The Corporations Law and Cooperative Federalism after *The Queen v Hughes*

1. Introduction

The object of the national scheme for the regulation of corporations, securities, and the futures industry[1] was to simulate the position that would be obtained if the Commonwealth had plenary constitutional power to pass a single law for Australia.[2] Because the *Corporations Law* is constituted by uniform state[3] Acts,[4] this simulation is achieved by dovetailing provisions within the Corporations Acts of each state and the *Corporations Act* 1989 (Cth).[5] In *The Queen v Hughes*,[6] the prosecution of the defendant by the Commonwealth Director of Public Prosecutions (DPP), for an offence committed against the *Corporations Law* as enacted by Western Australia,[7] naturally depended upon the efficacy of these provisions. The High Court's restrained and rather diffident decision to uphold them presents certain challenges for the future operation of the national scheme. This note seeks to evaluate the nature and extent of those challenges. To do so, it is firstly necessary to discuss the background to the decision, the particular facts of the case, and the statutory framework that confronted the court.

2. The 'Unravelling' of the Corporations Law: the Background to The Queen v Hughes

The decisions of the High Court in *Bond v The Queen*[8] *and Byrnes v The Queen*[9] did not deal with the provisions that were material in *Hughes*.[10] The former cases were concerned with the powers conferred on the Commonwealth DPP by the

1 Section 3(1) of the *Corporations Act* 1989 (Cth) provides that, 'The object of this Act (other than Part 8) is to make a law for the government of the Australian Capital Territory in relation to corporations, securities, the futures industry and some other matters.'

2 Harold Ford, Robert Austin & Ian Ramsay, *Ford's Principles of Corporations Law* (9th ed, 1999) at 59.

3 Section 9 of the *Corporations Law* defines 'State' to include the Northern Territory.

4 The *Corporations Law* is set out in s82 of the *Corporations Act* 1989 (Cth). Section 7 of the Corporations (State) Acts then states that the *Corporations Law* as set out in s82 of the Commonwealth Act applies as the *Corporations Law* of the State. These have been enacted in every State.

5 Hereinafter the Commonwealth *Corporations Act*.

6 *The Queen v Hughes* (2000) 171 ALR 155 (hereinafter *Hughes*): a joint judgment was given by Gleeson CJ, Gaudron, McHugh, Gummow, Hayne & Callinan JJ. Kirby J concurred in a separate judgment.

7 Section 7 of *Corporations (Western Australia) Act* 1990 (WA) stipulates that: 'The *Corporations Law* set out in Section 82 of the *Corporations Act* 1989 (Cth) as in force for the time being: (a) applies as a law of Western Australia; and (b) as so applying, may be referred to as the Corporations Law of Western Australia.'

8 (2000) 169 ALR 607 (hereinafter *Bond*).

9 (1999) 164 ALR 520 (hereinafter *Byrnes*).

10 Above n6 at 157 (Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ).

transitional provisions[11] in the State Corporations Acts;[12] and more specifically, with whether the DPP had the authority to appeal against sentences given upon conviction for offences against the now defunct cooperative scheme.[13] Nevertheless, the outcome of those decisions is that neither the Commonwealth DPP nor the Australian Securities and Investments Commission (ASIC), are presently authorised to appeal against a sentence in respect of a conviction for an offence against the *Corporations Law*.[14]

These decisions thus contributed to the perception that Australia's Federal system of corporate law is 'unravelling;'[15] a perception created by *Re Wakim; Ex parte McNally*.[16] There, the High Court asserted that the purported conferral of state jurisdiction upon federal courts by cross-vesting legislation, was constitutionally invalid.[17] It thus followed that the Federal Court no longer has jurisdiction over the *Corporations Law*,[18] an implication of some practical significance.[19] But the consequences of *Re Wakim* were not confined to its practical effect: the principles of statutory and constitutional interpretation adhered to by the majority, as well as the conception of cooperative federalism articulated, would be material to inevitable subsequent challenges to the national scheme's validity. As Kirby J observed in *Hughes*, 'the present proceedings were to be seen as much the progeny of *Re Wakim* as of the decisions in *Byrnes* and *Bond*.'[20] An understanding of why that was so, requires an appreciation of the pertinent facts and the statutory framework subject to challenge.

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11 Contained in Part 13 of both the *Corporations (Western Australia) Act* and *Corporations (South Australia) Act* respectively.

12 The *Bond* case also considered the construction to be given to s17 of the Commonwealth *DPP Act*. That section provides that the Commonwealth DPP has the authority to "institute and carry on, in accordance with the terms of the appointment [ie. the appointment to prosecute offences against the laws of a state] prosecutions for such offences.' The High Court held that this provision did not allow the Commonwealth DPP to appeal against sentences in respect of convictions for those offences: above n8 at 603.

13 Section 91(1)(a) of the *Corporations (South Australia) Act* provides that the Commonwealth DPP 'has the same enforcement powers in relation to the co-operative scheme laws as has the DPP of South Australia.' It was held in *Byrnes* that this did not confer on the Commonwealth DPP a power to appeal against sentence for offences against the *Companies (South Australia) Code*. This was followed in *Bond* in respect of s91(1) of the *Corporations (Western Australia) Act*: above n8 at 615.

14 Kurtz J, 'Commonwealth Does Not Have Power To Bring Appeal Against Sentence for Breach of State Law' (2000) 31 *Corporate Law Email Bulletin* at 4A. Taken from <http:cclsr.law.unimelb.edu.au/bulletins>.

15 Ian Ramsay, 'The Unravelling of Australia's Federal Corporate Law' (2000) 31 *Corporate Law Email Bulletin* at 1A. Taken from <http://cclsr.law.unimelb.edu.au/bulletins/>.

16 (1999) 163 ALR 270.

17 For an analysis of this decision see Lam D, '*Wakim*' (2000) 22(1) *Sydney Law Review* 155.

18 For a discussion of this and other practical implications of *Wakim*, see Whincop M, 'Trading Places: Thoughts on Federal and State Jurisdiction in Corporate Law after *Re Wakim*' (1999) 17 *Company and Securities LJ*489.

19 See Lam above n17 at 170.

20 Above n6 at 178.

3. *The facts in Hughes*

Mr Hughes, and his co-accused, Mr Bell, had organised a collective managed investment scheme in Perth during 1992. It involved the raising of funds from a group of investors in Western Australia. These were to be invested in a United States security house, and the returns were then to be filtered back to the investors through Mr Bell's company. Prior to the channelling of the funds to the United States, they were to be held in a bank account maintained by a firm of solicitors. The scheme thus had the character and structure of a trust investment.

Although the investors did not receive any 'dividend', the Commonwealth DPP asserted that the scheme contravened what was then section 1064(1) of the *Corporations Law*. That section proscribed, in the absence of a prospectus and an approved trust deed,[21] the offering of 'a prescribed interest by persons other than public corporations' or by such a corporation's authorised agent. By reading this section in conjunction with paragraph (a) of section 1311(1),[22] it could be asserted that the conduct of Mr Hughes and Mr Bell constituted an offence against the *Corporations Law*. This was the offence that the Commonwealth DPP sought to prosecute.

It should be noted that section 1064 has now been repealed, but this was not material to the issues before the Full Court.[23] Of significance however, was that the offence created by sections 1064(1) and 1311(1) did not *directly* involve a constitutional corporation: rather, it was aimed at the regulation of these type of managed investment trusts. As such, *if* the Commonwealth DPP's authority to prosecute the offence was to depend on a referable head of federal power, it *seemed* that section 51(xx) of the Constitution could not be invoked. Indeed, this was the substance of the accused's motion to quash the indictment.[24] And consequently, these facts had the potential to test the outer bounds of the Commonwealth DPP's authority to enforce the provisions of the *Corporations Law*. To discuss the Full Court's response to this issue, it is necessary to examine the statutory mechanism that provides the Commonwealth DPP with such authority.

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21 Pursuant to what was then s1065. See Tomasic R, Jackson J & Woellner R, *Corporations Law: Principles, Policy and Process* (3rd Edition, 1996) at 620.

22 Para (a) of section 1311(1) is part of the general penalty provisions: it provides that a person who does an act or thing that the person is forbidden to do by or under the a provision of this Law, is guilty of an offence.

23 Division 5 of Pt 7.12 of the *Corporations Law* was repealed by Item 143 of Schedule 2 Pt 1 of the *Managed Investments Act* 1998 effective from 1 July 1998. The indictment disclosed that the accused was to be prosecuted with making available prescribed interests between 1 February 1992 and 24 November 1994. Thus, it was not contested that the subsequent removal of Division 5 affected any liability to prosecute and punish: above n6 at 158 (Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ).

24 Removed to the High Court pursuant to s40 of the *Judiciary Act* 1903 (Cth).

4. *The Power of the Commonwealth Director of Public Prosecutions to Investigate and Prosecute Offences Against the Corporations Law*

It should first be noted that section 6(1) of the *Director of Public Prosecutions Act* 1983 (Cth)[25] articulates the specific functions of the Commonwealth DPP. Supplementing these, section 6(2)(a) allows functions to be conferred on the DPP 'by or under any law of the Commonwealth.' Section 47(1) of the Commonwealth *Corporations Act* is such a law. It allows Regulations to be made for:

> prescribed authorities and officers of the Commonwealth [to] have prescribed functions and powers that are expressed to be conferred on them by or under *corresponding laws*.[26]

Section 38(a) of that *Act* relevantly defines a 'corresponding law' to include 'an Act of another jurisdiction 'that corresponds to this Act.' This is the link to the *Corporations (Western Australia) Act* 1990, Part 8 Division 2 which contains the provisions germane to *Hughes*. Before these are discussed, it is perhaps instructive to reflect on the objectives of that Part. In this respect, section 28(1)(a) aspires to an offence against 'an applicable provision' of the Western Australian legislation to be treated 'as if it were an offence against a law of the Commonwealth.' The 'applicable provisions' are the *Corporations Law* as embraced by section 7 of the *Corporations (Western Australia) Act*. As such, Part 8 Division 2 seeks to treat an offence against the *Western Australian Corporations Law*, *as if* it were an offence against the *Corporations Law* as enacted by the Commonwealth for the Australian Capital Territory.[27] More particularly, section 28(2)(a) provides that such an offence is to be so treated in respect of its 'investigation and prosecution.' This provided scope for the Commonwealth *DPP Act* to be 'picked up' as a law of Western Australia.

The specific provision that purported to achieve this is section 29(1) of the *Corporations (Western Australia) Act*. It provides that 'Commonwealth laws'[28] apply as laws of Western Australia in relation to an offence against the *Western Australian Corporations Law*, *as if* those provisions were federal laws and not the laws of that state. The relevance of this, is that a function of the Commonwealth DPP is to carry on prosecutions for indictable offences against federal laws.[29] Thus, in relation to the investigation and prosecution of the offence stated in the

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25 Hereinafter referred to as the *DPP Act*.

26 Emphasis added.

27 Section 5 of the Commonwealth *Corporations Act* provides that the *Corporations Law* as set out in s82:'(a) applies as a law for the government of the Capital Territory; and (b) as so applying, may be referred to as the *Corporations Law* of the Capital Territory.'

28 Section 3 defines 'Commonwealth law' as 'any of the written or unwritten law of the Commonwealth, including laws about the exercise of prerogative powers, rights and privileges, other than the *Corporations Law* of the Capital Territory, the ASC Law of the Capital Territory or the provisions prescribed, for the purposes of the definition of 'Commonwealth law' in section 4 of the Corporations Act, by regulations under section 73 of the Corporations Act.'

29 *Director of Public Prosecutions Act* 1983 (Cth) ss 6(1)(a) and (b).

indictment against Mr Hughes and Mr Bell, the Commonwealth *DPP Act* applied as a law of Western Australia.

Yet, section 6(1)(a) of the *DPP Act* relevantly provides that the function of the DPP is to institute prosecutions on indictment for indictable offences *only against Federal laws*; and section 9 specifies the powers permitted to the DPP in relation to *that* specific function. However, these apparent restrictions are overcome by section 31(1) of the *Corporations (Western Australia) Act*: it effectively allows the Commonwealth DPP the same powers in respect of an offence against the Corporations Law of Western Australia, as it would have for an offence against the *Corporations Law* as enacted by the Commonwealth.[30] What this amounted to then, was the conferral by the Parliament of Western Australia of its power to prosecute an offence against its *Corporations Law*, to the Commonwealth DPP.

This, by itself, would be meaningless: a state is precluded from unilaterally conferring subsidiary functions upon a Commonwealth officer or instrumentality.[31] Orthodox justifications for this have focused on the operation of section 109 of the Constitution;[32] and by the implied constitutional prohibition against states and territories modifying or restricting the Commonwealth's prescribed functions.[33] More broadly, it has been suggested that the remnant immunity enjoyed by Commonwealth instrumentalities from state law, needs to be 'waived' by federal legislation.[34] Whatever justification is made, the practical consequence is that Western Australia's conferral of its power to prosecute only had efficacy to the extent that it was authorised by the Commonwealth. To find such authorisation, we return full circle to section 47(1) of the Commonwealth *Corporations Act*. It contemplates that the Governor-General will make regulations for this specific purpose,[35] and these are to be found in the *Corporations (Commonwealth Authorities and Officers) Regulations*.[36] Of these, regulation 3(1)(d) confers on the Commonwealth DPP the powers and functions 'that are expressed to be conferred on them by or under a corresponding law.' The 'corresponding law' in *Hughes* was, of course, the *Corporations (Western Australia) Act*: it purported to confer on the Commonwealth DPP the power to prosecute the accused for offences against Western Australia's *Corporations Law*.

30 Section 5 of the *Corporations Act* 1989 (Cth) applies the *Corporations Law*, as set out in Section 82, to the Australian Capital Territory.

31 Above n6 at 163 (Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ).

32 *R v Duncan; Ex parte Australian Iron and Steel Pty Ltd* (1983) 158 CLR 535 at 579 (Brennan J).

33 *Melbourne Corporation v The Commonwealth* (1947) 74 CLR 31; *Re Residential Tenancies Tribunal (NSW); Ex parte Defence Housing Authority* (1997) 190 CLR 410 at 507–508. The impediments to States conferring powers on Commonwealth officers are more fully discussed in the judgment of Kirby J in *Hughes*: above n6 at 176.

34 *Gould v Brown* (1998) 72 ALJR 375 at 432 (Gummow J). For an analysis of these different approaches, see Cheryl Saunders, 'In the Shadow of *Re Wakim*' (1999) 17 *Company and Securities LJ* 507.

35 Pursuant to s73 of the Commonwealth *Corporations Act*. It provides that 'the Governor-General may make regulations, not inconsistent with this Act, prescribing matters: (a) required or permitted by this Act (other than Part 5) to be prescribed; or (b) necessary or convenient to be prescribed for carrying out or giving effect to this Act.'

36 No 457 of 1990.

5. *Identifying the Issue*

The intricacy, and perhaps convolution, of this legislative path naturally invites challenges. To adapt the words of Kirby J in *Byrnes*, gaps are bound to appear in the scheme when 'spectacles are applied to the magnifying glass through which lawyers search the text of the legislation at the behest of well-funded clients.'[37] Thus for Mr Hughes, the submissions made were not solely focused on the foreshadowed issue of the constitutional validity of the federal legislation and regulations. That is, the case was not solely concerned with the efficacy of sections 47 and 73 of the Commonwealth *Corporations Act* in their support of regulation 3(1)(d). For Mr Hughes also disputed the validity of the relevant state provision, namely section 29(1) of the *Corporations (Western Australia) Act*. This challenge contained three distinct submissions: that section 29(1) operated to usurp the powers of the federal legislature; that the conferral of power contemplated by section 29(1) represented an impermissible abdication of Western Australia's legislative responsibilities; and that the 'vagueness' of section 29(1) was contrary to an implied constitutional right of due process. The focus of such assertions on section 29(1) of the Western Australian Act, makes it convenient to analyse the decision of the Full Court firstly in respect of the state legislation and then in relation to the Commonwealth law.

6. *The Decision in Hughes*

A. Construing Section 29(1) of the Corporations (Western Australia) Act

To recount, section 29(1) provides that 'Commonwealth laws'[38] apply as laws of Western Australia in relation to an offence against the Western Australian *Corporations Law*, as if the *Corporations Law* was a Commonwealth law and not the law of that state. Consequently, whether the section purported to create federal law, and hence usurp the power of the Commonwealth legislature, depended upon how the phrase 'as if' was construed.

In holding that section 29(1) was a permissible state law, the joint judgment drew textual indications from other sections within Division 2 of Part 8. Their Honours specifically referred to section 29(2), which states that *for the purposes of a law of Western Australia*, an offence against the *Western Australian Corporations Law* is taken to be an offence against the laws of the Commonwealth, again *as if* the Commonwealth had enacted the *Corporations Law*. This effectively acknowledged that, despite the objective of the national scheme, state laws included within it retained their constitutional character.[39] This point was forcibly made by Kirby J: His Honour drew a distinction between the Western Australian legislature impermissibly exercising the powers of the federal parliament, and the legislature merely applying designated federal laws as 'laws of

37 Above n9 at 542.

38 Above n28.

39 Above n6 at 162 (Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ).

Western Australia.' In the latter case, the statutory fiction that those laws were then to be applied as if they had been enacted by the Commonwealth, did not alter their intrinsic character as state laws.[40]

B. The Abdication of Legislative Responsibility

It was then argued that section 29(1) amounted to the Western Australian parliament unacceptably relinquishing its legislative obligations. That is, it was submitted that by the conferral of *its* authority to prosecute upon the Commonwealth DPP, the Western Australian parliament was abdicating its legislative responsibility. However, a similar submission had been put to the Full Court in *Byrnes* and had been rejected,[41] and the joint judgment in *Hughes* was content to rely on the authorities therein cited.[42] In reiterating his observations in *Gould v Brown*,[43] Kirby J conveyed their essence. His Honour stated that in the particular context of cooperative legislative schemes, conferral of power does not amount to abdication of legislative responsibility; rather, it is an extant decision of the legislature to 'exercise its powers in a particular way.'[44]

C. An Implied Right of Due Process?

In the course of argument, McHugh J suggested that '[i]f we had a Bill of Rights with a due process clause, this legislation would be flat out passing muster.'[45] This was a reflection on the uncertainty of the operation of section 29(1), an issue of some urgency given its potential to adversely affect the rights of individuals. Indeed, during the proceedings, counsel were questioned extensively as to which Commonwealth laws[46] were 'picked up' by section 29(1). Given that section 28(2)(a) suggests that an offence against the *Western Australian Corporations Law* is to be treated as if it were an offence against the federal law in respect of its 'investigation and prosecution,' section 29(1) clearly picked up the Commonwealth *DPP Act*. This was also consonant with the Heads of Agreement.[47] However, other laws that might apply were not readily discernible. As Kirby J observed, counsel for the Commonwealth 'candidly admitted' that he was unable to say 'whether particular federal laws were, or were not, picked up by the force of section 29(1).'[48]

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40 Id at 179 (Kirby J).

41 Above n9 at 523–524. There, the Full Court relied on the following authorities: *Cobb & Co Ltd v Kropp* [1967] 1 AC 141 at 156–157; *Capital Duplicators Pty Ltd v Australian Capital Territory* (1992) 177 CLR 248 at 263–265; *Western Australia v The Commonwealth (Native Title Act Case)* (1995) 183 CLR 373 at 384; *Gould v Brown* (1998) 193 CLR 346 at 485–487.

42 Above n6 at 162.

43 Above n34 at 486.

44 Above n6 at 181.

45 Transcript of *The Queen v Hughes* P58/1999 1 March 2000 at 76.

46 See above n28 for a definition of 'Commonwealth laws.'

47 That is, the Alice Springs Agreement of June 1990 provides for the Commonwealth to have sole jurisdiction to prosecute: Heads of Agreement – *Future Corporate Regulation in Australia* 29 June 1990 clause 26.1. It should be noted that the Alice Springs Agreement, in its original form, no longer has effect: clause 1006 of the *Corporations Agreement* of 23 September 1997 so provides.

48 Above n6 at 183.

However, the Full Court considered that this ambiguity was an insufficient basis upon which to declare the invalidity of section 29(1). The joint judgment considered that it merely presented 'difficulties of interpretation' that 'may arise from case to case.'[49] Kirby J was more sympathetic to the notion that section 29(1) operated unfairly;[50] His Honour also suggested that an implied right of due process may be derived 'from the terms, structure and purposes of the Constitution.'[51] Nevertheless, the level of uncertainty presented by section 29(1) could not, in this case, justify the invocation of such a right. Ultimately, the court could determine on 'a case by case basis' the Commonwealth laws that were to be adopted.[52]

D. The Validity of Section 29(1)

The failure of the challenges to the validity of section 29(1), enlivened section 31(1) of the *Corporations (Western Australia) Act*.[53] To recite what was described earlier, that provision conferred on the Commonwealth DPP the same powers in respect of an offence against the *Corporations Law of Western Australia*, as it would have for an offence against the *Corporations Law* as enacted by the Commonwealth. But as discussed, that conferral of power only had efficacy to the extent that the Commonwealth had authorised it. Consequently, the accused's submissions became focused upon the validity of the federal provision that purported to supply such authority. Again, this was regulation 3(1)(d) of *Corporations (Commonwealth Authorities and Officers) Regulations*, as supported by sections 47 and 73 of the Commonwealth Corporations Act. It explicitly stipulates that the Commonwealth DPP is to have the powers that the *Corporations (Western Australia) Act* confers upon it. To determine the validity of regulation 3(1)(d), the Full Court once again had to return to an initial exercise of statutory construction. This was a threshold issue: its resolution could lead to an inference that the Commonwealth provisions depended for their validity upon a discrete head of federal power.[54]

E. Did the Commonwealth Provisions Impose upon the Commonwealth DPP the Duty to Prosecute, or Merely Consent to it Performing that Function?

In *Re Wakim*, Gummow and Hayne JJ considered an argument that the federal cross-vesting legislation merely signified Commonwealth consent to the conferral by the states of their judicial power upon federal courts.[55] Their Honours agreed that a consequence of this construction would be that no supporting head of federal

49 Id at 162.

50 Id at 182.

51 In this respect, His Honour seemed prepared to develop the reasoning in *Leeth v The Commonwealth* (1992) 174 CLR 455 at 484–492 (Deane and Toohey JJ); and at 501–503 (Gaudron J).

52 Above n6 at 182.

53 Id at 163 (Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ).

54 See Saunders, above n34 at 516.

55 Gleeson and Gaudron JJ expressed significant agreement with the approach taken by Gummow and Hayne JJ: above n16 at 276 (Gleeson CJ); at 281 (Gaudron J).

power need be found.[56] However, it was also suggested that if such 'consent' is 'to be understood as having some operative effect,' then 'a question of power does intrude.'[57] Ultimately, this was obiter. Gummow and Hayne JJ construed the federal cross-vesting legislation as itself conferring jurisdiction upon federal courts, and that meant that the need to find a federal head of power was all the more pressing.[58] Of course in that case, the search for such a head of power could not be reconciled with the perceived exhaustive nature of Chapter III of the Constitution.[59]

In *Hughes* however, no question of judicial power arose.[60] The critical issue was the construction of the Commonwealth provisions authorising the DPP to prosecute an offence against the *Western Australian Corporations Law*. Following the reasoning of Gummow and Hayne JJ in *Re Wakim*, it seemed that if the provisions simply manifested Commonwealth consent, then no discrete supporting head of power was required. The joint judgment in *Hughes* appeared to concur in this principle: their Honours suggested that 'in the exercise of the incidental power' the Parliament could 'permit' Commonwealth officers to perform functions 'in addition to their Commonwealth appointments.'[61] However, that principle was held to have no application to regulation 3(1)(d) and the laws supporting it, because rather than simply manifesting the consent of the federal parliament, those provisions *imposed* upon the Commonwealth DPP the authority to prosecute.[62] This construction was based on the nature of the agreement that gave rise to the national scheme. That is, because the Commonwealth had assumed authority to prosecute, that function *had* to be construed as a duty 'lest there be an abdication of state authority with no certainty of its effective replacement.'[63] The legal consequence of this practical construction, was that the Commonwealth provisions had to rely on an applicable head of federal power.

Kirby J arrived at the same conclusion but by a different method. Consistent with his approach in *Re Wakim*,[64] His Honour asserted that *every* federal enactment that *consented* to the conferral of state powers upon a Commonwealth instrumentality, had to be 'clothed in the raiments of constitutional validity.'[65] In this sense, even if regulation 3(1)(d) and section 47(1) were to be construed as merely providing Commonwealth consent, they still needed to be supported by a referable head of federal power.[66]

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56 Above n16 at 305.
57 Id at 306.
58 Id at 302 with Gleeson CJ and Gaudron agreeing: at 276 (Gleeson CJ); at 281 (Gaudron J).
59 See Saunders, above n39 at 512.
60 See above n6 at 178 (Kirby J).
61 Id at 163.
62 Id at 167–168.
63 Id at 164.
64 Above n16 at 332–334.
65 Above n6 at 186.
66 In fact, His Honour considered that both s47(1) and regulation 3(1)(d) did only amount to consent: above n6 at 185.

F. Locating the Applicable Source of Constitutional Power

(i) The Executive Power and the Express Incidental Power

The principal submission made on behalf of the Commonwealth and the Western Australian Solicitor-General,[67] was that the agreement creating the national scheme had been entered into by the Commonwealth in exercise of the executive power contemplated by section 61 of the Constitution.[68] It was then argued that the provisions allowing the Commonwealth DPP to prosecute offences against the *Corporations Law* – as an integral part of that national scheme – were 'elemental' to this exercise, and hence supported by the express incidental power in aid of section 61. This conception of executive power was necessarily plenary: it appeared to rely on a statement of Mason J in *R v Duncan; Ex parte Australian Iron and Steel Pty Ltd.*[69] There, His Honour stated that 'the executive power of the Commonwealth' is not 'limited to heads of power which correspond with the enumerated heads of Commonwealth legislative power under the Constitution.' His Honour then went on to identify the 'entry into governmental agreements between Commonwealth and state on matters of joint interest,' as unquestionably within the scope of executive power.[70]

Basing the constitutional authority for regulation 3(1)(d) and section 47(1) on the express incidental power in aid of section 61 would occasion particularly practical benefits. Most significantly, the generic nature of the executive power could potentially provide a complete source of authority for the Commonwealth DPP, and by implication other federal officers and instrumentalities, to enforce the *Corporations Law*. That is, enforcement would not require justification by reference to a specific head of power: it would simply be authorised as a necessary incident of the intergovernmental agreement embodied by the national scheme. However, neither the joint judgment or Kirby J, were prepared to conclusively answer the submission that section 51(xxxix) in aid of section 61 was 'an appropriate head of power' to support regulation 3(1)(d) and section 47(1).[71] The joint judgment acknowledged the statements of Mason J in *Duncan*, but thought it inappropriate to explicate the scope of the executive power. This was consistent with Kirby J's assertion that the source of authority for these Commonwealth provisions, 'should be explored no further than is strictly necessary to establish validity in this case.'[72]

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67 See submissions made by Mr Meadows QC Solicitor-General for Western Australia and Mr Bugg QC for the Commonwealth DPP: Transcript of *The Queen v Hughes* P58/1999 2 March 2000.

68 Section 61 provides that, '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 the laws of the Commonwealth.

69 Above n32.

70 Id at 560.

71 Above n6 at 165 (Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ); at 187 (Kirby J).

72 Id at 187.

(ii) The Trade and Commerce Power, the External Affairs Power and the Corporations Power

The consequence of the foregoing, was that the validity of regulation 3(1)(d) and section 47(1), had to be determined by reference to the particular functions they conferred on the Commonwealth DPP in this instance. That is, the powers conferred on the DPP to prosecute Mr Hughes and Mr Bell for the offences in relation to which they had been accused. Essentially, this required asking whether the Commonwealth could have independently created the offence proscribed by section 1064(1) of the *Corporations Law*. Section 15A of the *Acts Interpretation Act* 1901 (Cth) could then be applied: it would allow regulation 3(1)(d) and section 47(1) to be read down as conferring authority only when the offence being prosecuted was referable to a head of power.[73]

Of course, it was at this point that the seeming irrelevance of section 1064(1) to constitutional corporations attained significance. As suggested, that provision was aimed at the regulation of the type of managed investment trusts in issue. However, the joint judgment appeared receptive to the notion that it could be broadly characterised as a law with respect to constitutional corporations.[74] By preventing all persons, other than public corporations, from making available prescribed interests, section 1064(1) effectively conferred a privilege on such corporations in this respect.[75] It was then recognised that corporations dealing with prescribed interests would necessarily be engaging in financial transactions. And consequently, provisions authorising the prosecution of the offence created by section 1064(1) could be characterised as laws with respect to financial corporations within the meaning of section 51(xx).[76]

Again however, the joint judgment preferred not to express a firm opinion about this source of authority. It was unnecessary to determine whether the DPP had authority to prosecute by reference to section 51(xx), because the prosecution in this case was undoubtedly supported by the trade and commerce power[77] and the external affairs power.[78] That is, in this instance, regulation 3(1)(d) and section 47(1) were conferring on the Commonwealth DPP the power to prosecute conduct involving an off-shore investment, a subject clearly within sections 51(i) and 51(xxix).[79] Kirby J came to the same conclusion.[80] As such, there was no impediment to the Commonwealth DPP, in this case, prosecuting Mr Hughes and Mr Bell for the conduct proscribed by section 1064(1) of the *Corporations Law*.

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73 Id at 166–167 (Gleeson CJ, Gaudron, McHugh, Gummow, Hayne & Callinan JJ).

74 Id at 166.

75 In this context, reference was made to *Re Dingjan; Ex parte Wagner* (1995) 183 CLR 323 at 336–337 (Brennan J).

76 On this point reference was made to *State Superannuation Board v Trade Practices Commission* (1982) 150 CLR 282 at 305 (Mason, Murphy and Deane JJ).

77 Section 51(i).

78 Section 51 (xxix).

79 Above n6 at 166.

80 Id at 187.

7. *The Practical Implications of Hughes*

A. *Administrative Functions Conferred upon Commonwealth Instrumentalities by the Corporations Law*

An initial reaction to the Full Court's decision in *Hughes*, was that it defeated the purpose of the national scheme. That is, it was thought that the requirement of a 'federal nexus' for Commonwealth regulation of the *Corporations Law*, restricted the scheme's operation to spheres within which the Commonwealth retained constitutional authority.[81] Certainly, this may be the logical corollary of Kirby J's approach. His Honour asserted that every federal enactment that requires, or consents to, a Commonwealth officer or instrumentality exercising a function conferred upon it, must be supported by a federal head of power.[82] This was so regardless of the nature of that function. The joint judgment however, did not express that requirement as broadly. It is worth setting out in full what their Honours required:

> The present case emphasises that for the Commonwealth to impose on an officer or instrumentality of the Commonwealth *powers coupled with duties adversely to affect the rights of individuals,* where no such power is directly conferred on that officer or instrumentality by the Constitution itself, requires a law of the Commonwealth supported by an appropriate head of power.[83]

Hughes thus stands for the principle that where a Commonwealth officer or instrumentality is *enforcing* an aspect of the *Corporations Law*, most obviously, prosecuting an offence against it – the Commonwealth legislation imposing that obligation will need to be supported by a federal head of power. However, where that officer or instrumentality is exercising a purely administrative function with no potential to adversely affect the rights of individuals, does the requirement stipulated by the joint judgment arise? An observation made by Gleeson CJ in the course of argument appears to support both the existence and significance of this distinction:

> We happen to be concentrating at the moment on the power to prosecute the offences, but the scheme was intended to deal with aspects of regulation extending far beyond that.[84]

This raises a number of questions about the conferral of *administrative* functions upon Commonwealth instrumentalities by the *Corporations Law*. These form the vast majority of functions performed by ASIC[85] – a Commonwealth

81 See for example, Chris Merritt, 'ASIC Jurisdiction in Jeopardy' *Australian Financial Review* (4 May 2000) at 11; Editorial, 'Corporate Law and Disorder' *Australian Financial Review* (4 May 2000) at 22.

82 Above n6 at 186.

83 Id at 167–168. [emphasis added].

84 Above n45 at 20.

85 For empirical data showing that the majority of functions performed by ASIC are administrative in nature see above n2 at 66.

instrumentality thought to be jeopardised by *Hughes*.[86] Section 66 of the State Corporations Acts[87] confer on ASIC the functions and powers expressed to be given to it by the national scheme laws of the particular jurisdiction. The reciprocal Commonwealth consent to this conferral is found in section 11(7) of the *Australian Securities and Investments Commission Act* 1989 (Cth). It provides that ASIC has 'any functions and powers that are expressed to be conferred on it by a national scheme law of another jurisdiction.'

Thus, the conferral of power upon ASIC is achieved by essentially the same mechanism as was at issue in *Hughes*. We know from *Hughes* that despite its complexity, that mechanism works. In this sense, the question becomes whether section 11(7) is to be construed as obliging ASIC to perform those conferred functions. Consistently with the approach taken by the joint judgment in *Hughes*, that question is to be answered by reference to the role of those functions within the national scheme. That is, the Commonwealth provisions that gave the Commonwealth DPP authority to prosecute in *Hughes*, had to be construed as imposing that function; this was because the effect of the national scheme was 'to substitute the Commonwealth prosecution apparatus for those of the States.'[88] Thus, to construe those provisions as only manifesting consent to the conferral of those functions, would effectively allow the Commonwealth DPP to pick and choose when to prosecute offences against the law.[89] Clearly, public policy effectively dictated that such a construction – allowing a discretion beyond the normal prosecutorial discretion – could not be maintained.

However, do similar considerations arise where purely administrative functions are conferred upon ASIC by the *Corporations Law*? That is, is it necessary for the efficacy of the national scheme that administrative functions be conferred upon Commonwealth bodies as a matter of obligation? Or is it permissible to construe provisions like section 11(7) of the ASIC *Act*, as merely manifesting Commonwealth *consent* to such a body exercising administrative functions? In accordance with the joint judgment in *Hughes*, the consequence of the latter interpretation would be that such provisions do not need to be supported by a discrete head of federal power.[90] And thus as a matter of conceptual consistency, such an interpretation seems preferable: it returns us to the principle that a head of power only need be found where a Commonwealth body is exercising duties that may adversely affect the rights of individuals.

ASIC's role in overseeing the registration of companies is a context within which these issues may arise.[91] Functions in respect of company registration are

86 Ian Ramsay, 'Another Challenge to Corporate Regulation: the Hughes Case' (2000) 33 *Corporate Law Email Bulletin* <http://cclsr.law.unimelb.edu.au/bulletins/Bulletin.n0033.htm> (9 Aug 2000). Also, see Merritt above n81; Ian Dunlop, 'Legal Mess Must be Cleaned Up as Soon as Possible' *Australian Financial Review* (4 May 2000) at 57; Bryan Frith, 'Commonwealth Wins Battle Despite Fragile Terrain' *The Australian* (4 May 2000) at 24.

87 See above n4.

88 Above n6 at 164.

89 This was a point made by Gaudron J in the course of argument: see above n67.

90 Above n6 at 163–164.

conferred upon ASIC by Ch 2A of the *Corporations Law*; and section 11(7) of the *ASIC Act* purports to provide Commonwealth authority for this conferral. But we know that after *NSW v Commonwealth* the Federal Parliament cannot legislate with respect to the incorporation of companies. Presumably then, section 11(7) will be invalid to the extent that it operates to impose those functions upon ASIC, because in line with *Hughes* it would need to be supported by a federal head of power. However, this result can be obviated if section 11(7) is construed in this context as merely providing Commonwealth consent to ASIC exercising those functions. As discussed, the seemingly administrative nature of such functions – and the apparent absence of any supplementary duty that may adversely affect the rights of individuals – may favour such a construction. If so, then the operation of section 11(7) in this way, could simply be authorised in the exercise of the incidental power.[92] That is, Commonwealth provisions consenting to ASIC exercising such functions, would be valid as incidental to federal powers establishing the instrumentality.

B. The Enforcement of the Corporations Law by Commonwealth Officers and Instrumentalities

It is clear that *Hughes* requires a 'federal nexus' to be established whenever the purported enforcement of the *Corporations Law* by a Commonwealth instrumentality is challenged.[93] Arguably, this is 'a fragile foundation for a highly important national law,'[94] but the express and implied constitutional powers given to the Federal Parliament do give it extensive scope to regulate corporations, securities and the futures industry. Most obviously, such authority may be derived from the corporations power: the joint judgment in *Hughes* suggested (in obiter) that section 51(xx) will provide authority for Commonwealth officers and instrumentalities to prosecute 'the very great majority of offences' created by the *Corporations Law*.[95] Other relevant sources of specific constitutional authority include the insurance power[96] which may authorise the regulation of elements of securities law,[97] section 51(xiii) for offences involving banking, and the power with respect to insolvency.[98] *Hughes* itself demonstrated that federal enforcement will be permitted by sections 51(i) and 51(xxix) whenever the proscribed conduct has some foreign element.

There does, however, appear to be an absence of specific constitutional authority for federal regulation of trusts that have no interstate or foreign aspect. Such regulation would currently appear to rely on a general head of power, such

91 See Editorial, 'Legal Certainty at Risk in Challenge' *The Australian* (10 July 2000) at 12.

92 See the joint judgment on this point: above n6 at 163–164.

93 These are the Commonwealth bodies that may be 'obliged' to exercise the powers conferred upon them by the *Corporations Law* as stipulated in s3 of the *Corporations (Commonwealth Authorities and Officers) Regulations*.

94 Above n6 at 189.

95 Id at 166.

96 Section 51(xiv).

97 Above n2 at 47.

98 Section 51(xvii).

as the express incidental power in aid of section 61.[99] In this sense, Commonwealth enforcement of provisions concerning subjects not specifically within federal power – such as intrastate managed investments – may be justified as incidental to the national scheme perceived as a cooperative venture between the Executive arm of the state and federal governments. As discussed, the Full Court did not need to address this issue in *Hughes*, but it is clearly an area susceptible to prospective litigation. And it is in this context that the Full Court's conception of cooperative federalism assumes relevance.

8. *Hughes and Cooperative Federalism*

The implicit constitutional principle of cooperative federalism acknowledges that Australian governments may work together to produce results – such as the national scheme – that 'could not be achieved by each acting alone.'[100] Nevertheless, such cooperative action remains subject to the proviso that the means by which it is achieved 'is consistent with and does not contravene the Constitution.'[101] It thus created a weak presumption that cooperative legislative action would be valid, unless the Constitution expressly or impliedly prohibited it.[102] However in *Hughes*, the joint judgment's construction of the relevant Commonwealth provisions effectively denied any such presumption. As discussed, their Honours asserted that the nature of regulation 3(1)(d) and section 47(1), was to impose on an officer of the Commonwealth certain authority coupled with duties that may adversely affect the rights of individuals. Consequently, that imposition required a law of the Commonwealth supported by an appropriate head of power.[103] Thus, according to the joint judgment, the fact that the federal provisions formed part of a national cooperative scheme had no particular bearing on their constitutional validity. This reflected the approach that Gummow and Hayne JJ had taken to this issue in *Re Wakim*. There, their Honours stipulated that the combined operation of legislative power that cooperative federalism entails, 'is limited according to the constitutional validity which each respective parliament can give.'[104] Kirby J explicitly made this point in *Hughes*. His Honour asserted that it was inadequate to point to the cooperative scheme and simply argue that the merits of national cooperation sustained the constitutional validity of regulation 3(1)(d) and section 47(1).[105] A discrete source of federal power thus had to be located.

Yet, the notion that cooperative federalism is restricted according to the constitutional powers of the respective parliaments, should not exhaust its practical operation. For if cooperative federalism remains a positive objective of

99 Or alternatively, the implied nationhood power explicated by Kirby J in *Re Wakim* above n16 at 335–337.

100 See above n6 at 167–168 (Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ).

101 Above n32 at 560 (Mason J).

102 Saunders above n34 at 514.

103 Above n6 at 167–168.

104 Above n16 at 864; also at 846 (Gleeson CJ).

105 Above n6 at 186.

the Constitution, then presumably it will contribute to defining the scope of those powers. This was the essence of the Government's submission in respect of section 61. It was argued that as Commonwealth enforcement of the *Corporations Law* was a necessary incident of a scheme that entailed cooperative federalism, it came within the scope of the executive power of the Commonwealth. Of course, the joint judgment did not answer this submission. However, their Honours did suggest that section 51(xxxix) in aid of the executive power, will not allow the Federal Parliament to legislate with respect to any subject that it thinks is of national interest and concern. Arguably, this is a warning that the executive power will not be widely construed in prospective litigation: it may not provide a source of authority for aspects of the national scheme or indeed, features of other cooperative arrangements not specifically within federal power. If so, this would be consistent with the 'formal' approach to constitutional interpretation adhered to by the High Court in this particular context.[106] The apparent consequence of such formalism however, is that it leaves the *implicit* principle of cooperative federalism with little content.[107]

9. *Conclusion*

In *Gambotto v Resolute Samantha Ltd*, Gummow J intimated that the only source of constitutional authority permitting complete federal regulation of corporations, securities and futures, is the Territories power in section 122.[108] Given the obvious geographical limitations of that power, this implies that there must be inadequacies in the Commonwealth's present express authority to uniformly regulate such matters. *Hughes* provides impetus for those inadequacies to be addressed: it signals that the ability of the Commonwealth to enforce the *Corporations Law* may otherwise be compromised.

Consequently, calls for the states to appropriately refer their powers pursuant to section 51(xxxvi) have been renewed,[109] and all bar South Australia and Western Australia have now 'in principle' recognised that this solution is appropriate.[110] Apparently, the current proposal contemplates a referral of the

106 Although as Greg Craven points out, the 'concern for constitutional purity' reflected in *Re Wakim* and *Hughes* is difficult to reconcile with the Court's inclination 'to dredge vastly implausible implications out of the Constitution in the area of freedom of political communication:' Greg Craven, 'High Court Jesters Pose Cooperative Puzzle' *The Australian* (12 May 2000) at 16. For a criticism of 'flawed invocations of legalism' in *Re Wakim* see Jeremy Kirk, 'Constitutional Interpretation and a Theory of Evolutionary Originalism' (1999) 27 *Federal Law Review* 323.

107 George Williams, 'Hughes Decision Heightens Uncertainty' *Australian Financial Review* (5 May 2000) at 33.

108 (1995) ACLC 1564 at para 18.

109 Darryl Williams, Commonwealth Attorney-General & Joe Hockey, Minister for Financial Services and Regulation, *Joint News Release: Hughes* (3 May 2000) at 23.

110 See Malcolm Maiden, 'West Winds Causing Turbulence in the East' *Sydney Morning Herald* (31 July 2000); Chris Merritt, 'Hughes Reaction Just Panic' *Australian Financial Review* (5 May 2000) at 32.

Corporations Act of each state, together with sufficient constitutional power to ensure that they could be enforced by Federal agencies.[111] However, it has been suggested that this approach is likely to lead to an inflexible system of corporate law – conceivably a consequence of a compromise to 'recalcitrant' states.[112] But even if the political obstacles to such a reference are overcome, the spectre of *Hughes* will remain. Pending challenges to ASIC's power to register companies under the national scheme – which thus threaten the incorporation of some 660,000 companies since 1991[113] – show that the decision was a catalyst for further litigation. This note has suggested that the approach of the Full Court in *Hughes* provides scope for these challenges to be rejected; and yet, the past 18 months have shown us that any definitive prediction would be perilous.[114]

ALEX DE COSTA*

111 Chris Merritt, 'Crisis Plan Second Best Idea say Experts' *Australian Financial Review* (4 August 2000) at 33.

112 Mark Westfield, 'We Need a National Law Scheme – We Need a Law Scheme' *The Australian* (15 August 2000) at 21; Katherine Towers, 'Corporate Payback for Rebel States' *Australian Financial Review* (14 July 2000) at 26.

113 Editorial, 'Legal Certainty at Risk in Challenge' *The Australian* (10 July 2000) at 12.

114 See Chris Merritt, 'Black-Letter Law Leaves a Nasty Mess on the Floor' *Australian Financial Review* (26 July 2000) at 28.

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