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# Intergovernmental agreements and the executive power

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*Executive agreements between governments affect most areas of governmental activity in Australia, with implications for the transparency and accountability of government that have long since been understood. Relatively little attention has been paid, however, to the question that is the subject of this article: the scope of constitutional power to make such agreements. The question is significant in its own right, but is given greater practical importance still by the head of power in s 51(xxxix) of the Constitution, which is triggered by an exercise of executive power. The possibility that this is a source of authority for the exercise of State functions by Commonwealth officers was raised but not resolved by the High Court in *R v Hughes* (2002) 202 CLR 535. While the matter certainly is not free from doubt, this article concludes that the power to enter into agreements is limited by the text and structure of the Constitution, but that s 51(xxxix) authorises legislation to implement Commonwealth commitments pursuant to an agreement that falls within Commonwealth executive power.*

## INTRODUCTION

The broad subject of this article is the interaction between federalism and the executive power of the Commonwealth. In a sense, of course, it is not possible to separate the two, because the federal division of power under the Australian *Constitution* defines the scope of Commonwealth executive power, limiting the constitutional authority of the executive government of the Commonwealth to act in particular ways that are accepted to be executive in character. The general scope of executive power, including what George Winterton has described as its breadth,<sup>1</sup> necessarily is canvassed in Professor Zines<sup>2</sup> article and need not be pursued further here.<sup>2</sup>

This article is concerned rather with a particular application of the question of the scope of federal executive power, to agreements between the Commonwealth and the States. The subject thus not only provides a vehicle for exploring the meaning of the relevant sections of the *Constitution*, but also is significant in its own right for the operation of federalism in Australia. It is rendered topical by a series of decisions of the High Court, culminating for the moment in *R v Hughes* (2002) 202 CLR 535; by the legislative responses to them;<sup>3</sup> and by a resurgence of interest in the potential of intergovernmental cooperation to achieve a new round of coordinated policy outcomes.<sup>4</sup>

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<sup>1</sup> Winterton G, *Parliament, Executive and the Governor-General* (Melbourne University Press, 1983) p 29.

<sup>2</sup> Zines L, "The Inherent Executive Power of the Commonwealth" (2005) 16 PLR 279.

<sup>3</sup> See the Corporations (Commonwealth Powers) Acts 2001 (all States) converting the intergovernmental scheme for the regulation of corporations to one based on the reference power, s 51(xxxvii). More particularly, however, for present purposes, see the amendments to other cooperative scheme legislation designed to cure defects perceived to have been identified in *Hughes* without radically altering the structure of the scheme: by way of example, *Agricultural and Veterinary Chemicals Legislation Amendment Act 2001* (Cth); *Agriculture and Veterinary Chemicals (Victoria) (Amendment) Act 2001* (Vic). For a more considered legislative response to *Hughes*, see *Water Efficiency Labelling and Standards Act 2005* (Cth), *Water Efficiency Labelling and Standards (New South Wales) Act 2005* (NSW). See also the Co-operative Schemes (Administrative Actions) Acts 2001 (all States, although with application to a different range of schemes), seeking to validate past actions taken pursuant to cooperative schemes, to the extent to which they might have been put at risk by *Hughes*.

<sup>4</sup> See, eg Premier of Victoria, *A Third Wave of National Reform: A New National Reform Initiative for COAG* (August 2005) <http://www.dpc.vic.gov.au/thirdwave> viewed 26 August 2005.

It is noted in passing that uncertainty about the scope of federal executive power has contemporary significance in several other contexts as well. One,<sup>5</sup> to which Anne Twomey drew attention in her comment on an earlier version of this article that was prepared for discussion at the Executive Power Roundtable,<sup>6</sup> is Commonwealth expenditure on purposes and programs that could not constitutionally be supported by legislation enacted pursuant to its heads of substantive legislative power. The last detailed examination of the spending power by the High Court took place in 1975, in *Victoria v Commonwealth (AAP Case)* (1975) 134 CLR 338, which established the likelihood of a link between spending and the executive power but which left key questions unresolved.<sup>7</sup> Interest in the answers has subsequently been revived by what may be the beginning of a trend in the design of Commonwealth programs in the field of education, away from the use of s 96 grants in which Commonwealth moneys are made available through the States, in favour of conditional grants directly to the ultimate recipient.<sup>8</sup> While there may be an argument that the present payments could be supported in whole or in part by reference to Commonwealth power to make laws for the provision of benefits to students,<sup>9</sup> this is something of a long bow,<sup>10</sup> to which the alternative is a generous construction of s 61. If the latter were ultimately to prevail, it would provide an incentive to structure Commonwealth programs in reliance on executive power, which would have implications not only for the federal character of the Australian system of government, but also for the traditional mechanism for the accountability of government that regulatory legislation represents.

The question of the scope of federal executive power is significant in its own right. It derives additional significance, however, from its interaction with s 51(xxxix), which offers a source of supporting legislative power, albeit of uncertain extent. The segments of s 51(xxxix) that are relevant for present purposes confer legislative power on the Commonwealth Parliament to make laws with respect to: "Matters incidental to the execution of any power vested by this *Constitution* ... in the Government of the Commonwealth ... or in any department or officer of the Commonwealth." These parts of the paragraph most obviously complement s 61 of the *Constitution*,<sup>11</sup> which confers the general "executive power of the Commonwealth" on the Queen, makes it "exercisable" by the Governor-General and provides that the power "extends to the execution and maintenance of this *Constitution*, and of the laws of the Commonwealth". While there are other sections of the *Constitution* that vest power in the executive branch,<sup>12</sup> these more specific conferrals almost certainly are comprehended within the scope of s 61 as it is now understood.<sup>13</sup> Nevertheless, they represent

<sup>5</sup> Another, which is a perennial, is the scope of Commonwealth power to contract: see Seddon N, *Government Contracts* (3rd ed, Federation Press, 2004) pp 47-66.

<sup>6</sup> Roundtable on Executive Power, hosted by the Centre for Comparative Constitutional Studies, 14 July 2005.

<sup>7</sup> In particular, the extent to which the reference to "purposes of the Commonwealth" in s 81 operates as a restriction on the power of the Commonwealth Parliament to appropriate funds; and the consequential question of the extent to which, if s 81 is not so restricted, s 61 operates as a limitation on the executive action that may be taken in the course of expenditure.

<sup>8</sup> In the case of higher education, this is not a recent development: *Higher Education Funding Amendment Act 1992* (Cth); see now *Higher Education Support Act 2003* (Cth). In relation to schools see, eg the description of the "Investing in our Schools Programme", [http://www.dest.gov.au/sectors/school\\_education/programmes\\_funding/general\\_funding/capital\\_grants/iios/default.htm](http://www.dest.gov.au/sectors/school_education/programmes_funding/general_funding/capital_grants/iios/default.htm) viewed 26 August 2005; see also Department of Education, Science and Training *Portfolio Budget Statements 2005-2006*, Outcome 1 [http://www.dest.gov.au/portfolio\\_department/dest\\_information/publications\\_resources/resources/budget\\_information/budget\\_2005\\_2006/pbs.htm](http://www.dest.gov.au/portfolio_department/dest_information/publications_resources/resources/budget_information/budget_2005_2006/pbs.htm) viewed 26 August 2005. The appropriation for the program appears to be included in the general departmental appropriation in *Appropriation Bill (No1) 2005-2006* (Cth).

<sup>9</sup> *Constitution*, s 51(xxiiiA).

<sup>10</sup> An opinion on this point in relation to the *Higher Education Amendment Bill 1999* (Cth), by law firm Minter Ellison, has been made public: <http://www.avcc.edu.au/archive/news/1999/99mr12.htm> viewed 26 August 2005.

<sup>11</sup> Quick and Garran equate the two, although somewhat coyly: see their annotation of "powers vested in the Government" in the context of s 51(xxxix), and their discussion of responsible government on the context of s 62 in particular: Quick J and Garran RR, *The Annotated Constitution of the Australian Commonwealth* (Angus & Robertson, 1901, repr Legal Books 1976) pp 655, 703.

<sup>12</sup> In particular, ss 70 and 64. The former deals with the executive authority transferred from the colonies to the Commonwealth under the *Constitution*, which Quick and Garran understood as another source of power "vested ... in the Government" for the purposes of s 51(xxxix): Quick and Garran, n 11, p 655. The latter provides a "bare grant of power" to Ministers to administer departments, which also attracts s 51(xxxix): pp 655, 653.

<sup>13</sup> *Barton v Commonwealth* (1974) 131 CLR 477 at 498 (Mason J).

additional sources of executive authority, with potential application to intergovernmental agreements, which assist to focus attention on some of the uses to which agreements may be put.

This article has two primary aims. The first is to answer a series of general questions about the scope of the executive power to make intergovernmental agreements and to enact legislation pursuant to them, using s 51(xxxix). The second is to examine the question left unanswered in *Hughes*,<sup>14</sup> about the extent to which ss 61 and 51(xxxix) in combination can support the performance of State functions by Commonwealth officers or bodies where specific power is needed and there is no other, more obvious, source. The structure of the article is as follows. First, it outlines the nature, scope and purposes of intergovernmental agreements in Australia, to assist understanding of this peculiarly federal phenomenon, as a context for the legal analysis that follows. While this part is concerned primarily with the broad range of intergovernmental agreements, it concludes by examining two agreements in greater detail, as more or less typical examples of the genre. Second, it identifies and explains the three sets of constitutional questions raised by intergovernmental agreements; to which answers are suggested in the following part. Finally, it makes some concluding observations, not the least of which is to draw attention to the necessarily speculative nature of much of the analysis in this notoriously obscure corner of Australian constitutional law.

## THE NATURE, SCOPE AND PURPOSES OF INTERGOVERNMENTAL AGREEMENTS

The practice of entering into agreements between two or more governments as a basis for collaborative action preceded federation.<sup>15</sup> After federation it continued, generally although not always including the Commonwealth as a party.<sup>16</sup> By the early 21st century, intergovernmental agreements affect many, and perhaps most, areas of governmental activity. We have no reliable tally of the total number of such agreements; there is no reason to suspect, however, that there are significantly fewer agreements in Australia than in Canada where, in 2002, it was estimated that federal-provincial agreements numbered somewhere between 1,500 and 2,000.<sup>17</sup>

Agreements may be entered into at all levels in the executive branch: between the Governor-General and State Governors;<sup>18</sup> between Heads of Government;<sup>19</sup> between Ministers,<sup>20</sup> and

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<sup>14</sup> *R v Hughes* (2002) 202 CLR 535 at 555.

<sup>15</sup> Quick and Garran refer, for example, to the “Murray Customs Treaties” in the 1850s and 1860s between New South Wales, Victoria and South Australia, which dealt with both the level of the tariff to be imposed in South Australia on “Murray-borne goods” and its distribution between the three jurisdictions: Quick and Garran, n 11, p 101. Other agreements were made at inter-colonial conferences between 1863 and 1880, with a view to “securing uniform legislation and concerted administration”, apparently with limited success: p 103.

<sup>16</sup> Opinions of successive Commonwealth Attorneys-General refer to various such agreements in the first decade of federation, including the River Murray Waters Agreement between New South Wales, Victoria and South Australia and the mechanism proposed for securing joint electoral rolls between the Commonwealth and Tasmania in 1909: Commonwealth, Attorney-General’s Department, *Opinions of the Attorneys-General of the Commonwealth of Australia Vol 1: 1901–1914* (1981) pp 414–418. A selection of agreements from the 1920s can be found in Wiltshire KW (ed), *Administrative Federalism* (University of Queensland Press, 1977): see, eg the arrangements between the Commonwealth, New South Wales and Queensland for Cattle Tick Control in 1924 and a Meat Inspection Agreement between the Commonwealth and Queensland in 1931, pp 258, 254. Many of these early agreements required joint administration and went to some lengths to avoid constitutional pitfalls and improprieties in establishing them. Financial compensation for services rendered also was a continuing issue: Groenewegen PD (ed), *The Premiers’ Conference 1905: Report of Proceedings* (CRFFR, 1982).

<sup>17</sup> Poirier J, “Intergovernmental Agreements in Canada: At the Crossroads between Law and Politics” in Meekison JP, Telford H and Lazar H, *Reconsidering the Institutions of Canadian Federalism* (McGill-Queens University Press, 2002) pp 425, 427. Poirier reported, however, that at the end of 2001 only 1000 of them had been “located”: p 428. In 2001 the registry of the Quebec Secretariat for Canadian Intergovernmental Affairs contained 1,600 agreements to which Quebec was a party, “534 of which were considered to be in force”: p 428.

<sup>18</sup> In relation to the timing of Senate elections, eg: Evans H (ed), *Odgers’ Australian Senate Practice* (11th ed, Commonwealth Senate, 2004) p 94. For an example of another kind, see *Statistics (Arrangements with the States) Act 1956* (Cth), s 5.

<sup>19</sup> For example, Corporations Agreement 1997; Corporations Agreement 2002.

<sup>20</sup> For example, Lake Eyre Basin Intergovernmental Agreement 2002 (signed by Ministers with responsibility for the environment in the participating jurisdictions).

between officials.<sup>21</sup> Some are formally drawn and executed;<sup>22</sup> some are evidenced in other written forms, from an exchange of letters<sup>23</sup> to minutes of agreement;<sup>24</sup> and some are in oral or at least only partly written form.<sup>25</sup> Intergovernmental agreements sometimes are authorised<sup>26</sup> or foreshadowed<sup>27</sup> by statute, although many are not.<sup>28</sup> Most require implementation by statute in some form, to effectively carry out the terms of the agreement, although some do not.<sup>29</sup>

The purpose of any intergovernmental agreement is to combine the authority of two or more jurisdictions to pursue a mutually agreed outcome. Beyond that loose definition, however, the purposes of agreements and thus the mechanisms employed in them are so varied as to defy neat categorisation. What follows therefore does no more than sketch the field. Many agreements are driven by financial considerations, reflecting the Commonwealth's fiscal dominance, while others are purely, or largely, regulatory in character. The former often are associated with conditional grants, made pursuant to s 96 of the *Constitution*,<sup>30</sup> but there have been other types of agreements with a financial character as well, directed to the coordination of government borrowing,<sup>31</sup> the raising and allocation of taxes<sup>32</sup> and the combination of Commonwealth money and State legislative power to avoid certain constitutional constraints.<sup>33</sup> Agreements of a primarily regulatory character may call for collaborative although essentially separate action<sup>34</sup> or provide for reciprocal or joint action.<sup>35</sup> An increasingly important category of these aims to achieve harmonisation or uniformity of legislation,

<sup>21</sup> For example, the agreement between the Commonwealth Director of Public Prosecutions and the Queensland Director of Public Prosecutions, in relation to the prosecution of persons by the former for offences against the *Criminal Code* (Qld): referred to in *R v Fukusato* [2003] 1 Qd R 272 at [5], [78], [135].

<sup>22</sup> For example, Food Regulation Agreement 2002.

<sup>23</sup> For example, the exchange between Queensland Premier Theodore and Prime Minister Bruce in 1923–1924 in relation to the cotton guarantee: Wiltshire, n 16, pp 256–258.

<sup>24</sup> For example the agreement on uniformity of public holidays recorded in the COAG Communiqué, 8–9 June 1993, <http://www.coag.gov.au/meetings/080693/index.htm#holidays> viewed 31 May 2005. The same item appeared on the agenda for the 1905 Premiers' Conference: Groenewegen, n 16, p 173.

<sup>25</sup> The Justices in *Fukusato* noted that this appeared to be the case with the agreements between the Directors of Public Prosecution of the Commonwealth and Queensland. See, eg *R v Fukusato* [2003] 1 Qd R 272 at [135] (Thomas JA): “The full terms of the agreement ... have not been supplied and it is by no means clear whether there is an authoritative record of such agreement”; see also at [78] (Davies JA), observing that the court had seen “a draft agreement ... attached to the letter from the Commonwealth Director”, but that “it is unclear ... whether that represents precisely what was later agreed”.

<sup>26</sup> For example *Commonwealth Electoral Act 1918* (Cth), s 84, authorising arrangements with the States for joint electoral rolls. By way of a reverse example, the *States Grants (Primary and Secondary Education Assistance) Act 2000* (Cth) prohibits authorisation of payments to a State pursuant to the Act unless an intergovernmental agreement has been made with the State conforming with the requirements in the Act: s 12.

<sup>27</sup> For example, the *Research Involving Human Embryos Act 2002* (Cth) includes a definition of “corresponding State law” and adjusts Commonwealth law in apparent contemplation of cooperative State legislation, but makes no specific reference to an agreement: s 7(1), Pt 4.

<sup>28</sup> For example, Intergovernmental Agreement on a National Water Initiative 2004.

<sup>29</sup> For example, National Police Research Unit Enabling Agreement 2003.

<sup>30</sup> These range from formal and detailed agreements to terms and conditions attached by a Minister to payments to a State pursuant to the very sketchy authority given in a general appropriation Act: see, eg *Appropriation Act (No 2) 2004–2005* (Cth), s 15.

<sup>31</sup> Financial Agreement 1994.

<sup>32</sup> Intergovernmental Agreement on the Reform of Commonwealth-State Financial Relations 1999.

<sup>33</sup> For example, the War Service Land Settlements Agreements, in issue in *PJ Magennis Pty Ltd v Commonwealth* (1949) 80 CLR 382; cf *Pye v Renshaw* (1951) 84 CLR 58. An example of a different kind is the wheat industry assistance arrangement agreed by the governments in August 1938, in issue in *Deputy Federal Commissioner of Taxation v W R Moran Pty Ltd* (1939) 61 CLR 735, *W R Moran Pty Ltd v Deputy Federal Commissioner of Taxation* (1940) 63 CLR 338 (on appeal to the Privy Council).

<sup>34</sup> For example, the establishment in each jurisdiction of a national approach to the regulation of ammonium nitrate, in accordance with principles agreed at the COAG meeting 25 June 2004.

<sup>35</sup> A leading example is the mutual recognition of standards for goods and services between the States and Territories: Agreement Relating to Mutual Recognition 1992. See also the Trans-Tasman Mutual Recognition Agreement 2002.

using a variety of techniques including parallel uniform statutes,<sup>36</sup> complementary legislation,<sup>37</sup> the adoption of template legislation,<sup>38</sup> or a reference of power by the States to the Commonwealth.<sup>39</sup>

Sometimes harmonisation or uniformity of administration is sought as well, as an adjunct to legislative uniformity or as a goal in its own right. This is not a new development: since shortly after federation, agreements have provided for administrative cooperation, either through collaboration between officers in different spheres of government,<sup>40</sup> through the establishment of joint bodies,<sup>41</sup> or through the performance by officers of one sphere of government of functions derived from another.<sup>42</sup> From the 1990s, however, these familiar forms of administrative cooperation were extended, through a technique that became known as “federalisation”,<sup>43</sup> generally used in association with legislative schemes in which a high degree of uniformity was sought. The goal of federalisation was to structure cooperation in such a way that the regulatory arrangements became indistinguishable from a scheme enacted by a single jurisdiction that, usually, was the Commonwealth. Typically, such an arrangement involved the establishment of a single regulatory agency, with power derived from all participating jurisdictions, but formally accountable only to one. Typically also, uniformity was sought also in relation to all ancillary authorities and discretions, including prosecution, adjudication, and the investigation of maladministration. Describing the scheme as a “novel legislative device” on the first occasion on which it was used, for the cooperative arrangements that followed the invalidation of the Commonwealth’s unilateral *Corporations Law*, Attorney-General Duffy noted that “Commonwealth judicial and other authorities” would exercise their powers “to the exclusion of any corresponding powers conferred on State authorities and officers”, in order to give the arrangements “as far as is practicable, the characteristics of a single national law”.<sup>44</sup> Once used for the purposes of the corporations law, the technique was employed in other contexts as well,<sup>45</sup> until questions about its validity were raised in *Gould v Brown* (1998) 193 CLR 346, *Re Wakim; Ex parte McNally* (1999) 198 CLR 511 and *Hughes*.<sup>46</sup>

With one notable exception, the Australian *Constitution* does not provide a specific framework for intergovernmental agreements, or for intergovernmental bodies established in association with them, leaving questions about their validity and legal effect to be governed by general principles of law. The exception is s 105A of the *Constitution*, added to the *Constitution* in 1929 to authorise agreements between the Commonwealth and the States in relation to State debts. The Financial Agreement, by which the Australian Loan Council is established, is made pursuant to s 105A. The section provides that the agreement is binding on the parties, irrespective of constitutional or other laws and confers power on the Commonwealth Parliament to legislate to compel its performance by the parties.<sup>47</sup> It has been held, nevertheless, that the Agreement is contractual in character,<sup>48</sup> although

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<sup>36</sup> Effectively, the technique contemplated in the Intergovernmental Agreement on a National Water Initiative; see also Research Involving Human Embryos and Prohibition of Human Cloning Agreement 2004.

<sup>37</sup> For example, the Tasmanian Regional Forest Agreement 1997, also Supplementary Tasmanian Regional Forest Agreement 2005.

<sup>38</sup> Corporations Agreement 1997; see also Agriculture and Veterinary Chemicals Agreement, implied by the *Agriculture and Veterinary Chemicals Act 1994* (Cth)

<sup>39</sup> Corporations Agreement 2002; Agreement on Counter-Terrorism Laws 2004.

<sup>40</sup> See, eg the practice whereby the State Governors issue writs for half-Senate elections, to enable them to be held in conjunction with elections for the House of Representatives.

<sup>41</sup> For example, the joint coal industry tribunal that was in issue in *R v Duncan; Ex parte Australian Iron and Steel Pty Ltd* (1983) 158 CLR 535.

<sup>42</sup> For example, the arrangements for joint electoral rolls: *Commonwealth Electoral Act 1918* (Cth), s 84.

<sup>43</sup> Commonwealth, House of Representatives, *Debates* (8 November 1990) p 3663 ff (Attorney-General Duffy).

<sup>44</sup> Commonwealth, House of Representatives, n 43.

<sup>45</sup> See, eg Intergovernmental Agreement on Censorship 1995, as reflected in the *Classification (Publications, Films and Computer Games) Act 1995* (Cth); Intergovernmental Agreement on Gene Technology 2000.

<sup>46</sup> And the questions have continued: see *R v Holden* (2001) 161 FLR 372; *R v Fukusato* [2003] 1 Qd R 272

<sup>47</sup> *New South Wales v Commonwealth [No 1]* (1932) 46 CLR 155 at 178 (Rich and Dixon JJ).

<sup>48</sup> *Sankey v Whitlam* (1978) 142 CLR 1.

the contract is “one with very special qualities”<sup>49</sup> and the Loan Council is not an “authority of the Commonwealth”<sup>50</sup> whatever else it might be.

The provisions of an intergovernmental agreement may have legal effect when implemented by statute and an agreement itself may acquire the force of law if a statute so provides: although this is relatively rare.<sup>51</sup> In the absence of legislation, however, the legal effect of an agreement between governments must be determined by reference to the rules that apply to an exercise of executive power. These rules do not clearly distinguish intergovernmental agreements from two other more familiar categories of executive instruments: treaties and contracts. Conceptually, an intergovernmental agreement usually falls between the two, bearing the hallmarks of a political agreement, but between parties who lack the sovereign status of treaty partners. An intergovernmental agreement may in some circumstances be able to be enforced as a contract. Usually, however, lack of precision in the terms of the agreement, or the political nature of the undertakings in it, dispel an intention to create binding legal relations and place it beyond the normal authority of courts to enforce.<sup>52</sup> Even where the conditions for enforcement as a contract otherwise are right, an agreement may specifically deny an intention to create legal relations.<sup>53</sup>

Agreements that have no legal effect either as contracts or through legislation, nevertheless may be significant as a form of “soft law”,<sup>54</sup> effectively guiding executive action, often complementing the operation of legislation and sometimes affecting the interests of third parties.<sup>55</sup> Recognition of the regulatory effects of many agreements caused the implementation of the principles and guidelines for regulatory action by ministerial councils, which were endorsed by COAG in 1995, to avoid creating an “artificial boundary between the different forms of regulatory control”.<sup>56</sup>

Notwithstanding the political and legal significance of intergovernmental agreements, access to them often is difficult, not least because their very existence sometimes is unknown. This is not only a nuisance for academic researchers. It also impedes the proper performance of the other branches of government: most obviously Parliaments<sup>57</sup> and courts,<sup>58</sup> but also, in some circumstances, central executive agencies.<sup>59</sup> It is relatively rare for an intergovernmental agreement to be scheduled to a statute, even when it affects the operation of the statute; and while agreements are so scheduled from time to time,<sup>60</sup> it is difficult to discern any principle that guides when and why this is done.<sup>61</sup> There is no central source of intergovernmental agreements. The COAG website<sup>62</sup> now has a field for “Current Intergovernmental Agreements”: seven were listed on 1 June, 2005, although some others can be

<sup>49</sup> *Sankey v Whitlam* (1978) 142 CLR 1 at 90 (Mason J).

<sup>50</sup> *Tasmanian Wilderness Society v Fraser* (1982) 153 CLR 270.

<sup>51</sup> The distinction is drawn in relation to contracts generally in *Sankey v Whitlam* (1978) 142 CLR 1 at 31, 77, 89, 106.

<sup>52</sup> *South Australia v Commonwealth* (1962) 108 CLR 130.

<sup>53</sup> See for example clause 4 of the Agreement on Research Involving Human Embryos and Prohibition of Human Cloning (which is highly unlikely to have been justiciable in any event): “This Agreement is not justiciable and is not intended to create any legal or equitable right, duty or obligation whatsoever.”

<sup>54</sup> Poirier, n 17, pp 441-442.

<sup>55</sup> See, eg clause 5.1 of the Mutual Recognition Agreement 1992, laying down a procedure to be followed during the 12-month period for a “temporary exemption” of goods from a standard pursuant to s 15 of the *Mutual Recognition Act 1992* (Cth).

<sup>56</sup> Principles and Guidelines for National Standard Setting and Regulatory Action by Ministerial Councils and Standard Setting Bodies 1995.

<sup>57</sup> The Commonwealth, Senate, *Procedural Information Bulletin* (13 May 2005) p 2 reported a refusal by government to produce the Housing Assistance Agreements with the States in response to an order from the Senate on the grounds that “the information belongs to the States as well as the Commonwealth” which the *Bulletin* described as “another frequently-used reason in recent times”.

<sup>58</sup> As in *R v Fukusato* [2003] 1 Qd R 272, for example.

<sup>59</sup> Many of the reforms to the machinery of intergovernmental relations in Australia from the early 1990s were directed to improving the coordinating capacity of Cabinets and central agencies in the area: Painter M, *Collaborative Federalism* (Cambridge University Press, 1998) pp 65-67. There has been no comparable enthusiasm for improving accountability to Parliaments, courts and the public at large.

<sup>60</sup> Unusually, Part 1 of the Intergovernmental Agreement on the Reform of Commonwealth State Financial Relations requires the Agreement to be scheduled to the relevant Commonwealth and State legislation.

<sup>61</sup> There appears to be no reference to Agreements in the Commonwealth Legislation Handbook 2000, for example.

<sup>62</sup> <http://www.coag.gov.au/>.

found by searching back through meeting outcomes or going to the websites of individual ministerial councils. A reference online to an intergovernmental agreement is not necessarily accompanied by a link to its text; and while agencies sometimes will forward copies of agreements on request, not all will do so.<sup>63</sup> Once the existence of an agreement is known, presumably a copy could be obtained under the *Freedom of Information Act 1982* (Cth), on the assumption that it would be difficult to establish the conditions for an exemption under s 33A of the Act.<sup>64</sup>

While the nature and substance of agreements are almost infinitely varied, the following two are typical enough to be used as examples.

The Corporations Agreement 1997 contains provisions of a kind that were in issue in *Hughes*<sup>65</sup> and thus is doubly useful for present purposes. The 1997 Agreement elaborated the Alice Springs “heads of agreement”,<sup>66</sup> with which the court in *Hughes* was principally concerned.<sup>67</sup> The 1997 Agreement recorded agreement on a legislative scheme, whereby each State would apply the Commonwealth *Corporations Law*, enacted for the ACT, as a law of the State, in a way that enabled the law to be administered and enforced on a national basis<sup>68</sup> and provided for the distribution between participating jurisdictions of fees received under cooperative scheme laws.<sup>69</sup> The agreement also required the corporate regulator<sup>70</sup> to have “sole responsibility” for the administration of the corporations legislation and made it responsible to the Commonwealth, rather than to the States;<sup>71</sup> established the Ministerial Council for Corporations and prescribed its procedures;<sup>72</sup> and “federalised” investigations and prosecutions under the scheme legislation, to simulate as fully as possible the effect of Commonwealth legislation, even when action is taken under a State application law.

The Intergovernmental Agreement on the Reform of Commonwealth-State Financial Relations 1999 was made in connection with the introduction of the Goods and Services Tax (GST). In essence, it provides for the payment by the Commonwealth to the States of the revenue raised from the GST, with a consequential adjustment of aspects of the previous federal financial system, including the cessation of the Financial Assistance Grants. Other key provisions include the following. First, Part 2 provides, inter alia, that the States “will cease to apply” a range of listed taxes from specified dates “and will not reintroduce them or similar taxes in the future”. The force of this requirement is modified by an “acknowledgement” that the various jurisdictions will “use their best endeavours to ensure that their legislation will require compliance with the Agreement”. Second, Part 3 provides that the States will “compensate the Commonwealth for the agreed costs incurred by the Australian Taxation Office (ATO) in administering the GST”.

## ISSUES FOR DETERMINATION

### General

Despite the range and long history of intergovernmental agreements in Australia, there has been relatively little judicial consideration of the specific constitutional authority for them. This is not

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<sup>63</sup> The Intergovernmental Agreement establishing the Centre for Crime and Justice Statistics is “not publicly available or ... located on a public website”: email to the author, in response to a request for access, February 2005.

<sup>64</sup> Section 33A relevantly provides an exemption where a document “would, or could reasonably be expected, to cause damage to relations between the Commonwealth and a State” unless the disclosure “would, on balance, be in the public interest”. In *Re Cyclists’ Rights Action Group* (1995) 35 ALD 187, the Administrative Appeals Tribunal upheld the claim for an exemption for the record of deliberations in the Australian Transport Advisory Council (a ministerial council) but on the basis that the meeting was conducted in confidence and thus fell within another part of the section, exempting matter communicated in confidence: s 33A(1)(b).

<sup>65</sup> *R v Hughes* (2000) 202 CLR 535 at 544.

<sup>66</sup> The heads of agreement were tabled in the Senate on 11 December 1990.

<sup>67</sup> More recently, the 1997 Agreement has been superseded in turn by the Corporations Agreement 2002, accompanying the restructured scheme put in place in the wake of the decision in *Hughes*.

<sup>68</sup> Article 502 ff.

<sup>69</sup> Part 7.

<sup>70</sup> Now the Australian Securities and Investment Commission (ASIC).

<sup>71</sup> Articles 301, 302.

<sup>72</sup> Part 4.

particularly surprising. As has been seen, there is no system for making agreements publicly available; most agreements involve political rather than legal undertakings;<sup>73</sup> typically their effect is intangible until legislative action pursuant to them is taken. At that point, challenges sometimes have been made, on constitutional grounds. For the most part, however, the argument in such cases focuses on the legislation, with little if any reference to the underlying agreement. This is because in every (or almost every) case, the legislation can be defended (or impugned) independently of the agreement, by reference to a substantive head of power<sup>74</sup> or, in the case of State legislation, to State power.<sup>75</sup> In such cases, possible constitutional flaws in an underlying agreement will not directly affect the validity of the legislation<sup>76</sup> and agreements have not so far significantly influenced the process of characterisation.<sup>77</sup> Even in *PJ Magennis Pty Ltd v Commonwealth* (1949) 80 CLR 382, where an agreement that the States would compulsorily acquire land with funds supplied by the Commonwealth ultimately led to the invalidation of the implementing legislation, the analysis focused principally on the legislation, to which the Agreement was scheduled. For the majority of the court,<sup>78</sup> in these circumstances, the law was one for the acquisition of property without just terms, contrary to s 51(xxxi). Once the Agreement was decoupled from the legislation, however, the scheme legislation survived a new challenge.<sup>79</sup> There was relatively little consideration in *Magennis* of the validity of the agreement itself.<sup>80</sup> This is true even of Dixon J in the minority, who would have upheld the law as a valid exercise of s 61, in combination with s 51(xxxix), but on the basis that the legislation simply authorised the formal making of an agreement.<sup>81</sup>

Nevertheless, in principle, the activity of participating in an intergovernmental agreement, like any other activity undertaken by the Commonwealth, must have a constitutional source, whether expressed or implied, and must be consistent with other constitutional rules capable of applying to it. The concern is not purely academic: it is possible to conceive of circumstances in which the validity of an intergovernmental agreement becomes relevant in the course of litigation, even in the absence of implementing legislation. One general issue for decision, then, is the scope of constitutional authority for the Commonwealth to participate in such agreements. Section 61 undoubtedly is the principal source of power. There is, however, uncertainty about its application to agreements on subjects beyond those for which the Commonwealth has a head of substantive legislative power, which parallels the more familiar problems of the extent to which the Commonwealth can engage in executive schemes and enter into government contracts.

A second set of issues arises if legislative action is required on the part of the Commonwealth to implement the terms of an agreement. If what is required falls with a substantive head of legislative power, implementation is relatively straightforward, subject to the rest of the *Constitution*. The difficult case, however, arises once again where there is no substantive legislative power on which the Commonwealth can rely. There is a question in these circumstances about whether legislation to implement the Commonwealth's commitments under an agreement can be enacted pursuant to s 51(xxxix), on the basis that entry into the agreement is a "power vested by this *Constitution* in ...

<sup>73</sup> *John Cooke & Co Pty Ltd v Commonwealth* (1922) 31 CLR 394 at 416; *South Australia v Commonwealth* (1962) 108 CLR 130.

<sup>74</sup> *R v Duncan; Ex parte Australian Iron and Steel Pty Ltd* (1982) 158 CLR 535. Cf *Wilcox Mofflin Ltd v New South Wales* (1952) 85 CLR 488, in which the challenge was mounted solely by reference to s 92 ignoring, as the joint judgment somewhat pointedly remarked, questions about "the sufficiency of Commonwealth legislative power to sustain the provisions of the Federal Act which are not confined in their operation to the Territories", possibly to keep open the option of an appeal to the Privy Council pursuant to s 74: at 514-515 (Dixon, McTiernan and Fullagar JJ).

<sup>75</sup> *Pye v Renshaw* (1951) 84 CLR 58.

<sup>76</sup> "[I]t is ... difficult to suppose that the invalidity of the agreement would affect the Commonwealth Act, assuming it to be otherwise within power": *R v Duncan; Ex parte Australian Iron and Steel Pty Ltd* (1982) 158 CLR 535 at 560 (Mason J). The result is broadly the same in relation to treaties, as *Horta v Commonwealth* (1994) 181 CLR 183 shows.

<sup>77</sup> In *Moran* the validity of the underlying agreement was not considered and although the courts acknowledged the fact of the "scheme", it did not ultimately affect their analysis of the legislation.

<sup>78</sup> Latham CJ, Williams, Webb and Rich JJ.

<sup>79</sup> Cf *Pye v Renshaw* (1951) 84 CLR 58.

<sup>80</sup> Although see *PJ Magennis Pty Ltd v Commonwealth* (1949) 80 CLR 382 at 403 (Latham CJ, referring to the Agreement as "invalid" for the purposes of determining the inapplicability of the State Act, which operated by reference to the Agreement.

<sup>81</sup> *PJ Magennis Pty Ltd v Commonwealth* (1949) 80 CLR 382 at 410-411.



the Government of the Commonwealth, or ... in any department or officer of the Commonwealth". Even if the answer to this is yes, at least in principle, it necessarily follows in these circumstances that the validity of the underlying agreement is critical. If the agreement is not made in the exercise of a power vested by the *Constitution* in a branch of the Commonwealth sphere of government, legislation based on s 51(xxxix) will fail for that reason.<sup>82</sup>

There is a further general question about the operation of s 51(xxxix) in connection with intergovernmental agreements as well: whether, and if so to what extent, it can be used to enforce compliance by other parties with the terms of an agreement to which the Commonwealth is party. The answer depends on several considerations: the manner in which the executive power of the Commonwealth is engaged in relation to agreements; the meaning of the concept of "execution" in s 51(xxxix); the relevance, if any, of the theoretically consensual nature of intergovernmental agreements; and the impact of implications derived from federalism on Commonwealth legislation of this kind. The question has practical significance. If Commonwealth legislation extends so far, it is likely to cause even greater care to be taken on the part of the States in drafting intergovernmental agreements, to ensure not only that commitments are not justiciable, but also that they are not enforceable at all, by regulatory means.

### **R v Hughes**

The decision of the High Court in *Hughes* drew attention to one particular context in which questions about the source and scope of authority to make and implement an intergovernmental agreement may arise.

The legislation in issue in *Hughes* gave effect to clauses of the Alice Springs Agreement that dealt with prosecutions for offences under the cooperative corporations scheme.<sup>83</sup> The scheme was designed to achieve the highest possible degree of uniformity of corporations law and administration, employing for the first time the technique of federalisation. The Commonwealth would enact agreed template legislation, ostensibly as a law for the ACT, in the exercise of the Territories power. State and territory legislation would apply the Commonwealth Act as amended from time to time, as law in their respective jurisdictions. Technically, the applied law remained State law. Prosecutions normally, therefore, would be undertaken by State officers. Consistently with the concept of federalisation, however, the Agreement required prosecutions to be undertaken by the Commonwealth Director of Public Prosecutions (DPP), in the interests of securing complete uniformity of this aspect of the operation of the scheme.<sup>84</sup> To this end, State legislation applied the *Director of Public Prosecutions Act 1983* (Cth) within the State in relation to offences against the provisions of the State Corporations laws "as if" the latter were a law of the Commonwealth. From the standpoint of State law, this legislation thus conferred State authority on Commonwealth officers exercising powers in relation to prosecutions in connection with the scheme legislation<sup>85</sup> and effectively withdrew the corresponding power from State officers.<sup>86</sup> The Commonwealth officer most obviously affected was the DPP and the staff of the office of the DPP. The arrangement also had implications, however, for the authority of the Commonwealth Attorney-General, with whom the DPP was obliged to consult in the exercise of certain powers, and who was empowered to give "directions or guidelines" to the DPP.<sup>87</sup>

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<sup>82</sup> Cf Gummow and Hayne JJ in *Re Wakim; Ex parte McNally* (1999) 198 CLR 511 at 580: "The first focus of inquiry must ... be on the subject matter of the power to which the step in question is said to be incidental."

<sup>83</sup> These clauses subsequently were superseded by Part 8 of the 1997 Agreement.

<sup>84</sup> Clause 27.1 of the Agreement provided that the DPP was to "have responsibility" for the prosecution of offences under the scheme legislation: at 550. Similarly, clause 801 of the 1997 Agreement provided that the Commission and the DPP "will have" responsibility for the prosecution of offences under scheme laws.

<sup>85</sup> The relevant provisions in the Western Australian legislation, which were in issue in *Hughes*, are set out in the joint judgment: (2002) 202 CLR 535 at 549-552.

<sup>86</sup> *R v Hughes* (2002) 202 CLR 535 at 550, 553, pointing to s 33 of the *Corporations (Western Australia) Act 1990* (WA). This aspect of the scheme is inferred from the requirement in the Agreement for the Commonwealth DPP to have responsibility for prosecutions under national scheme laws. A more specific statement appeared in Attorney-General Duffy's second reading speech: "On effect will be to confer ... prosecutorial ... powers on the relevant Commonwealth authorities...to the exclusion of the corresponding State authorities": Commonwealth, House of Representatives, n 43.

<sup>87</sup> *Director of Public Prosecutions Act 1983* (Cth), s 7.

It is not open to an Australian State unilaterally to confer power on Commonwealth officers. Potential constitutional obstacles include the supremacy of Commonwealth law, pursuant to s 109 of the *Constitution*; implied restrictions on the power of the States to modify the “capacities” of the Commonwealth or otherwise to inappropriately burden it,<sup>88</sup> and also, perhaps, any limitations inherent in the requirement for moneys to be appropriated to purpose by the Parliament, before they can validly be spent.<sup>89</sup> To overcome these obstacles, corresponding Commonwealth legislation of some kind is needed. In the case of the legislation challenged in *Hughes*, this was found in ss 46 and 47 (and supporting regulations) of the *Corporations Act 1989* (Cth). The effect of this legislation was to provide that the Attorney-General and the DPP respectively had the powers conferred on them by a corresponding scheme law. The joint judgment interpreted these provisions as themselves imposing duties or obligations on these two quite different officers, rather than merely consenting to the exercise by them of additional functions conferred by State law.<sup>90</sup>

*Hughes* challenged the validity of these arrangements, when he was prosecuted by the DPP for offences against the “prescribed interest” provisions of the *Corporations Act* as applied in Western Australia, in connection with a series of offshore investments with a United States securities house.<sup>91</sup> One ground of the challenge was the lack of Commonwealth power to enact ss 46 and 47 of the *Corporations Act*. In the circumstances of this prosecution, the court found the power in the overseas trade and commerce and the external affairs powers (ss 51(i) and (xxix) respectively) and the challenge was dismissed.<sup>92</sup> For present purposes, however, the significance of the decision lies in two steps in the reasoning in the joint judgment. The first is the conclusion that, in a case such as this, where duties to perform functions or powers pursuant to State law are imposed on Commonwealth officers by federal law, a “head of power” is required.<sup>93</sup> The “incidental power” is not sufficient for this purpose, although it would be sufficient to ground mere permission for the performance of additional functions by Commonwealth statutory officeholders.<sup>94</sup> Although it is not entirely clear, the joint judgment here appears to refer to the power incidental to the head of power that supports the conferral of Commonwealth functions on the office holder, on the ground that such power will be sufficient to rebut an intention to cover the field but will not be sufficient for other purposes.<sup>95</sup> The second relevant step in the reasoning concerns s 51(xxxix). The joint judgment refers to the possibility that the provisions extending the power of the DPP could be supported as laws pursuant to s 51(xxxix) and s 61, triggered by the Alice Springs Agreement. It does not pursue the possibility, however, noting that “the scope of the executive power and of s 51(xxxix) in aid of it, remains open to some debate and this is not a suitable occasion to continue it”.<sup>96</sup> The suggestion seems to be, nevertheless, that in principle the court would accept these provisions as a “head of power” although whether and when they would be adequate to the purpose is left undecided.

The joint judgment in *Hughes* is written in elliptical terms that make aspects of it hard to understand. It refers, for example, to a possible “constitutional imperative” for a Commonwealth law to impose duties on a Commonwealth officer to exercise State powers,<sup>97</sup> which it did not need to “stay

<sup>88</sup> *Re Residential Tenancies Tribunal (NSW); Ex parte Defence Housing Authority* (1997) 190 CLR 410; *R v Hughes* (2000) 202 CLR 535 at 569 (Kirby J).

<sup>89</sup> *Constitution*, s 81; *R v Hughes* (2002) 202 CLR 535 at 552 (joint judgment), 569 (Kirby J).

<sup>90</sup> *R v Hughes* (2002) 202 CLR 535 at 552, 553.

<sup>91</sup> *R v Hughes* (2002) 202 CLR 535 at 547.

<sup>92</sup> *R v Hughes* (2002) 202 CLR 535 at 556, 582.

<sup>93</sup> *R v Hughes* (2002) 202 CLR 535 at 553.

<sup>94</sup> *R v Hughes* (2002) 202 CLR 535 at 553.

<sup>95</sup> The concept is well-described by Dennis Rose in “Commonwealth-State Co-Operative Schemes after *Hughes*” (2002) 76 ALJ 631 at 635: Commonwealth consent to a State conferral of functions is a law with respect to whatever power conferred the Commonwealth functions on the body, because its effect is to establish that the Commonwealth functions are not exhaustively conferred.

<sup>96</sup> *R v Hughes* (2002) 202 CLR 535 at 555. The occasion was not suitable because other substantive heads of power were available. Note also, however, the possible complication presented by the impact of the prosecutorial power on the rights of individuals: a point which receives somewhat unexpected prominence in the summation of the holding in the case in the joint judgment, at 558.

<sup>97</sup> *R v Hughes* (2002) 202 CLR 535 at 553-554. It is not entirely clear whether the “imperative” refers to duties (rather than to some other form of power) or to the imposition of duties by Commonwealth rather than State law.

to consider” given its interpretation of the legislation before it as imposing such duties in implementation of the Alice Springs Agreement. It hints at a distinction between the constitutional position of the Attorney-General and that of a statutory office-holder for the purposes of cross-jurisdictional conferral of powers.<sup>98</sup> It qualifies its acceptance of “permissive provisions” with a side reference to “the operation of negative implications arising from the *Constitution*”, offering Ch III as an “example”,<sup>99</sup> thereby raising suspicion that there may be others.<sup>100</sup>

All three of these aspects of the judgment suggest the influence of perceived underlying constitutional proprieties, drawn from the text of the *Constitution* and the structure of the system of government for which it provides. They are not clearly articulated in *Hughes*, although it may be that some insight into them can be gleaned from earlier cases. Two, which are particularly relevant for present purposes, may be as follows. First, there is a distinction between the positions of Ministers on the one hand and statutory office-holders on the other, which is suggested by the text of s 61 itself, albeit informed by structure. Its rationale is that Ministers, as advisers to the Governor-General by whom the executive power is exercisable, are authorised to execute and maintain the *Constitution* and Commonwealth laws; statutory officeholders, on the other hand, are created by laws of the Commonwealth and may be constituted in a way that authorises them to accept other functions as well.<sup>101</sup> It assists to explain why the court’s “proposition as to permissive provisions” is confined to “officers ... holding appointments by or under statute” and also, perhaps, the need for Commonwealth law to confer authority on Commonwealth Ministers.<sup>102</sup> To this extent there may be an echo of the view most clearly expressed by Gummow and Hayne JJ in *Re Wakim* that, absent constitutional provision to the contrary, it is for the legislature of the polity concerned to confer jurisdiction on its own courts.<sup>103</sup> Second, there is a distinction between duties and powers, at least in the extreme circumstances manifested in *Hughes*, where State administrative responsibility effectively is transferred to the Commonwealth, with all its accoutrements and with associated implications for accountability under a system of parliamentary responsible government in a “dual political system” for which, on its face, the Australian *Constitution* still largely provides.<sup>104</sup> On this understanding, withdrawal of power from State officers under this aspect of the cooperative scheme is as significant as the character of the power conferred on the Commonwealth, and perhaps more so.

There is more than one way of reading *Hughes*; one plausible reading, however, which responds to these influences, is as follows. First, Commonwealth statutory office-holders may be permitted to accept State powers in the exercise of the incidental power. Second, if a duty to exercise State power is conferred, at least in the sense in which duty is understood in *Hughes*, a substantive head of power is required, which may, potentially, be supplied by s 61 in combination with s 51(xxxix), although this is not yet decided. Third, it may be the case (as a “constitutional imperative”) that Ministers can exercise only functions conferred on them by the *Constitution* or by Commonwealth law, which also will require a substantive head of power, which again may be found in s 61 in combination with s 51(xxxix).

This is not the understanding that has emerged in subsequent cases. *R v Fukusato* [2003] 1 Qd R 272 is the principal case in point. In *Fukusato*, the Supreme Court of Queensland Court of Appeal was asked to determine the lawfulness of the prosecution of the applicant by the Commonwealth DPP for offences against the *Corporations Law* (now based on a reference of power and therefore indubitably Commonwealth law) and a “connected” offence under the *Criminal Code* of Queensland. A majority of the court accepted that the Commonwealth Act merely “permitted” the conferral of

<sup>98</sup> *R v Hughes* (2002) 202 CLR 535 at 553, 554.

<sup>99</sup> *R v Hughes* (2002) 202 CLR 535 at 553.

<sup>100</sup> Hill G, “Will the High Court ‘Wakim’ Chapter II of the Constitution?” (2003) 31 FL Rev 445.

<sup>101</sup> Cf the similar distinction drawn by *Re Residential Tenancies Tribunal (NSW); Ex parte Defence Housing Authority* (1997) 190 CLR 410 at 463-464, 466, 468-469. In this case, it suggests a limitation on the range of Commonwealth officers on whom the executive power of the Commonwealth is conferred in s 61, with consequential implications for the operation of s 51(xxxix).

<sup>102</sup> *R v Hughes* (2002) 202 CLR 535 at 553.

<sup>103</sup> *Re Wakim; Ex parte McNally* (1999) 198 CLR 511 at 573.

<sup>104</sup> *Re Foreman and Sons Pty Ltd; Uther v Federal Commissioner of Taxation* (1947) 74 CLR 508 at 529 (Dixon J), quoted by McHugh J in *Re Wakim; Ex parte McNally* (1999) 198 CLR 511 at 557.

Queensland functions, and did not impose them as a duty.<sup>105</sup> On the reading of *Hughes* outlined earlier, if this interpretation were correct, the authority for the Commonwealth to “consent” automatically lay in the power incidental to the power(s) on which the DPP legislation depended. This was not the basis on which the case was decided, however. Instead all three judgments, with some variations which are not presently relevant, sought a “head of power” and found it, in relation to this particular prosecution, in a combination of s 61 and 51(xxxix), through a somewhat unconvincing process of reasoning. On the other hand, there is some indication that the approach taken in *Fukusato* was flawed. In subsequently refusing leave to appeal, Gleeson CJ observed that “the actual decision of the Court of Appeal in this case is not attended by sufficient doubt to warrant a grant of special leave ... It is not necessary to consider whether all of the reasoning of the Court of Appeal is endorsed in the light of this Court’s decision” in *Hughes*.<sup>106</sup>

On any reading of *Hughes*, including the relatively benign one suggested here, the question left unanswered by the court about the “scope of the executive power, and of s 51(xxxix) in aid of it”, is significant.<sup>107</sup> As refined for present purposes, that question is whether, if a duty to exercise power derived from State law is imposed on a Commonwealth officer by Commonwealth law pursuant to an intergovernmental agreement, and if there is no other substantive legislative power to support the Commonwealth law, the necessary power is supplied by s 61 in combination with s 51(xxxix). This somewhat more specific question about the constitutional framework for intergovernmental agreements also is considered in the next part, which deals first with the scope of executive power to enter into agreements and then with the use of the incidental power to implement them through legislation.

## SOME POSSIBLE ANSWERS

### The scope of executive power in relation to intergovernmental agreements

There is no doubt that constitutional authority in relation to intergovernmental agreements is sourced in s 61.<sup>108</sup> This is to say, to an extent yet to be explored, s 61 will support Commonwealth participation in intergovernmental agreements, including entry into an agreement,<sup>109</sup> the giving of commitments pursuant to an agreement<sup>110</sup> and, probably, the acceptance of commitments by other parties to an agreement, drawing on a loose analogy with international agreements.<sup>111</sup>

On its face, however, the description in s 61 of the executive power of the Commonwealth as extending “to the execution and maintenance of this *Constitution*, and of the laws of the Commonwealth”, may support an intergovernmental agreement in several different ways, which need to be distinguished for present purposes. First, some agreements are made in the course of executing a law of the Commonwealth. Most obviously this is so where a Commonwealth law authorises the making of an agreement.<sup>112</sup> In such a case, questions about constitutional power are likely to focus on the validity of the law, rather than of the agreement made pursuant to it. Second, although less usually, an agreement may be made in the course of “execution” of the *Constitution*.<sup>113</sup> Successive Financial Agreements made pursuant to s 105A are an example. In this case, questions about power will be a straightforward exercise in constitutional interpretation.

<sup>105</sup> *R v Fukusato* [2003] 1 Qd R 272 at [104], [142] – [143] (Davies and Thomas JJA).

<sup>106</sup> *Fukusato v Commonwealth Director of Public Prosecutions* HCA Trans B16/2002 (26 June 2002).

<sup>107</sup> *R v Hughes* (2002) 202 CLR 535 at 555.

<sup>108</sup> *R v Duncan; Ex parte Australian Iron and Steel Pty Ltd* (1983) 158 CLR 535 at 560 (Mason J).

<sup>109</sup> “It is beyond question that it extends to entry into governmental agreements between the Commonwealth and the States”: *R v Duncan; Ex parte Australian Iron and Steel Pty Ltd* (1983) 158 CLR 535 at 560 (Mason J).

<sup>110</sup> See the description of cooperation as a context in which “the Commonwealth and the States ... exercise their respective powers in such a way that each is complementary to the other”: *R v Duncan; Ex parte Australian Iron and Steel Pty Ltd* (1983) 158 CLR 535 at 552 (Gibbs J).

<sup>111</sup> *R v Burgess; Ex parte Henry* (1936) 55 CLR 608 at 644 (Latham CJ), at 684 (Evatt and McTiernan JJ).

<sup>112</sup> For example, *Commonwealth Electoral Act 1918* (Cth), s 84, authorising arrangements in relation to joint electoral rolls.

<sup>113</sup> Winterton G, “The Limits and Use of Executive Power by Government” (2003) 31 FL Rev 421 at 424.

A more difficult case is the third, where an intergovernmental agreement depends in one way or another on that aspect of the executive power that concerns the “maintenance” of the *Constitution*.<sup>114</sup> In this case, s 61 might be understood as a source of authority for an agreement on one of two different bases. Agreement between governments might itself be considered to be an element of the “maintenance” of the *Constitution*, derived from “the very formation of the Commonwealth as a polity” in a federation.<sup>115</sup> Alternatively, intergovernmental agreements might derive support from s 61 as a component of the “mass of powers which the Executive Government possesses to act lawfully without statutory authority”<sup>116</sup>, by loose analogy with contract. The choice between these two is significant. If intergovernmental agreements are characterised as inherent in the conception of maintenance of a federal *Constitution* or, for that matter, as a property of nationhood or of the position of the Commonwealth as a central government in a federation, questions about the breadth of executive power to support them are less likely to arise. If, on the other hand, agreements are treated simply as another aspect of inherent executive power, in a manner analogous to contract, despite their governmental character, it becomes necessary to consider the extent to which they are affected by federal limitations on executive power.

On either view, however, there are some limitations on Commonwealth executive power to participate in intergovernmental agreements pursuant to s 61. This much is evident from the description of the executive power in s 61 as, in effect, operating in aid of the *Constitution* and not inconsistently with it. It was recognised by Mason J, in a much quoted passage in *R v Duncan; Ex parte Australian Iron and Steel Pty Ltd* (1983) 158 CLR 535 at 560:

Of necessity the scope of the [executive] power is appropriate to that of a central executive government in a federation in which there is a distribution of legislative powers between the Parliaments of the constituent elements in the federation. It is beyond question that it extends to entry into governmental agreements between the Commonwealth and the States on matters of joint interest ... so long as any rate as the end to be achieved and the means by which it is to be achieved are consistent with and do not contravene the *Constitution*.

Two types of limits potentially are relevant: those derived from the federal division of powers and those derived from the text and structure of the rest of the *Constitution*. The distinction between ends and means that is drawn by Mason J in the passage just quoted offers a useful analytical tool for exploring how these might affect the scope of the executive power of the Commonwealth to participate in intergovernmental agreements.

Beginning with means, and leaving aside for the moment the particular problems presented by the federal division of power, it seems obvious that the Commonwealth cannot enter into an intergovernmental agreement or undertake or accept commitments pursuant to such an agreement that would be inconsistent with or contrary to the *Constitution*. A range of restrictions on power is invoked by this proposition, both express and implied and both textual and structural. The express textual limitations are those that apply to Commonwealth executive power or to State power including, most obviously, ss 92 and 117. Limitations that apply only to Commonwealth legislative power are not relevant at this stage, although they may become relevant if an agreement is given effect by statute or, arguably, as a factor in evaluating whether the ends of an agreement are consistent with the *Constitution*. Structural limitations include, most obviously, the separation of federal judicial power. To the extent that the Alice Springs Agreement required the enactment of Commonwealth legislation to confer or to accept the conferral of State jurisdiction on federal courts, it was not, on this analysis, a valid exercise of the executive power of the Commonwealth. Other limitations implied from constitutional structure include the freedom of political communication and any protection afforded by federal principle to one sphere of government from another, which is unable to be waived.

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<sup>114</sup> Winterton, n 113 at 425.

<sup>115</sup> *Victoria v Commonwealth (AAP Case)* (1975) 134 CLR 338 at 362 (Barwick CJ). See also: “The end and purpose of the Constitution is to sustain the nation”: *Davis v Commonwealth* (1988) 166 CLR 79 at 110 (Brennan J). Similar observations have been made in relation to entry into international agreements: *R v Burgess; Ex parte Henry* (1936) 55 CLR 608 at 643 (Latham CJ); *Attorney-General (Vic) v Commonwealth* (1945) 71 CLR 237 at 269 (Dixon J).

<sup>116</sup> *Davis v Commonwealth* (1988) 166 CLR 79 at 108 (Brennan J).

Any “negative implication”<sup>117</sup> precluding the cross-conferral of executive power between the Commonwealth and the States would affect the scope of the power to participate in intergovernmental agreements as well. The textual basis for such an argument is suggested by the interpretation accorded to Ch III in *Re Wakim* and the earlier cases on which it drew. And there has been some inconclusive flirtation with the idea in the context of executive power in the past.<sup>118</sup> Consideration of the demands of responsible government and, perhaps, aspects of the rule of law offer other arguments from principle in favour of implications of this kind. Both long practice and judicial doctrine, such as it is, nevertheless tend to suggest that there is no absolute prohibition on the exercise by one sphere of government of executive power derived from another,<sup>119</sup> as long as a source of power to support the cross-jurisdictional conferral can be found.<sup>120</sup>

There is a more difficult question about the impact of the federal division of power on the means through which the participating governments choose to pursue their goals under an intergovernmental agreement. One possibility is that it has no impact at all, so that executive power to participate in intergovernmental agreements is unconstrained by the federal division of power. This view depends on an assimilation of intergovernmental cooperation to the notion of the maintenance of a federal *Constitution* and has some synergy with the perception of cooperation as an objective of the *Constitution*.<sup>121</sup>

The other possibility is that federal limits apply and require commitments made by the Commonwealth pursuant to an intergovernmental agreement to be measured against the breadth of s 61, using known tests developed in other contexts. On this basis, the first question is whether an agreement or a commitment undertaken under an agreement is paralleled by a head of legislative power. Section 51(xxxix) offers a head of power for this purpose, interacting with other constitutional provisions although not, presumably, with s 61 itself, in a classic bootstraps exercise. If there is a corresponding head of legislative power, executive power exists on any view, and may be augmented by an incidental executive power, implied to effectuate the purpose of the main grant.<sup>122</sup> If there is no parallel legislative power, the second question that arises is whether the agreement represents an exercise of the nationhood power, “deduced from the existence and character of the Commonwealth as a national government”, conferring a “capacity to engage in enterprises and activities peculiarly adapted to the government of a nation and which cannot otherwise be carried out for the benefit of the nation”.<sup>123</sup> Views about the scope of this power have varied greatly between justices, partly reflecting different perceptions of the relative significance of the federal division of powers and the “advancement of the nation”<sup>124</sup> through Commonwealth action.<sup>125</sup> The case for the nationhood power as a source of support for intergovernmental agreements is strengthened by the consensual nature of such agreements. The potential for competition between Commonwealth and State powers remains, however, even in the absence of competition between governments of the day.

In policy terms, there is something to be said for each of these views. The absence of any restrictions on intergovernmental agreements derived from the federal division of power eases the path to all forms of cooperation subject, critically, to what follows about the use of s 51(xxxix). On the other hand, subject again to the scope of s 51(xxxix), this view has the potential to undermine the

<sup>117</sup> *R v Hughes* (2000) 202 CLR 535 at 553-554.

<sup>118</sup> Zines L, *The High Court and the Constitution* (4th ed, Butterworths, 1997) p 270, collecting a range of sources.

<sup>119</sup> Compare the “negative implications” that inhibit the conferral of State jurisdiction on federal courts: *Re Wakim; Ex parte McNally* (1999) 198 CLR 511. If this is correct, it represents another respect, that is even more difficult to justify, in which the separation of powers under Australian *Constitution* is asymmetrical: *Victorian Stevedoring and General Contracting Co Pty Ltd v Dignan* (1931) 46 CLR 73.

<sup>120</sup> See generally Hill G, “Will the High Court ‘Wakim’ Chapter II of the Constitution?” (2003) 31 FL Rev 445.

<sup>121</sup> The meaning and significance of this perception in other contexts has been pursued through a range of cases, including *R v Duncan; Ex parte Australian Iron and Steel Pty Ltd* (1983) 158 CLR 535 and *Gould v Brown* (1998) 193 CLR 346, as well as in *Re Wakim* and *Hughes*.

<sup>122</sup> Lane P, *Commentaries on the Australian Constitution* (Lawbook Company, 1986) p 258.

<sup>123</sup> *Victoria v Commonwealth (AAP Case)* (1975) 134 CLR 338 at 397-398.

<sup>124</sup> *Davis v Commonwealth* (1988) 166 CLR 79 at 110 (Brennan J).

<sup>125</sup> Compare *Davis v Commonwealth* (1988) 166 CLR 79 at 101 ff (Wilson and Dawson JJ), on the one hand, with *Victoria v Commonwealth & Hayden* (1975) 134 CLR 338 at 413 (Jacobs J) and with Brennan J in *Davis* at 410.

federal division of power; and in a way that provides an incentive to increasing reliance on executive action, albeit ultimately with legislative support. Doctrinally, the latter view is more orthodox, although there is little in the case law that is determinative, either way.

Finally, consider the relevance of the ends of an intergovernmental agreement, for the purpose of determining whether it is a valid exercise of executive power. It is clear that there is no constitutional objection to an intergovernmental agreement on the grounds that, in order to achieve common goals, it seeks to pool the powers that have been distributed between the spheres of government for the purpose of creating a federation. The rationale for this conclusion also may readily be accepted as long, at least, as the means chosen to achieve the common goals also are within power. There is a question, however, whether an agreement to pool power to circumvent a constitutional limitation on the manner in which the powers of the Commonwealth can be exercised is equally unobjectionable. So far, in the few cases in which the point potentially has arisen for decision, the agreements have avoided or survived scrutiny. *Deputy Federal Commissioner of Taxation v W R Moran Pty Ltd* in which the purpose of the underlying agreement was to circumvent the prohibition against discrimination among States in Commonwealth taxation<sup>126</sup> and the soldier settlement schemes, designed with an eye to the requirement for the Commonwealth, but not the States, to acquire property on just terms<sup>127</sup> are the principal examples.<sup>128</sup> As the example of the just terms requirement suggests, it will sometimes be difficult to distinguish between an agreement designed to pool power for a benign purpose and one that is designed to avoid a constitutional restriction, because the restriction is built into the power. This is not always so, however: the prohibition against discrimination or at least preference between States in Commonwealth taxation is also a freestanding rule, which is a component of the federal fiscal and economic framework.<sup>129</sup> In relation to provisions of this kind, there is a strong argument that an agreement designed to avoid the operation of the requirement is not an exercise of the executive power of the Commonwealth within the meaning of s 61.<sup>130</sup> Such a conclusion would not necessarily affect the outcome in a case such as *Moran*, where the validity of the legislation was examined independently of the agreement, but it would add a new, and unpredictable, element to the problem.

It remains only to apply this analysis to the particular kind of agreement in issue in *Hughes*. The Alice Springs Agreement was understood by the court to require the conferral on Commonwealth officers, including the DPP and the Attorney-General, of exclusive authority to administer aspects of particular State laws. While in the circumstances of *Hughes* itself there was a substantive head of the power on which the Commonwealth law implementing the agreement was able to rely, it is possible to envisage circumstances in which this is less likely to be so, including prosecution for offences connected with the process of incorporation.<sup>131</sup> The first part of the question raised but left unanswered by the court in *Hughes* is whether, in such a case, the agreement itself is an exercise of the executive power of the Commonwealth, offering a potential trigger for an exercise of legislative power pursuant to s 51(xxxix). The earlier analysis suggests the following, tentative answer.

First if, (as has been argued seems unlikely), a negative prohibition can be found in the *Constitution*, against cross-jurisdictional conferral of executive power, generally or in relation to particular officers, the agreement would not represent an exercise of the executive power of the Commonwealth on which s 51(xxxix) might build. Although the problem that arose in *Wakim* was not dealt with in this way, it offers an example of a case in which the participating governments had agreed to a course of action that was not constitutionally permissible and that presumably therefore did not represent a legally effective exercise of executive power.

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<sup>126</sup> Section 51(ii); see also s 99: *Deputy Federal Commissioner of Taxation v W R Moran Pty Ltd* (1939) 61 CLR 735, *W R Moran Pty Ltd v Deputy Federal Commissioner of Taxation* (1940) 63 CLR 338 (on appeal to the Privy Council).

<sup>127</sup> Pursuant to s 51(xxxi).

<sup>128</sup> *PJ Magennis Pty Ltd v Commonwealth* (1949) 80 CLR 382; *Pye v Renshaw* (1951) 84 CLR 58.

<sup>129</sup> *Constitution*, s 99.

<sup>130</sup> For a possible example of another kind, see the Communiqué from the Special Meeting of COAG on Counter-Terrorism of 27 September 2005: "State and Territory leaders agreed to enact legislation to give effect to measures which, because of constitutional constraints, the Commonwealth could not enact, including preventative detention for up to 14 days." <http://www.coag.gov.au/meetings/270905/#Strengthening> viewed 2 October 2005.

<sup>131</sup> *New South Wales v Commonwealth (Incorporation Case)* (1990) 169 CLR 482.

Second, if there is no wider constitutional objection to the substance of an agreement, its effect as an exercise of the executive power of the Commonwealth depends on the understanding of the “breadth” of s 61<sup>132</sup> in relation to intergovernmental agreements. If intergovernmental agreements ultimately are held to raise no questions of breadth, for the reasons earlier canvassed, the agreement in *Hughes*, and others similar to it, would be effective as an exercise of executive power. If, on the other hand, the breadth of executive power is a consideration in relation to intergovernmental agreements, it becomes necessary to engage in a standard s 61 analysis to determine their effectiveness. As by definition there is in our case study no substantive head of legislative power on which the Commonwealth might rely, bringing this aspect of the agreement within what might be described as the undisputed core of s 61, its validity depends on whether it falls within an implied incidental executive power<sup>133</sup> or within the nationhood power, on the grounds that the agreement is “peculiarly adapted to the government of a nation”.<sup>134</sup> The former sits oddly with the *New South Wales v Commonwealth (Incorporation Case)* (1990) 169 CLR 482, where Commonwealth legislation with respect to the incorporation of companies was not saved by the incidental legislative power. On the other hand, it is possible to see how a notion of implied incidental executive power would support provisions of the agreement establishing the ministerial council. A case for the nationhood power is difficult to sustain in relation to this particular agreement, although other agreements, on other subjects, might more obviously be covered by it.<sup>135</sup>

If an agreement of this kind represents an effective exercise of the executive power of the Commonwealth, on any of the bases above, it becomes relevant to consider whether it can be given legislative effect through s 51(xxxix); a question that is taken up below. If, however, an agreement fails at this first hurdle, the consequences for Australian governance are not as serious as might at first glance be thought. Most of the commitments made by the Commonwealth under most intergovernmental agreements are underpinned by powers that are undisputed. The remaining parts of the Corporations Agreement 1997 and the Intergovernmental Agreement on the Reform of Commonwealth-State Financial Relations 1999 are cases in point.<sup>136</sup> The difficulty suggested in *Hughes* concerns a particularly intense form of cross-jurisdictional conferral of executive power. And even in relation to agreements of this kind, as *Hughes* itself shows, a substantive head of Commonwealth power to support the arrangement will often be found.

### **The functions of s 51(xxxix) in relation to agreements**

Once an agreement is determined to fall within the scope of executive power in s 61 or any other section conferring power on an the government of the Commonwealth, the power to make laws with respect to “matters incidental to” its “execution” potentially is enlivened. In this sense, ss 61 and 51(xxxix) are interdependent. If legislative support is required, however, reliance on s 51(xxxix) may not be necessary where, as usually is the case, the Commonwealth possesses specific legislative power for the purpose. Again, the Corporations Agreement and the Financial Relations Agreement show how this occurs.

There is, however, a range of purposes for which legislation may be necessary or useful in connection with intergovernmental agreements, for which s 51(xxxix) might be called in aid, in the absence of any more obvious legislative power. Legislation might be used formally to authorise the making of the Agreement, in the manner in which Dixon J understood the purpose of the legislation

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<sup>132</sup> Winterton, n 1, p 29.

<sup>133</sup> The question to ask would be something like this: is the power necessary to effectuate the main grant (in this case, the authority of the Commonwealth to take responsibility for the administration of those aspects of State corporations law in relation to which the Commonwealth also has concurrent power).

<sup>134</sup> *Victoria v Commonwealth (AAP Case)* (1975) 134 CLR 338 at 397 (Mason J).

<sup>135</sup> Presumably, for example, an intergovernmental agreement of some kind underlay the arrangements for the bicentennial that were challenged in *Davis*, which could have been attributed to that aspect of the executive power that derives from nationhood, if need be.

<sup>136</sup> The Commonwealth’s commitment under the 1997 Agreement to enact template legislation for the purposes of the cooperative scheme relies on s 122 and, probably, other substantive heads of power, including s 51(xx). The key commitments under the Financial Relations Agreement rely on s 96 of the *Constitution*.



in *Magennis*<sup>137</sup> Alternatively, it might be used to control the exercise of the power to enter into intergovernmental agreements by, for example, requiring all Agreements to be tabled in the Parliament or recorded on a register. This use raises some familiar questions about the extent to which the general executive power is subject to legislative control and, if so, to what extent.<sup>138</sup> Further, legislation might be used to implement an Agreement, in the sense of carrying out the Commonwealth's side of the bargain. Finally, legislation might, perhaps, be used to enforce an Agreement against the other parties to it. In what follows, this article will focus only on the questions whether s 51(xxxix) offers a head of legislative power for the last two purposes. Its use in relation to the others is self-evident.

The operation and use of s 51(xxxix) in relation to intergovernmental agreements is affected by the following factors, suggested by the constitutional text, but informed by broader considerations.

First, like all legislative powers of the Commonwealth, s 51(xxxix) is "subject to this *Constitution*". It is thus subject to all the limitations found elsewhere in the *Constitution*, identified earlier in relation to s 61.<sup>139</sup> It follows that the paragraph will not support legislation to implement an agreement where this would be inconsistent with a negative prohibition or a constitutional guarantee even if, contrary to my argument, such factors had no influence on validity of the agreement itself. And the need for legislation to comply with the rest of the *Constitution* is potentially relevant to the issue of enforcement as well. Some of the most significant obligations under an intergovernmental agreement relate to the enactment of legislation or the appropriation of funds. Typically, these are cast in cautious terms requiring, for example, parties to use their "best endeavours" to secure legislation of the kind contemplated by the agreement. An undertaking in this form may not be capable of enforcement by regulatory means. In any event, however, an attempt by the Commonwealth to legislate to enforce, against State parties, provisions of an agreement that interfere directly with the operation of institutions of State government would almost certainly fall foul of the federal immunities doctrines,<sup>140</sup> even if there were no other constitutional impediment to it.

Second, s 51(xxxix) is limited to legislation on matters incidental to the *execution* of a power vested in the government. Despite a tendency in some contexts to treat the express and implied incidental powers as much the same in their application to legislative power<sup>141</sup> it seems clear that the reference to "execution" is significant.<sup>142</sup> The distinction, according to Dixon J in *Burton v Honan* (1952) 86 CLR 169 at 177-178, is that "par (xxxix) of s 51 is related not so much to matters incidental to the subjects placed under the legislative power of the Commonwealth but rather to matters which arise in the execution of the various powers". The relative width of the implied incidental power in relation to legislative power explains why the distinction has had no impact in that context.<sup>143</sup> Where the scope of legislative power in relation to the executive or the judicial power is at stake, however, it requires closer attention.

The question for present purposes is the significance of the reference to "execution" in s 51(xxxix) for the purposes of the implementation or enforcement of intergovernmental agreements. There is no decision directly in point; there is, however, some disagreement between justices over the analogous question of reliance on s 51(xxxix) for the implementation of international agreements. Thus in *Commonwealth v Tasmania (Tasmanian Dam Case)* (1983) 158 CLR 1 at 299-300 Dawson J argued that, if s 61 were the source of the power to conclude treaties (which he doubted), an "argument would have been available" that legislation to implement treaties could be supported by s

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<sup>137</sup> *PJ Magennis Pty Ltd v Commonwealth* (1949) 80 CLR 382 at 410.

<sup>138</sup> See generally Zines, n 118, pp 262-273, with whose conclusions at p 273 the author entirely agrees.

<sup>139</sup> The relationship between s 51(xxxix) and other paragraphs in s 51 itself is a complex question that need not be explored further here.

<sup>140</sup> *Austin v Commonwealth* (2003) 215 CLR 185; 77 ALJR 491.

<sup>141</sup> For example *Crespin & Son v Colac Co-operative Farmers Ltd* (1916) 21 CLR 205 at 214 (Barton J); *Gazzo v Comptroller of Stamps (Vic)* (1981) 149 CLR 227 at 236 (Gibbs CJ); *Cunliffe v Commonwealth* (1994) 182 CLR 272 at 351 (Dawson J); Zines, n 118, 38-39.

<sup>142</sup> *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1.

<sup>143</sup> *Burton v Honan* (1952) 86 CLR 169 at 177-178, describing the distinction as "immaterial" for present purposes.

51(xxxix).<sup>144</sup> In *Davis v Commonwealth* (1988) 166 CLR 79, however, Brennan J took a different view in a rare extended treatment of the interrelationship of the express incidental power and the executive power. Making the relatively familiar point that s 51(xxxix) does not confer a power to make law “with respect to the subject matter of an executive power”<sup>145</sup> he concluded that, in consequence, it “confers no power to make a law to implement [a] treaty, for the execution of the ... power to make a treaty does not embrace the implementing of the treaty once made. The external affairs power is available to implement the treaty, the incidental power being limited to matters incidental to treaty-making”.<sup>146</sup>

If this view were correct it would preclude the use of the express incidental power to implement provisions of intergovernmental, as well as international agreements. It seems, however, to involve an unduly narrow reading of “execution”.<sup>147</sup> In the context of an agreement, execution might, literally, refer both to the act of bringing an agreement into existence and to the act of putting it into effect. Neither expands the subject-matter, thus preserving the established distinction with the implied incidental power.<sup>148</sup> On this basis, while the reference to “execution” in s 51(xxxix) is a limiting factor, it offers no impediment to legislation giving effect to the Commonwealth’s commitments under an intergovernmental agreement. It may, indeed, also support use of the power to enforce agreements against other parties.

Third, s 51(xxxix) is limited to matters *incidental* to the execution of a power. Two themes emerge from the cases that are relevant to this aspect of the power for present purposes. The first is the concept of “incidental” itself. With the interesting exception of Jacobs J in the *AAP Case*,<sup>149</sup> which represents a minority view, no distinction has been drawn between the meaning of the term as used in the implied and express incidental powers. It follows that the effect of the reference to “incidental” in s 51(xxxix) is to require legislation that purports to rely on the power in conjunction with s 61 to be “necessary to effectuate its main purpose”:<sup>150</sup> namely, the execution of the executive power to participate in intergovernmental agreements.

The second theme concerns the use of the express incidental power to create offences. The problem that arises is that, although for the most part offences cannot be created in the exercise of executive power,<sup>151</sup> the protection of the executive power through the creation of offences in the exercise of s 51(xxxix) seems clearly to meet the description of a matter incidental to the effectuation of the execution of the executive power. In this way, the executive power becomes a trigger for the enactment of penal legislation, with implications both for civil liberties and for the federal division of powers. The problem is further exacerbated by uncertainty about the scope of the executive power itself. This difficulty lies at the root of a range of cases that seek to limit the use of s 51(xxxix) in conjunction with s 61 by, for example, denying its use for retrospective legislation;<sup>152</sup> scrutinising the link between the law and the executive power to the execution of which it is claimed to be incidental;<sup>153</sup> identifying other factors that may assist to identify whether the law has stepped beyond its incidental limits,<sup>154</sup> including its impact on the federal division of powers;<sup>155</sup> and restricting use of

<sup>144</sup> *Commonwealth v Tasmania (Tasmanian Dam Case)* (1983) 158 CLR 1 at 299-300.

<sup>145</sup> *Davis v Commonwealth* (1988) 166 CLR 79 at 111.

<sup>146</sup> *Davis v Commonwealth* (1988) 166 CLR 79 at 112.

<sup>147</sup> Compare, eg Mason CJ, Deane and Gaudron JJ in *Davis v Commonwealth* (1988) 166 CLR 79 at 93: “Section 51(xxxix) ... enables the Parliament to legislate in aid of an exercise of the executive power.”

<sup>148</sup> *Re Judiciary and Navigation Acts* (1921) 29 CLR 257 at 265 (Knox CJ, Gavan Duffy, Powers, Rich and Starke JJ); *Cunliffe v Commonwealth* (1994) 182 CLR 272 at 312-313 (Brennan J), 383-384 (Toohey J).

<sup>149</sup> *Victoria v Commonwealth (AAP Case)* (1975) 134 CLR 338 at 413-415, identifying two uses of “incidental”: as a “side occurrence which ... may be expected to arise in connexion with the main action [and] a side occurrence with stress on its independence of the main action”. Jacobs J associated the latter with the express incidental power which consequently, in his view, had a “wider ambit” than the implied power.

<sup>150</sup> *Grannall v Marrickville Margarine Pty Ltd* (1955) 93 CLR 55 at 77 (Dixon CJ).

<sup>151</sup> *Davis v Commonwealth* (1988) 166 CLR 79 at 112 (Brennan J).

<sup>152</sup> *R v Kidman* (1915) 20 CLR 425 at 434 (Griffith CJ).

<sup>153</sup> *R v Sharkey* (1949) 79 CLR 121 at 149 (Dixon J); *Australian Communist Party v Commonwealth (Communist Party Case)* (1950) 83 CLR 1 at 186-187 (Dixon J); *Davis v Commonwealth* (1988) 166 CLR 79 at 111-112 (Brennan J).

<sup>154</sup> *Davis v Commonwealth* (1988) 166 CLR 79 at 93 (Mason CJ, Deane and Gaudron JJ); *Nationwide News v Wills* (1992) 177 CLR 1 at 34 (Mason CJ).

s 51(xxxix) to create offences in relation to those aspects of the executive power that are purely “facultative”<sup>156</sup>.

Both themes are relevant to intergovernmental agreements. First, if the execution of executive power is understood to encompass putting an agreement into effect, the enactment of legislation, where required for the purpose, would seem to be necessarily incidental. All else being equal, therefore, if the Commonwealth has executive power to make an agreement of the kind in issue in *Hughes*, s 51(xxxix) provides a basis for the implementing legislation. Second, however, the repeated concern of the court about the combination of the executive and incidental powers to impact on civil liberties or to undermine the federal division of powers suggests the need for caution, if not at this point, then at an earlier stage on this uncertain constitutional road. In *Hughes*<sup>157</sup> itself, the court was hesitant to accept that the legislation might rely on the incidental power because of the role of the DPP in relation to penal legislation. Hesitation on this point is unlikely to survive more careful scrutiny: it highlights the concern of the court however about the underlying problem. Third, in part for reasons connected with the federal division of power, it is unlikely that legislation to enforce an intergovernmental agreement against other parties is incidental to the execution of executive power for the purposes of s 51(xxxix) even if, as I have argued, the acceptance of commitments from other parties pursuant to an agreement potentially falls within the executive power of the Commonwealth. The express authority to enforce financial agreements given to the Commonwealth in s 105A offers an additional interpretative tool, to this end.

## CONCLUDING REMARKS

The scope of constitutional authority for intergovernmental agreements is relatively unexplored. It is an important question in its own right, which deserves more attention than it has received so far. It also offers another perspective from which to examine the scope and operation of s 61 and its interface with s 51(xxxix). The conclusions reached must necessarily be tentative, however. This is partly because of the indeterminate state of the existing law, but partly also because of the novelty of the exercise of measuring executive action of this kind against constitutional standards. If s 61 did not offer a potential trigger for legislative action, the question might have less practical significance. Even without legislative support, however, an exercise (or purported exercise) of the executive power to participate in intergovernmental agreements might have significance in administrative, if not constitutional law.

This article has identified the lines along which a constitutional framework for intergovernmental agreements could develop, as the law becomes more settled. As far as possible, it seeks to indicate the particular line which might or should prevail. Thus, on the understanding of the law presented here, s 61 is a broad-based source of power for most intergovernmental agreements, at least where they are made between Ministers or pursuant to statute. There are, however, limits to the executive power for this purpose. Most obviously, agreements must be consistent with the text and structure of the *Constitution*. They may also be affected by the federal division of powers, to the extent that this is a distinct consideration. There are several bases on which the agreement in *Hughes* might have been argued to fall within the terms of s 61, each of which has its own difficulties and none of which commands recognition as self-evidently correct.

On the analysis in this article, if an agreement falls within the executive power of the Commonwealth, s 51(xxxix) is available, if needed, to give effect to the commitments undertaken by the Commonwealth, subject to compliance with the rest of the *Constitution*. It does not, however, provide a source of power for enforcement of agreements by the Commonwealth against other parties. And even the conclusion that it is available for implementation itself is attended by some doubt.

It is likely that these matters will come before the High Court again, in the short or medium term. When that occurs, the court should take the opportunity to clarify the meaning of its judgment in *Hughes*. It will not be able to resolve these questions by reference to the *Constitution* alone which,

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<sup>155</sup> *Davis v Commonwealth* (1988) 166 CLR 79 at 103-104 (Wilson and Dawson JJ).

<sup>156</sup> *Davis v Commonwealth* (1988) 166 CLR 79 at 112-113 (Brennan J).

<sup>157</sup> *R v Hughes* (2000) 202 CLR 535 at 555.

while it provides some signposts, in the end is inconclusive on these points. The court could and should derive further assistance from consideration of structure, not only of the Australian federation but also of the system of representative parliamentary government, which the *Constitution* has put in place for the Commonwealth and which it has saved for the States.<sup>158</sup>

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<sup>158</sup> *Constitution*, s 106.