain undertakings about the use of the referred matters; to set out agreed procedures for alteration of the legislation and termination of the references; to prescribe voting arrangements for the purposes of the agreement; and to require review of the operation of the scheme every three years. The new scheme came into effect on 15 July 2001.

5. Future directions

The new focus on the constitutional implications of inter-governmental arrangements, following *Wakim* and *Hughes*, is likely to ensure that greater attention is paid to the choice and design of models for schemes in the future. Greater use of the reference power can be expected, with consequential advantages for the transparency of the arrangements involved.

During the debate on the future of the Corporations Scheme, there was some discussion of constitutional change. Various options were canvassed. These ranged from the conferral of substantive power on the Commonwealth to provision of a constitutional framework for collaborative schemes.

In cases where there is general agreement that uniformity is required, it may be appropriate to confer substantive power on the Commonwealth. Any such proposal is always likely to encounter resistance, however, because of the potential for Commonwealth constitutional power to be interpreted by the High Court or used by the Commonwealth, in unexpected ways. While a similar danger is presented by a reference of power, references can be redrawn or withdrawn in such a case, at least as long as a degree of state control is built into the scheme in the first place.

An alternative approach is to provide a formal constitutional framework for inter-governmental schemes. This might take various forms. With an eye to the problem that emerged in connection with *Hughes*, a constitutional alteration might do no more than authorise the conferral of state power on Commonwealth officers, with Commonwealth consent. This would overcome the narrow constitutional issue in *Hughes* but would not assist with the wider conflict with constitutional principle; if anything, it could aggravate it further. A more comprehensive option might draw on Section 105A for a model that could provide some structure and transparency for inter-governmental schemes and prescribe the legal effect of action taken pursuant to them. In the end, however, there is a limit to the extent to which accountability can be prescribed by

constitutional or legal rule. Effective results require a commitment on the part of parliaments and governments, to the design of collaborative arrangements that meet the same standards for accountability as those that represent the norm within each individual jurisdiction.

Notes

1 DJ Elazar (ed), *Constitutional Design and Power-Sharing in the Post-Modern Epoch*, Lanham Md., 1991, p xii.
2 KC Wheare, *Federal Government*, 4th ed, Oxford, 1963, pp 35–36; Lidija R Basta and Thomas Fleiner (eds) *Federalism and Multi-Ethnic States: The Case of Switzerland*, Fribourg, Switzerland, 1996.
3 These terms are used synonymously in this paper: cf. Martin Painter, *Collaborative Federalism*, Cambridge University Press, 2001.
4 Deil Wright, 'Policy shifts in the politics and administration of intergovernmental relations: 1930s to 1990s' in John Kincaid (ed), *American Federalism: The Third Century*, Annals of the American Academy of Political and Social Science, May 1990, pp 60–61. Wright attributes the initiation of the metaphor to Joseph McLean, in 1952, and its development to Morton Grodzins, in 1960.
5 Geoffrey Sawer, *Modern Federalism*, Pitman Australia, 1976, p 98.
6 Cheryl Saunders, 'Constitutional and legal aspects of intergovernmental relations in Australia', Galligan, Hughes and Walsh (eds), *Intergovernmental Relations and Public Policy*, Allen and Unwin, 1991, p 39.
7 In particular in *Re Wakim ex parte McNally* (1999) 198 CLR 511; see also *R v Hughes* (2000) 202 CLR 535.
8 Australian Constitution, Sections 51, 61, 73, 75 and 76 respectively.
9 Cheryl Saunders, 'Administrative law and relations between governments: Australia and Europe compared', *Federal Law Review*, vol 28, 2000, p 263. 'Dualism' in this sense refers to the institutional structure of the two spheres of government. There is potential for confusion with the use of 'dualism' as synonymous with 'co-ordinate' or 'layer-cake' federalism and thus automatically in opposition to 'co-operative' federalism.
10 Australian Constitution, Section 73.
11 *Pfeiffer v Rogerson* (2000) 203 CLR 503.
12 John Quck and RR Garran, *Annotated Constitution of the Australian Commonwealth*, orig 1901, repr Legal Books, 1976, p 735.
13 Australian Constitution, Section 77 (iii).
14 *Kable v Director of Public Prosecutions for New South Wales* (1996) 189 CLR 51.
15 Initially the imbalance stemmed from the constitutional conferral on the Commonwealth of exclusive power to impose duties of customs and of excise (Section 90). Since 1942, a more significant factor has been the de facto monopoly of the Commonwealth over corporate and personal income tax.
16 Quick and Garran, *Annotated Constitution*, p 103
17 Pursuant to the offshore constitutional settlement, jurisdictional responsibility for specified fisheries is allocated between the Commonwealth and relevant states.
18 Exemplified by the Ministerial Council for Immigration and Multicultural Affairs.
19 Natural Disaster Relief Arrangements, pursuant to which the Commonwealth makes financial assistance available on terms and conditions set by the minister for finance pursuant to *Appropriation Act (N*o 2) 2001-2002.
20 Odgers, *Australian Senate Practice*, 10th ed, 2001, part 4.4.
21 *Barton v Commonwealth* (1974) 131 CLR 477; and *Commonwealth v Tasmania* (1983) 158 CLR 1.

22 Commonwealth of Australia, *Principles and Procedures for Commonwealth-State-Territory Consultation on Treaties*, 1996.
23 *Federal Financial Relations*, Budget Paper No 3, table 2.
24 *A New Tax System (Commonwealth-State Financial Arrangements) Act* 1999, Section 13. See generally Cheryl Saunders, 'Federal fiscal reform and the GST', *Public Law Review*, vol 11, 2000, pp 99–105.
25 Department of Prime Minister and Cabinet, *Ministerial Councils: A Compendium*, 1999 (http://www.dpmc.gov.au/pdfs/Compendium.pdf)
26 The most recent review took place in June 2001.
27 For example, the Corporations Agreement 1997.
28 *South Australia v Commonwealth* (1962) 108 CLR 130.
29 *New South Wales v Commonwealth* (1990) 169 CLR 482.
30 See generally Cheryl Saunders 'A new direction for intergovernmental arrangements', *Public Law Review*, vol 12, 2000, p 274.
31 *Agricultural and Veterinary Chemicals Act* 1994 (Cth); *Road Transport Reform (Vehicles and Traffic) Act* 1993 (Cth); *Road Transport Reform (Dangerous Goods) Act* 1995 (Cth); *Road Transport Reform (Heavy Vehicles Regulation) Act* 1997 (Cth); and *Gas Pipelines Access (South Australia) Act* 1997 (SA).
32 See the Administrative Remedies Agreement that accompanied the arrangements establishing the National Companies and Securities Commission.
33 *Freedom of Information Act* 1982 (Cth), Section 33.
34 See now the 'Broad protocols for the operation of ministerial councils', in *Commonwealth-State Ministerial Councils: A Compendium.*
35 Senate Standing Committee on Constitutional and Legal Affairs, *The Role of Parliament and the National Companies Scheme*, Canberra, 1986.
36 See for examples the decisions on whether certain decisions under inter-governmental schemes are made by an 'officer of the Commonwealth' and thus attract federal jurisdiction pursuant to Constitution, Section 75 (v): *Bond v Sulan* (1990) 98 ALR 121; *Hong Kong Bank of Australia Ltd v Australian Securities Commission* (1992) 108 ALR 70; *Mercantile Mutual Life Insurance Co Ltd v Australian Securities Commission* (1993) 112 CLR 463; *Attorney-General v Oates* [1999] HCA 35. See generally Cheryl Saunders, 'Administrative law and relations between governments, p 263.
37 The cases are collected and analysed in Cheryl Saunders, 'Towards a theory for Section 96: Part 1', *Melbourne University Law Review*, vol 16, 1987, p 1.
38 An example of long-standing is provided by *Moran v Deputy Federal Commissioner of Taxation* (1940) 63 CLR 338
39 *PJ Maginnis Pty Ltd v Commonwealth* (1949) 80 CLR 382; *Pye v Renshaw* (1951) 84 CLR 58.
40 *Australian Iron & Steel v Dobb* (1958) 98 CLR 586, 596: 'This is not the occasion to inquire into the extent constitutionally to which such a legislative conflation may succeed'.
41 *R v Duncan; Ex parte Australian Iron and Steel Pty Ltd.*, (1983) 158 CLR 535.
42 Ibid, Gibbs CJ at 553.
43 Ibid, at 589.
44 *Complementary Jurisdiction of Courts (Cross-vesting) Acts* 1987, enacted by the Commonwealth and all state parliaments and the Northern Territory Legislative Assembly.
45 See generally Cheryl Saunders, 'A new direction', p 274.
46 Including *Byrnes v R* (1999) 164 ALR 520.
47 For example, J McHugh in argument in *Wakim:* 'If we had a Bill of Rights with a due process clause, this legislation would be flat out passing muster, I think. How would the citizen really know what his or her rights were?', Transcript of Proceedings, p 79, quoted in Graeme Hill, '*R v Hughes* and the future of co-operative legislative schemes', *Melbourne University Law Review*, vol 24, 2000, p 462, fn 18.