

**A CONSTITUTIONAL PERSPECTIVE ON *HUGHES*¹ AND
THE REFERRAL OF POWERS**

by

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1. SUMMARY

- 1.1 The agreed references to enable the Commonwealth to enact a national Corporations Law were not needed in order to solve the problems arising from *Hughes* (though they were needed after *Wakim*² to give comprehensive jurisdiction to the Federal Court).
- 1.2 The *Hughes* problems could have been solved by narrower references pursuant to which this and other similar cooperative schemes would continue to be combinations of Commonwealth laws for the ACT and complementary laws of the States and the Northern Territory. The extensive range of these schemes is illustrated by the list contained in the judgment of Kirby J in *Hughes*.³

2. THE EFFECTS OF THE AGREED CORPORATIONS LAW REFERENCES

- 2.1 The agreed references were needed, not to meet the *Hughes* problems, but to meet the different problem created by *Wakim* – ie to enable the Federal Court to be given comprehensive jurisdiction in Corporations Law matters.
- 2.2. However, the agreed references have several disadvantages -
- 2.2.1. The references do not resolve the *Hughes* problem for the other cooperative schemes and will not necessarily provide a model for those

¹ (2000) 171 ALR 155.

² *Re Wakim; Ex parte McNally* (1999) 198 CLR 511. For a detailed criticism of *Wakim* see Dennis Rose, "The Bizarre Destruction of Cross-vesting", in G Williams and A Stone (eds.), *The High Court at the Crossroads* (Federation Press 2000), Chapter 6 (an expanded version of a paper with the same title in (1999) 11 *Aust Jnl of Corp Law*, 1-26).

³ (2000) 171 ALR 155, at 185 - 6 [109] fn 146 (see *Attachment A*).

schemes since States may be unwilling to give the Commonwealth similar references of the relevant subject-matters. They may object to the width of such references.

- 2.2.2 The Corporations Law, as a Commonwealth law, will need to be modified so as to be consistent with Chapter III of the Constitution.

(However, these modifications may also have been needed in the present ACT Corporations Law under the existing scheme. This is because of doubts raised by recent cases on the extent to which some of the provisions contained in Chapter III limit the power of the Parliament to make laws for the Territories under section 122.⁴)

- 2.2.3 Any inconsistency between the Corporations Law, as a Commonwealth law, and other State legislation will be resolved by the operation of s109 of the Constitution, and not, as is the case now, inconsistency solely as between State legislation. Press reports indicate that at least one State is concerned about this consequence.⁵

- 2.3. In so far as the basic references would be limited to legislation in the precise terms of the existing Corporations Law, they would be references of a "matter" within the meaning of section 51(xxxvii) of the Constitution⁶.

Amendments of the Commonwealth Corporations Law

- 2.4 The agreed references will include a Commonwealth power to amend the referred legislation to be exercised subject to the provisions of the Corporation Agreement. This will allow amendments to be made relating to "the formation of corporations, corporate regulation and the regulation of financial products or services".
- 2.5 Given that the restrictions on the Commonwealth's amendment powers are to be achieved through that Agreement (which is not legally binding), it is unnecessary to consider whether any legally effective restrictions *could* have been devised. However, we think they could have been achieved by means of State references expressed not to have effect, for the purposes of any Commonwealth legislation enacted pursuant to them, unless and until at least four States have consented to legislation in those terms.⁷

⁴ Eg *Northern Territory v GPAO* (1999) 196 CLR 553; *Re Governor Goulburn Correctional Centre; Ex parte Eastman* (1999) 165 ALR 165; and see also the relationship between s51(xxxi) and 122 considered in *Newcrest Mining (WA) Ltd v The Commonwealth* (1997) 190 CLR 513..

⁵ The State in question is Western Australia: see Chris Merrit, "National Corporate Law Strikes Hurdles" *Australian Financial Review* 27 October 2000 at p 55.

⁶ *R. v Public Vehicles Licensing Appeal Tribunal; Ex parte Australian National Airways Pty Ltd* (1964) 113 CLR 207 at 224-225.

⁷ *The Queen v. Australian Industrial Court; Ex parte CLM Holdings Pty Ltd.* (1977) 136 CLR 235.

- 2.6 Presumably the amendment power over "corporate regulation" will be limited to the matters covered by the various Chapters of the present Corporations Law. It therefore seems that, apart from "financial products and services", the Commonwealth is not to be able, under the Corporations Law, to regulate other activities of corporations generally – eg on environmental or health matters (though of course it could do so in separate legislation, for example, under section 51(xx)). The Corporations Law would not then "cover the field" of corporate activity so as to exclude, for example, State laws on matters such as environment protection or health.

3. THE LIMITED UNCERTAINTIES CREATED BY *HUGHES*

- 3.1. In order to understand the solution suggested below, it is essential to understand how narrow are the uncertainties created by *Hughes*. The uncertainties are as follows:

3.1.1 Uncertainty on whether there is a "constitutional imperative" to have a Commonwealth duty to exercise the State powers and functions under the Corporations Law or any other cooperative scheme.

3.1.2 If there is such a "constitutional imperative", uncertainty whether the Commonwealth has power (either an "incidental" or "nationhood" power, or an implied power to waive its implied constitutional immunities⁸) to impose such duties in relation to the full range of State powers and functions, or whether the Commonwealth's power is limited to the exercise by the Commonwealth bodies of State powers and functions that assist in some way in the performance of Commonwealth powers and functions.

3.1.3 Uncertainty (lingering from *Wakim*) on whether the Commonwealth has power to consent to the conferral of the full range of State powers and functions on Commonwealth bodies.

4. THE HIGH COURT'S FUNDAMENTAL ERROR CONCERNING *DUNCAN*⁹

- 4.1 The joint judgment in *Hughes* errs fundamentally in saying that *Duncan* applies only where the exercise of the Tribunal's powers assisted in the settlement of an "interstate" dispute. The Deputies' Association claim involved a purely intra-State dispute (see *Attachment B*).

- 4.2. The High Court might nevertheless contrive to explain away (and limit) *Duncan* on some other ground – eg on the ground that it did not involve prosecutorial

⁸ *State Chamber of Commerce v The Commonwealth* (1987) 163 CLR 329 at 357, 358 and 365.

⁹ (1983) 158 CLR 535.

powers purportedly vested exclusively in the Commonwealth DPP, or on the ground that the Tribunal was not established solely under Commonwealth legislation. Such attempted distinctions would be wholly without merit. However, there is no cause for optimism after *Wakim* that the Court will not resort to such distinctions.

5. THE SUGGESTED SOLUTION

5.1. The basic solution is for each State to give a narrow reference enabling the Commonwealth to have power only in the areas of the *Hughes* uncertainties outlined in paragraph 3 above, ie a reference from each State covering -

5.1.1 the matter of the imposition of duties with respect to the exercise by any Commonwealth body of State powers and functions conferred by the State on the body with Commonwealth consent; and

5.1.2 the matter of consent to the exercise of State powers and functions by any Commonwealth body.

5.2 Pursuant to these references the Commonwealth could impose whatever duties were needed to meet the possible “constitutional imperative” suggested in *Hughes* and to give its consent to the exercise of the State powers and functions (thereby meeting the characterisation problem lingering from *Wakim*¹⁰). Such references would, of course, preserve the schemes in the States as schemes of State legislation administered by Commonwealth authorities.

5.3 It would be possible for each State to refer simply the matter of the exercise of State powers and functions conferred by the State on a Commonwealth body with Commonwealth consent. Commonwealth provisions imposing the duties and giving the consents would be laws “with respect to” that referred matter. However, references in those terms would legally permit Commonwealth legislation affecting the exercise of the State powers and functions in ways not intended by the States. It would therefore be necessary, by means such as those outlined in paragraph 2.5 above, to limit the scope of the legislation that the Commonwealth could enact pursuant to such references.

5.4 The State legislation (as now) would not be directly affected by Chapter III or other restrictions that would apply to a Commonwealth law enacted pursuant to section 51(xxxvii). However, it would be *indirectly* affected if such restrictions apply to laws made for the ACT since the State legislation only “picks up” and applies the ACT laws to the extent to which they are valid.

Federal jurisdiction

5.5 The only “draw-back” (if it is one) seems to be that the Federal Court would not have *comprehensive* jurisdiction in matters arising under the State laws.

¹⁰ See *Attachment B*, pp. 9-10.

- 5.6 However, under our suggested scheme, *the Federal Court would probably have jurisdiction in matters involving the exercise of the State powers or functions*. This is because the Commonwealth duties would be a (constitutionally necessary) essential factor in establishing the claims or defences in such matters¹¹.
- 5.7 The federal jurisdiction could be expanded if the State legislation were widened to provide that *none* of the State powers or functions could be exercised in the absence of a Commonwealth-imposed duty (whether or not it was constitutionally necessary), and if the State references in paragraph 5.1.1 above were expanded to include the matter of the imposition of such duties.

Possible objections

- 5.8 A possible objection is that State references must be references of matters on which the States themselves have power to legislate, and that the States have no power to impose duties on Commonwealth bodies without Commonwealth consent, or to provide that such bodies may exercise State-conferred powers and functions.
- 5.9 However, this objection fails. A State does have *power* to make laws imposing duties on Commonwealth bodies and providing that they may exercise powers and functions conferred by State law. Such laws are merely *ineffective* while there is any inconsistent Commonwealth legislation¹² or any unwaived Commonwealth immunity from such laws.
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¹¹ See, for example, *Western Australia v The Commonwealth* (1995) 183 CLR 373 at 412, where federal jurisdiction was held to exist in common law native title claims, even though the *Native Title Act 1983* (Cth) was not even an essential element in establishing the rights claimed, but was only "protective" of such rights by precluding State laws purporting to extinguish or impair the common law rights). Note also the jurisdiction under s75(v) of the Constitution.

¹² *Butler v Attorney-General (Vic)* (1961) 106 CLR 268.

ATTACHMENT A

***R v HUGHES* (1999) 171 ALR 155 [109] fn 146 per Kirby J**

[Pages 185 – 6]

[109] In this case there is no express or implied prohibition in the Constitution against the conferral of such functions and powers by State law on the Commonwealth officer or authority concerned, as was held in *Re Wakim* to exist in respect of the purported federal consent to the conferral of State jurisdiction upon federal courts[144]. On the contrary, it is established beyond argument that State functions and powers may be conferred upon officers and authorities of the Executive Government of the Commonwealth[145]. There are many such arrangements to which the Federal Parliament has consented [146].

146 See eg *Aboriginal and Torres Strait Islander Commission Act* (Cth), s 9; *Air Navigation Act 1920* (Cth), s 30; *Australian Federal Police Act 1979* (Cth), s 8(1)(bc); *Australian National Railways Commission Act 1983* (Cth), s 11; *Australian National Training Authority Act 1992* (Cth), s 6; *Australian Prudential Regulation Authority Act 1998* (Cth), s 9A; *Australian Sports Drug Agency Act 1990* (Cth), s 9A; *Child Support (Assessment) Act 1989* (Cth), s 15; *Civil Aviation Act 1988* (Cth), s 9; *Classification (Publications, Films and Computer Games) Act 1995* (Cth), s 4; *Gas Pipelines Access (Commonwealth) Act 1998* (Cth), s 13; *Human Rights and Equal Opportunity Commission Act 1986* (Cth), ss 11(1)(c), 16; *National Crime Authority Act 1984* (Cth), s 11; *National Road Transport Commission Act 1991* (Cth), s 8(1)(d); *Public Service Act 1999* (Cth), s 71; *Taxation Administration Act 1953* (Cth), s 13L; *Therapeutic Goods Act 1989* (Cth), s 6A; *Trade Practices Act 1974* (Cth), ss 44ZZM, 150F; *Workplace Relations Act 1996* (Cth), s 5(6).

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ATTACHMENT B

1. *R v HUGHES* (1999) 171 ALR 155

[Page 167]

[45] "[The] several judgments of Mason, Murphy, Brennan and Deane JJ in [*The Queen v Duncan; Ex Parte Australian Iron And Steel Pty Ltd* support the proposition that the powers in s 51(xxxv) and s 51(xxxix) support legislation to establish a tribunal to exercise federal and State powers where this may better achieve the object of preventing and settling interstate disputes.¹³ What has been said above respecting the powers and functions of the DPP which derive from State law is consistent with that approach".

2. The passages in *Duncan* referred to (158 CLR at 562-563, 566-567, 579-580, and 590-592) deal with the claims by certain unions for variation of an award made in the exercise of Commonwealth powers) in respect of an "interstate" dispute.
3. However, the statement in *Hughes* completely disregards the decision and reasons in *Duncan* concerning the Deputies' Association claim which related to a purely intrastate dispute (see below).

***THE QUEEN V DUNCAN; EX PARTE AUSTRALIAN IRON AND STEEL PTY LTD* (1983) 158 CLR 535**

[Page 537: CLR - statement of facts; underlining added]

"On 1 October 1982 Australian Iron and Steel Pty. Ltd. (AIS) gave notice to a number of its employees that their services would be terminated from 29 October 1982. Each notified employee was a member of an organization registered under the *Conciliation and Arbitration Act* 1904 (Cth) or of an industrial union registered under the *Industrial Arbitration Act* 1940 (N.S.W.). The organizations were [list of organizations]. The industrial union was the New South Wales Colliery Officials' Association, Illawarra District (the Deputies' Association). On 22 October the unions, other than the Deputies' Association, applied to the Coal Industry Tribunal constituted by Mr. D.A. Duncan, for the inclusion in the appropriate awards of a new clause relating to retrenchment and redundancy. The Deputies' Association made a similar application on 27 October. ... Because of a pending objection to its jurisdiction, the Tribunal made no order relating to the federal organizations, but made recommendations to the same effect as its order in relation to the Deputies' Association."

Gibbs CJ

[557] "The final question in the case is whether the orders made by the Tribunal were within its powers. No difficulty arises as to the order made on 27 October 1982 in respect of the members of the Deputies' Association. The powers conferred by the State Coal Industry Act were available and ample to enable the Tribunal to deal with the application for an interim order that the prosecutor should extend the period of the notices which it had given, or should reinstate its employees. Such an application was clearly within both the opening words and par. (k) of the definition of "industrial matters": see *Australian Iron & Steel Ltd. v. Dobb* [(1958) 98 CLR, at pp 597-598]. Since it was not necessary to establish that the application made by the Deputies' Association was within the ambit of an interstate dispute the Tribunal clearly had jurisdiction to entertain it. In the case of the other respondents

Mason J

[561-562] "[The] Court's judgment in *Lydon* is important for another reason. It proceeds on the footing that the joint legislation validly sets up the Local Coal Authority. In discussing the joint legislation the Court said (1960) 103 CLR, at p 20:

"By this ingenious legislative device the best is done to give powers expressed almost in identical terms and conferred by the two respective Parliaments a combined operation so that they will operate according to the constitutional validity which each respective Parliament was able to give to them."

"And the Court's decision was that the Authority was exercising a power conferred by the State Parliament.

"There have been other cases in which the Court has assumed that Commonwealth and State Parliaments have the capacity by joint legislation to create and confer powers on an authority or to create a combined legislative scheme - see *Wilcox Mofflin Ltd. v. State of N.S.W.* (1952) 85 CLR 488, at pp 508-511, 526-528; *Airlines of N.S.W. Pty. Ltd. v. New South Wales* (1964) 113 CLR 1; *Clark King & Co. Pty. Ltd. v. Australian Wheat Board* (1978) 140 CLR 120."

[565] "In other respects, and they include the validity of the order made on 27 October, I agree with the reasons of the Chief Justice".

Murphy J

[566] "I agree generally with the reasons for judgment given by the Chief Justice, but will deal briefly with some aspects of the constitutional validity of the Coal Industry Tribunal and its powers."

Wilson and Dawson JJ

[567-568] "We have had the advantage of reading the reasons for judgment of the Chief Justice. We agree with the conclusions of his Honour and substantially with the reasoning which leads to those conclusions.

Brennan J (underlining added)

[579-580] "Section 32(1) permits the Tribunal to have and to exercise State powers to the extent specified in that part of [the Act](#); it does no more. [Section 32\(2\)](#) is the only provision which vests powers in the Tribunal and it does not purport to vest State powers. It is within the competence of the Commonwealth Parliament to permit such a tribunal to have and to exercise State powers where the vesting and exercise of State is conducive to or consistent with the achievement of the object which the vesting and exercise of federal powers is intended to achieve. It is no argument against the validity or efficacy of co-operative legislation that its object could not be achieved or could not be achieved so fully by the Commonwealth alone.

Deane J

[594] "The Tribunal had power to consider and determine that industrial dispute regardless of whether it was an intrastate dispute or an interstate dispute and regardless of whether the Tribunal's order would involve a variation of a previous award of the Tribunal. It was unnecessary for the Tribunal to be concerned with whether the dispute before it came within the ambit of previous disputes which had led to the making of the relevant award."

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RE WAKIM: EX PARTE McNALLY (1999) 198 CLR 511

Gummow and Hayne JJ (underlining added)

[119] "In the case of the general cross-vesting arrangements, [the State jurisdiction] is said to be conferred on the federal judicature to avoid 'inconvenience and expense . occasionally [being] caused to litigants by jurisdictional limitations in federal, State and Territory courts.' That is, it is conferred in aid of what is thought to be the more efficient disposition of matters that fall within the *States'* judicial power. No other justification ... was put forward in argument."

[122] "Various descriptions of what is meant by "incidental" power can be found in the cases: '[e]verything necessary to the effective exercise of a power'; 'everything that is reasonably necessary to carry the [main power into effect]; provision that is conducive to the success of the legislation!.. [The main power] is the Commonwealth's power with respect to the judicial power of the Commonwealth. [It] is not necessary to the exercise of *that* power, and it is not reasonably necessary to carry it into effect, that State judicial power is conferred on federal courts".

McHugh J (underlining added)

[71] "[The] cross-vesting of State judicial power has nothing to do with federal jurisdiction".

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