Chapter 2

Constitutional questions

2.1 The founding fathers regarded a federation as the most appropriate form of government for Australia and, over time, this has provided a very sound foundation for the development of the nation's prosperity and security. However, Australia's experience has been that managing relations between the different levels of government in a federation has proved very demanding politically, economically and constitutionally. Over 110 years of federation, there has been a tendency towards the centralisation of power in the hands of the federal government. As a result, the Commonwealth now has responsibility for a range of areas not envisaged by the original drafters of the constitution: education is a particularly potent example of this. This tendency, together with the demands of managing the increasingly complex interplay of policy between the different levels of government, has resulted in the development of an intricate set of schemes and arrangements to promote cooperation in efficient delivery of policy.

2.2 This chapter will examine the way federal state relations has been affected by the tendency towards greater centralisation and consider the various cooperative legislative schemes and referrals of powers which have been developed as a way of managing relations between the different levels of government. The constitutional issues relating to local government are considered in Chapter 6.

Constitutional interpretation and centralisation of federal power

2.3 As the debates during the 1898 Australasian Federal Convention make clear the framers of the Constitution envisaged a High Court that would be 'the guardian of the expressions of the people' to 'guarantee the preservation of the Constitution until the electors themselves choose to change it.'[1] This view was reiterated by Alfred Deakin during the debates for the Judiciary Bill. For Deakin, the High Court existed to 'protect the Constitution against assaults.'[2] However, Deakin envisaged that this role would be accomplished through forward-looking rather than static interpretation of the Constitution:

> I would say that our written Constitution, large and elastic as it is, is necessarily limited by the ideas and circumstances which obtained in the year 1900....But the nation, lives, grows and expands. Its circumstances change, its need alter, and its problems present themselves with new faces.

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1 Sir Edmund Barton, *Official record of the debates of the Australasian federal convention. Third session. Melbourne, 20th January to 17th March 1898, 2 vols.* Melbourne, Robert S. Brain, Government Printer, [1898] 17 March 1898, pp 2470 – 2471, http://www.nla.gov.au/guides/federation/resources/conventions1890s.html (accessed 31 May 2011).

2 Alfred Deakin, 18 March 1902, *House of Representatives Hansard*, p. 4.

> The organ of the national life which preserving the union is yet able from time to time to transfuse into it the fresh blood of the living present, is the Judiciary of the High Court of Australia...It is as one of the organs of Government which enables the Constitution to grow and to be adapted to the changeful necessities and circumstances of generation after generation that the High Court operates. Amendments achieve direct and sweeping changes, but the court moves by gradual, often indirect, cautious, well considered steps, that enable the past to join the future, without undue collision and strife in the present.3

2.4 This view of the role of the High Court is reflected in the Court's decision in *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd*[4] (the Engineers' Case). The High Court held that the Constitution is to be interpreted according to the plain meaning of its provisions:

> It is therefore, in the circumstances, the manifest duty of this Court to turn its earnest attention to the provisions of the Constitution itself. That instrument is the political compact of the whole of the people of Australia, enacted into binding law by the Imperial Parliament, and it is the chief and special duty of this Court faithfully to expound and give effect to it according to its own terms, finding the intention from the words of the compact, and upholding it throughout precisely as framed.[5]

2.5 The case signalled a departure from the view that the Constitution should be interpreted as reserving power for the States over matters for which the Commonwealth has constitutional responsibility. Dr Zimmermann and Mrs Finlay submitted that the case brought an end to a mode of constitutional interpretation that gives credence to the federal nature of the system of government which the Constitution established:

> [I]n the *Engineers' Case*, in 1920, Isaacs J successfully introduced a new method of interpretation whereby no areas of law were assumed to be reserved to the States. Thus the fact that Australia was constituted to be a federation was allowed to play "no significant part in determining the meaning and scope of the various powers conferred by s 51 of the Constitution".[6]

2.6 Dr Zimmermann and Mrs Finlay further argued that the approach to Constitutional interpretation required by the *Engineers' Case* is inappropriate, as it overlooks the implied federalism of the Constitution:

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3 Alfred Deakin, 18 March 1902, *House of Representatives Hansard*, p. 4.

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

5 *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd* (1920) 28 CLR 129, per Knox CJ, Isaacs, Rich and Starke JJ, at para. 142.

6 Dr Zimmermann and Mrs Finlay, *Submission 17*, p. 14; citing H Gibbs, 'The Decline of Federalism?' (1994) 18 *University of Queensland Law Journal* 1, 2–3.

> I have no doubt that the Constitution is a federal compact, which means that there is a distribution of power and the fact that the Commonwealth government is only mentioned in the Constitution in terms of the powers which have been granted to the central government for the purpose of protecting state rights. I believe that the original interpretation of the High Court, the one that was exploded, as some constitutionalists say, by the engineers case, is actually the right approach for a federal document...My interpretation is that we should read that as a state reserved power, which means that the states would only lose the powers which have been explicitly allocated to the central level of government.[7]

2.7 Brown was also critical of the High Court's approach to Constitutional interpretation, stating:

> [Y]ou get a High Court like in the Work Choices decision where you have a majority of judges who just say, 'We are not going to discuss the federal balance. It has no content for us.' In interpreting a federal constitution that is an amazingly incredible indictment on an institution.[8]

2.8 The recent debate over the new funding arrangements for health is an example of creeping centralisation, but most dramatic has been the change in the Commonwealth's role in relation to education. The Commonwealth had little involvement in education until 1940 when the demands of WWII saw it fund an expansion of vocational and higher education under the defence power in the constitution.[9] Subsequently in 1942, the High Court granted a monopoly of income taxation powers to the Commonwealth and, over time, the Commonwealth began to 'fund universities from 1958, non-university higher education from 1965, secondary education from 1973, and technical and further education from 1975.'[10] This was achieved under section 96 of the Constitution - Financial assistance to States.

2.9 Twomey and Withers have stated that 'the cause of centralism has been advanced by High Court decisions'.[11] Similarly, several submissions argued that, through its interpretation of the Constitution, the High Court, rather than being the 'guardian of federalism', has undermined the federal balance of power as intended by

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7 Dr Augusto Zimmermann, *Committee Hansard*, 9 March 2011, p. 50.

8 Professor A. J. Brown, *Committee Hansard*, 1 February 2011, p. 40.

9 Dr Gavin Moodie, *Increased Commonwealth control over Australian vocational education: implications of the High Court's Work Choices decision* http://www.avetra.org.au/documents/56-Moodie.pdf , p. 3.

10 Dr Gavin Moodie, *Increased Commonwealth control over Australian vocational education: implications of the High Court's Work Choices decision* http://www.avetra.org.au/documents/56-Moodie.pdf , p. 3.

11 Anne Twomey & Glenn Withers, *Federalist Paper 1: Australia's federal future. Delivering growth and prosperity.* A Report for the Council of the Australian Federation, p. 28.

the framers of the Constitution.[12] The Pearce Division of the Liberal Party from Western Australia stated:

> Over the past century there has been a gradual expansion of Commonwealth powers, which has been made possible by the expansive approach to constitutional interpretation adopted by the majority of High Court justices.[13]

2.10 The view that the High Court has promoted centralisation of power at the Commonwealth level was shared by other submitters. Western Australian Attorney-General, the Hon Christian Porter MLA, submitted:

> [i]n my view, this expansion, which has principally been occasioned by High Court decisions such as the Engineers Case, Tasmanian Dams Case and the Work Choices Case, has inappropriately widened the scope and reach of Commonwealth legislative powers, and in conjunction with s 109, curtailed State legislative powers. This is inappropriate, firstly, because this centralisation of power is not warranted by the Constitution's text and structure. Secondly, it is inappropriate because it destroys the benefits of federalism.[14]

2.11 The extent of the concern that constitutional interpretation has distorted the federal balance of power was expressed by the Northern Territory Statehood Steering Committee, which reported:

> The Secretary of the Commonwealth Attorney Generals Department, Mr Roger Wilkins...wrote in October 2007: Currently the roles and responsibilities of federal and state levels of government are unclear...in a series of decisions the High Court has removed any real restrictions or limits on Commonwealth power.[15]

2.12 In considering the role of the High Court in redefining the balance of power in the federal system, submitters drew the committee's attention to the High Court's interpretation of the external affairs power and the corporations power.

2.13 FamilyVoice Australia submitted that 'the external affairs power can now effectively be used as a peg for the Commonwealth to legislate on matters for which it would otherwise not have any power to legislate.' For FamilyVoice Australia, this capacity to further centralise power 'undermines the original distribution of powers

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12 For example, FamilyVoice Australia, *Submission 8*, p. 2; Pearce Division Liberal Party of Australia, *Submission 14*, p. 2; Dr Zimmermann and Mrs Finlay, *Submission 17*, pp 12–17.

13 Pearce Division Liberal Party of Australia, *Submission 14*, p. 2.

14 Christian Porter, MLA, Attorney-General, Western Australian Government, *Submission 44*, p. 2.

15 Northern Territory Statehood Steering Committee, *Submission 12*, p. 7, citing Australian Review of Public Affairs University of Sydney, www.australinreview.net/digest/2007/election/wilkins.html 10 October 2007.

between the Commonwealth and the States.' [16] Similar concerns were raised by the Western Australian Attorney-General,[17] and by Dr Zimmermann, who stated:

> Certainly the most dangerous head of power, in my opinion, is external affairs because the combination of external affairs together with inconsistency can destroy the Australian Federation...Unless you can find a way to determine what the Commonwealth can do when it engages international relations, anything can go...I think the combination of external affairs with inconsistency can render the whole Australian system otiose or ineffective, or perhaps even to destroy it.[18]

2.14 Regarding the corporations power, the committee's attention was drawn to the *Work Choices Case*[19]. Dr Zimmermann and Mrs Finlay explained that the case provides authority for the principle that a 'head of power does not have to be read narrowly so as to avoid it actually breaching the explicit limitations of another head of power'. Dr Zimmermann and Mrs Finlay submitted that through the *Work Choices Case* the corporations power has been broadly interpreted so as to reduce the role of the States within Australia's federation:

> The result in Work Choices represented the continuation of how the High Court has approached the Constitution since the Engineers' Case, in 1920. It confirms the centralist method adopted by the High Court, which has given the Commonwealth the potential to further regulate many areas of law that have always been within State control.[20]

2.15 Dr Zimmermann and Mrs Finlay reported that the approach to Constitutional interpretation in the *Work Choices Case* was criticised by the dissenting justices as contributing to 'destabilising the federal nature of the Australian Constitution' and having 'the potential to reduce the States to "mere façades of authority possessing Parliaments and courts but little else"'.[21]

2.16 FamilyVoice Australia argued that the *Work Choices Case* 'needs to be re-examined to create the possibility for a restoration of federalism.'[22]

2.17 While Professor Galligan acknowledged the centralising impact of the High Court's decisions, he argued that there were ways governments could respond to the challenges they created should they wish to do so:

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16 FamilyVoice Australia, *Submission 8*, p. 2.

17 Christian Porter, MLA, Attorney-General, Western Australian Government, *Submission 44*, p. 2.

18 Dr Augusto Zimmermann, *Committee Hansard*, 9 March 2011, p. 54.

19 *New South Wales v Commonwealth (Work Choices Case)* (2006) 229 CLR 1.

20 Dr Zimmermann and Mrs Finlay, *Submission 17*, p. 26.

21 Kirby J and Callinan J, *New South Wales v Commonwealth (Work Choices Case)* (2006) 229 CLR 1, as cited by Dr Zimmerman and Mrs Finlay, *Submission 17*, pp 23–25.

22 FamilyVoice Australia, *Submission 8*, p. 4.

> I think what the High Court has essentially done is deal itself out of the federal adjudication balance of the roles of government for the most part and essentially left it to politics. Just because the High Court gives a very expansive definition of external affairs power or the corporations power does not mean that a Commonwealth government is going to take that up. It really depends on the political opportunity, the political drivers, the political leadership, the mood of the nation at the time and the strength of the states.[23]

2.18 At the same time as the committee heard extensive evidence regarding the centralising effect of the High Court's approach to constitutional interpretation, it also received evidence on possible solutions to the problem. One proposal was for a redistribution of power between the first and second tiers of governments. Twomey, for example, argued:

> It would be worthwhile for an independent body to conduct a broader review of the different functions of government, how they relate to each other and which level of government is most appropriate to exercise these functions.[24]

2.19 On this point, Brown noted that 'there is substantial public support for structural reform and redistribution of power within the system.'[25] Similarly, the Law Council of Australia stated that there is 'growing consensus across politics, business and the community that there needs to be a reallocation of powers in the Australian Federation.'[26]

2.20 Others, however, were more cautious. While supporting the need for reassessment of the roles of each tier of Government, the Hon Christian Porter MLA was hesitant to support reform achieved through Constitutional amendment:

> In my view, all of these aspects (legislative, executive and judicial) of federalism ought to be reassessed and brought back into line with the text, structure and federal spirit of the Commonwealth Constitution. This cannot occur via a constitutional amendment, but is a matter to be accomplished via the ongoing workings and relationships of the Commonwealth and the States. The risk of exacerbating the current undesirable trends might well be accelerated if...there are constitutional amendments which could have (even the unintended) consequences of further eroding our federal system.[27]

2.21 The committee heard suggestions that the High Court's centralising instincts may have been, at least in part, a consequence of the way the Court's Justices are

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23 Professor Brian Galligan, *Proof Committee Hansard*, 5 May 2011, p. 24.

24 Dr Anne Twomey, *Submission 32*, p. 1.

25 Professor A. J. Brown, *Submission 41*, p. 3.

26 Law Council of Australia, *Submission 34*, p. 5.

27 Christian Porter, MLA, Attorney-General, Western Australian Government, *Submission 44*, p. 2.

selected. While it was acknowledged that changing the selection process might not have a significant impact, at least immediately, on the historical body of judicial interpretation, it could perhaps influence its future direction. Accordingly, it was submitted that a new process for appointing High Court Justices is required. Section 72 of the Constitution directs that the Justices will be appointed by the Governor-General in Council. The process is expanded by the *High Court of Australia Act 1979*, which states:

> [w]here there is a vacancy in an office of Justice, the Attorney-General shall, before an appointment is made to the vacant office, consult with the Attorneys-General of the States in relation to the appointment.[28]

2.22 Dr Zimmermann and Mrs Finlay argued that the consultation required under the High Court of Australia Act is 'nothing more than a symbolic gesture' as it does not 'guarantee the States any substantive input into the eventual outcome'. Accordingly, it was submitted that the appointment process promotes a Commonwealth-centred view of the Constitution:

> With all High Court appointments being made by the Commonwealth government it is entirely unsurprising that the High Court has, over time, been broadly sympathetic towards the expansion of Commonwealth powers.[29]

2.23 Dr Zimmermann and Mrs Finlay proposed a new approach to appointment of High Court Justices:

> After considering a range of reform proposals submitted in various forms over the years, it is our view that the most practical proposal is the one originally put forward by the Queensland Government in 1983 to the Australian Constitutional Convention. This proposal has subsequently been endorsed by Professor Gabriel Moens, who described it as follows:
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> [U]pon a vacancy occurring on the High Court bench, the Commonwealth Attorney-General asks the State Attorneys-General for suggestions of possible appointees. The Commonwealth itself may then submit suggestions of potential appointees to the scrutiny of the State Attorneys-General. From this consultation the Commonwealth would gain a clear idea about which candidates met with State approval or disapproval. High Court vacancies could only be filled with prospective appointees of whom the Commonwealth government approved and of whom three (or more) State governments had expressed positive approval or had not expressed an opinion upon.[30]

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28 *High Court of Australia Act 1979*, s. 6.

29 Dr Augusto Zimmermann and Mrs Lorraine Finlay, *Submission 17*, pp 52–53.

30 Dr Augusto Zimmermann and Mrs Lorraine Finlay, *Submission 17*, pp 54–55, citing G Moens, "The Role of the States in High Court Appointments", in Upholding the Australian Constitution (Proceedings of The Samuel Griffith Society Conference, vol. 2, 1997).

2.24 The Pearce Division of the Liberal Party also argued for a new appointment process. The proposal went further than that recommended by Dr Zimmermann and Mrs Finlay:

> We suggest that the federal character of the Constitution could only be strengthened by providing for the Justices of the High court to be appointed by State Governments, with only the Chief Justice remaining an appointment for the Federal Government.[31]

Committee view

2.25 The committee accepts that over the last century there has been a strong tendency towards greater centralisation within the Australian federation. The committee notes the strong evidence that this has been a consequence, at least in part, of a succession of High Court decisions that have expanded the federal government's legislative reach. Decisions in recent years that have relied on an expansive interpretation of the Constitution's external and corporations powers have accelerated this process. Were this approach to Constitutional interpretation to continue, the potential for the further expansions of federal power would be considerable. This, in turn, would further undermine the Constitutional balance struck at the time of federation between the states and the federal government.

2.26 The committee sees merit in regular reviews of the way Justices of the High Court are selected. It is not convinced, however, that it is possible to change the selection process in a way that can ensure a better balance between any centralising and non-centralising inclinations of its Justices. Nor is it convinced that it would be desirable to try to do so, particularly if this were to be at the expense of other virtues that might be possessed by nominees.

2.27 The committee acknowledges that views within the Australian community on the desirability or otherwise of a more centralised federal structure are complex and widely divided. It notes that for some Australians centralisation is a desirable trend allowing the nation to better meet the numerous social, economic and political challenges it faces in an increasing complex and globalised world. Others, however, remain to be convinced and see the challenges best being met through a stronger rather than a weaker federal structure.

2.28 The committee does not regard it as necessary, given its terms of reference, to arbitrate between these different perspectives or to reach a conclusion on which is most appropriate for Australia's future. It notes, however, that the tendency towards greater centralisation within the federation is a matter that is having, and is likely to continue to have, a profound effect on the evolution on Australia's constitutional structure. For this reason, the committee is of the view that the matters canvassed in this section of the report should be widely debated among Australians and the issues they raise subject to careful scrutiny within the community.

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31 Pearce Division Liberal Party of Australia, *Submission 14*, p. 3.

Recommendation 5

2.29 The committee recommends that the tendency towards greater centralisation within the Australian federation resulting from High Court decisions be among the matters referred for inquiry to the Joint Standing Committee proposed in Recommendation 17 of this report. In the event that the proposed committee is not established, it encourages more extensive academic research to be undertaken on the subject with a view to formulating policy proposals that might be referred to a constitutional convention for possible constitutional change.

Cooperative legislative schemes and the referring of powers

2.30 As a way of better managing and encouraging a higher degree of cooperation among the state and federal governments and of overcoming some of the evolving consequences of High Court decisions, various schemes and arrangements for policy coordination have emerged between the different levels of government. National uniform legal frameworks, for example, can be an effective way to develop national policy initiatives leading to, among other things, comprehensive regulatory change and the promotion of Australia's international competitiveness. The creation of a national corporations law is a good case in point. As the Gilbert and Tobin Centre of Public Law submitted:

> It is just that in Australia—and this is particular to us, with a relatively small population and a relatively homogenous population—there are some areas where cooperation tends to transcend competition because we recognise there is a need for harmonised laws.[32]

2.31 Professors Andrew Lynch and George Williams have commented that, in relation to Australia's federal system, 'a burgeoning of agreements between the tiers of government, frequently underpinned by legislation, has been a feature of the later decades of the last century.'[33] However, there are constitutional constraints on the operation of cooperative schemes, and the High Court has called into question the legality of aspects of their establishment.

The constitutionality of cooperative schemes

2.32 In *Re Wakim; Ex parte McNally*[34], the High Court overturned over a decade-old system of cross-vesting state and federal jurisdiction in state and federal courts. The system, which reputedly improved court administration across the tiers of

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32 Professor George Williams, Foundation Director, Gilbert and Tobin Centre for Public Law, *Committee Hansard*, 2 December 2010, pp 15–16.

33 Professor Andrew Lynch, Professor George Williams, 'Beyond a federal structure: Is a Constitutional commitment to a federal relationship possible?', *UNSW Law Journal* Volume 31(2) 395 – 434, p. 414.

34 *Re Wakim; Ex parte McNally* (1998) 198 CLR 511.

government,[35] was held to be invalid on the grounds that Chapter III of the Constitution did not permit federal courts to exercise state jurisdiction. Subsequent to this, in *R v Hughes*,[36]the High Court held that the states cannot refer powers and functions of state executives to officers of the Commonwealth unless authority for the Commonwealth to exercise the functions and powers can be found in the Constitution.[37]

2.33 The decisions have limited the potential for cooperation between the federal and the state and territory governments.[38] Lynch and Williams have concluded that 'the High Court revealed (or created) a structural weakness that continues to blight cooperative endeavours by the States and the Commonwealth...'.[39] The problem was set out for the committee by Dr Anne Twomey:

> The provisions in the Constitution that support cooperative federalism need to be reviewed and renewed. At the moment they do not adequately serve our needs. They are quite limited in their scope and the High Court has neither been prepared to interpret them broadly nor to interpret the Constitution as supporting other cooperative measures which the Constitution does not explicitly permit or prohibit. In the words of Justice McHugh, 'co-operative federalism is not a constitutional term. It is a political slogan, not a criterion of constitutional validity or power.'
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> One consequence has been that the cooperative cross-vesting scheme, which allowed State jurisdiction to be vested in federal courts to complement the vesting of federal jurisdiction in State courts, was struck down as invalid by the High Court in *Re Wakim; Ex parte McNally*. The ability to use Commonwealth officers to enforce cooperative legislative schemes was left in doubt after the High Court's judgment in *R v Hughes*, as the Commonwealth may not have the necessary legislative power to impose such obligations upon its officers.[40]

2.34 The Gilbert and Tobin Centre for Public Law explained some of the consequences:

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35 Dennis Rose, 'The Bizarre Destruction of Cross-Vesting', in *The High Court at the crossroads: essays in constitutional law*, Stone, A., Williams, G. (eds), Federation Press, Annandale, 2000.

36 *R v Hughes* (2002) 202 CLR 535

37 *R v Hughes* (2002) 202 CLR 535, paragraph 34.

38 Professor Andrew Lynch, Professor George Williams, 'Beyond a federal structure: Is a Constitutional commitment to a federal relationship possible?', *UNSW Law Journal* Volume 31(2) 395 – 434, pp 416 - 417; Associate Professor Anne Twomey, 'Federalism and the use of cooperative mechanisms to improve infrastructure provisions in Australia', *Public Policy* (2007) volume 2(3) 211 – 226, p. 222.

39 Professor Andrew Lynch, Professor George Williams, 'Beyond a federal structure: Is a Constitutional commitment to a federal relationship possible?', *UNSW Law Journal* Volume 31(2) 395 – 434, p. 417.

40 Dr Anne Twomey, *Submission 32*, p. 4.

> This has caused problems in a range of areas, including family law, GST price monitoring by the Australian Competition and Consumer Commission, competition law and in new fields such as the regulation of gene technology. The problems can sometimes be circumvented by a referral of power…or by accepting that matters arising under a harmonised scheme will be heard by the several State courts and regulated by separate enforcement agencies in each State. Both options are second best solutions that can make cooperation politically unachievable or practically worthless. As a result, there exist significant legal obstacles to effective federal-state cooperation, even where there is bipartisan support for cooperation across all jurisdictions to achieve an outcome in the national interest.[41]

Referrals of power – cooperation through centralisation?

2.35 The Law Council of Australia noted that there are various approaches to establishing cooperative legislative schemes, including 'model or template legislation; applied legislation; complementary legislation and referral of powers.'[42] Of these, there has been a growing tendency in recent years to rely on referrals of power under s51(xxxvii) of the Constitution, which allows the Commonwealth to exercise authority over matters referred by the states. As the New South Wales Government noted:

> The referral of powers has been the primary mechanism for dealing with Commonwealth-State/Territory issues since the decision of the High Court in *Re: Wakim; Ex parte McNally* in 1999.[43]

2.36 Notwithstanding their growing use, the Council for the Australian Federation submitted that referrals of power are 'not necessarily the best mechanism' to achieve cooperation.[44] Two concerns were raised with the use of referrals of power as a mechanism to further intergovernmental cooperation. First, it was put to the committee that the failure of cross-vesting schemes has contributed to an erosion of state power rather than cooperation between the tiers of government. This view is reflected in the statement of Western Australian Attorney-General, the Hon Christian Porter MLA, that 'the referral of State legislative powers to the Commonwealth Parliament has significantly contributed to the continuing growth and centralisation of Commonwealth power.'[45] The Tasmanian Government concurred noting that:

> [r]eferral of powers should only be utilised as a ‘last resort’ option where there is a clearly demonstrated rationale for national uniformity that can only be addressed by ceding legislative powers to the Commonwealth after all other options have been considered and eliminated. The referral of

41 Gilbert and Tobin Centre of Public Law, *Submission 7*, p. 5.

42 Law Council of Australia, *Submission 34*, p. 6.

43 New South Wales Government, *Submission 39*, p. 9.

44 CAF, *Submission 38*, p. 8

45 Christian Porter, MLA, Attorney-General, Western Australian Government, *Submission 44*, p. 3.

> powers increases the centralisation and reduces the opportunities to capitalise on the advantages of cooperative federalism.[46]

2.37 A second objection to referrals schemes is that the scope of the power is uncertain; a fact that encourages caution and reluctance to its widespread use. Referrals schemes are created by power being referred by the states to the Commonwealth under s51(xxxvii) through text-based referrals, that is, through the states enacting legislation establishing the scope of the matters to be handed over to the Commonwealth. Examples of text-based referrals include the corporations law and anti-terrorism legislation. Text-based referrals generally include an initial referral of matters based on an agreed text of a bill, and a referral of powers to amend the text of a bill within defined parameters.[47]

2.38 A notable difficulty with a referral of powers scheme, however, is that once a referral has taken place it becomes difficult for a state to then control the Commonwealth's exercise of power over the matters referred. As Twomey argued in her submission to the committee:

> The ability of State Parliaments to refer matters to the Commonwealth under s 51(xxxvii) on the condition that the States retain a say in the amendment of laws enacted pursuant to the reference, was also thrown into doubt by comments made in *Thomas v Mowbray*.[48]

2.39 The Gilbert and Tobin Centre of Public Law agreed with this view, stating that 'while s51(xxxvii) appears to be straightforward, in truth the power suffers from uncertainty in key respects'.[49] Twomey explained that *Thomas v Mowbray*,[50]which concerned the validity of Commonwealth legislation based on referrals of power, has had the effect of removing the states' certainty about the extent and effect of referrals under s51(xxxvii):

> The thing is that how the High Court might deal with it is a random matter. That uncertainty makes the states reluctant to use section 51(xxxvii) because they are not absolutely sure when they refer a matter whether they can revoke it in the future if they need to. In particular, if you refer a matter to the Commonwealth you do not know what control you have in the future over potential amendments to the law that has been made pursuant to that reference.[51]

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46 Tasmanian Government, *Submission 40*, p. 12.

47 Professor Andrew Lynch, 'After a referral: The amendment and termination of Commonwealth laws relying on s 51(xxxvii)', *Sydney Law Review*, vol. 32, p. 375.

48 Dr Anne Twomey, *Submission 32*, p. 4.

49 Gilbert and Tobin Centre of Public Law, *Submission 7*, p. 6.

50 *Thomas v Mowbray* (2007) 233 CLR 307

51 Dr Anne Twomey, *Committee Hansard*, 2 December 2010, p. 3.

2.40 It was further submitted that this uncertainty fuels reluctance on the part of the states to enter into cooperative arrangements through a referrals process. Twomey argued:

> So the states do not have the same level of freedom or willingness to refer matters in circumstances where they cannot be confident as to what the future outcome might be and the extent of their control over how the reference might move on later on.[52]

2.41 A similar view was expressed by the Gilbert and Tobin Centre of Public Law:

> An issue of particular importance is the means by which the States may most effectively constrain the Commonwealth's powers to subsequently amend legislative text that has been referred to it for enactment. States will only be willing to hand over areas to Commonwealth control if they can be confident that sufficient safeguards are in place to prevent over-reaching or misuse of those powers by the national legislature.[53]

2.42 However, in contrast to this view, the Law Council of Australia reported:

> [a]t the Law Council's conference on the future of federalism, the Hon Justice French (as he then was) suggested that referral of powers offered the best solution to the current challenges for the Australian Federation as it provided clear accountability and protections for States and Territories in relation to future changes.[54]

Intergovernmental agreements and the erosion of parliamentary sovereignty

2.43 Another mechanism for establishing greater cooperation between the different levels of government has been though the use of intergovernmental agreements. On occasions these can serve as a catalyst for referrals of power, underpinning text-based referrals[55] or alternatively leading to the enacting of Commonwealth legislation.

2.44 The National Vocational Education and Training Regulator Bills, which were examined by the Senate Legislation Committee on Education, Employment and Workplace Relations during the course of this inquiry, are an example of legislation formed to give effect to an intergovernmental agreement.[56] The National Vocational Education and Training Regulator Bills highlight the potential concerns with this approach to cooperative federalism for the Commonwealth level of government.

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52 Dr Anne Twomey, *Committee Hansard*, 2 December 2010, p. 3.

53 Gilbert and Tobin Centre of Public Law, *Submission 7*, p. 6.

54 Law Council of Australia, *Submission 34*, p. 7.

55 Dr Anne Twomey, 'Federalism and the use of cooperative mechanisms to improve infrastructure provisions in Australia', *Public Policy* (2007) volume 2(3) 211–226, p. 213.

56 National Vocational Education and Training Regulator Bill 2010 [2011]; National Vocational Education and Training Regulator (Transitional Provisions) Bill 2010 [2011]; National Vocational Education and Training Regulator (Consequential Amendments) Bill 2011.

2.45 The Bills relied on a text-based referral of powers from the New South Wales Government, which was in two parts, namely, an initial reference and a continuing reference. The initial reference was made in the terms of the text of the yet to be introduced Commonwealth Bills, which were annexed to the New South Wales Bill. The continuing reference established the parameters under which the text of the legislation could be amended once passed.[57] The committee was advised that for the Commonwealth to be able to rely validly on the referral, the Commonwealth Parliament could not substantially amend the Bill. The decision before the Parliament was merely to pass or not to pass the Bill.[58] In this regard, the role of Parliament was reduced to exercising the powers of veto.

2.46 This approach to cooperative federalism has the unintended consequences of the Commonwealth executive binding the Commonwealth Parliament. This matter was raised in evidence before the committee, and the Gilbert and Tobin Centre of Public Law proposed greater Parliamentary oversight of intergovernmental agreements:

> You could put in place a mechanism, for example, to have automatic referral of intergovernmental agreements to a parliamentary committee. You might have a specially constituted parliamentary committee at the federal level which would consider an intergovernmental agreement and then report on it. I think a direct comparison could perhaps be drawn to the area of international relations where the Commonwealth will not ratify a treaty until it has been subject to the review of the Joint Standing Committee on Treaties. No such mechanism exists currently for intergovernmental agreements which some would say is a little incongruous.[59]

2.47 The issue of text-based referrals of power to implement intergovernmental agreements was also considered by the House of Representatives Standing Committee on Legal and Constitutional Affairs as part of the committee's 2008 inquiry into reforming the Constitution. The committee concluded:

> There are concerns regarding the escalation of intergovernmental agreements and the lack of transparency and oversight applied to these agreements. For this reason the Committee has recommended scrutiny of

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57 Parliament of New South Wales, *Vocational Education and Training (Commonwealth Powers) Bill 201*, http://www.parliament.nsw.gov.au/prod/parlment/nswbills.nsf/131a07fa4b8a041cca256e610012de17/369f8ac5a0f6539eca2577e5003ac314?OpenDocument (accessed 1 June 2011).

58 Senate Legislation Committee on Education, Employment and Workplace Relations, 21 March 2011, p. 2.

59 Mr Paul Kildea, Director, Gilbert and Tobin Centre of Public Law, *Committee Hansard*, 2 December 2010, p. 18.

intergovernmental agreements by a parliamentary committee, as currently happens with international treaties.[60]

Committee view

2.48 The committee notes that 'referrals of power' schemes have often been a very effective way of encouraging federal/state cooperation on matters of national importance. It recognises that when these referrals take place the states and territories may well desire to retain some control over the future exercise of the powers referred and that they are not always confident of being able to do so. It also notes that the referrals process often lack transparency, leaving significant changes in responsibilities between federal and state governments beyond the reach of the parliaments to scrutinise properly. One of the consequences can be that referrals arrangements are discouraged when they may be the best way to address issues of common concern.

The need for Constitutional change to promote cooperative federalism

2.49 As a way of overcoming the difficulties that have emerged in implementing cooperative schemes for the better management of common issues and problems, the committee heard some evidence that constitutional change would be necessary. This view was expressed by Twomey and the Gilbert and Tobin Centre of Public Law who both argued that if cooperative federalism was to be a natural policy option in the future a constitutional change is necessary.[61] The committee's attention was drawn to the first recommendation in the unanimous 2006 report of the House Standing Committee on Legal and Constitutional Affairs on the Harmonisation of Legal Systems, which includes the following proposals.

- The Australian Government seek bipartisan support for a constitutional amendment to resolve the limitations to cooperative legislative schemes identified by the High Court of Australia in the *Re Wakim* and *R v Hughes* decisions at the Standing Committee of Attorneys-General as expeditiously as possible;
- The Australian Government draft this constitutional amendment so as to encompass the broadest possible range of cooperative legislative schemes between the Commonwealth and the States and Territories.[62]

2.50 Twomey contended that Constitutional amendments to promote cooperative federalism might take one of several forms.

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60 House of Representatives Standing Committee on Legal and Constitutional Affairs, *Reforming our Constitution: A roundtable discussion*, June 2008, p. ix.

61 Gilbert and Tobin Centre of Public Law, *Submission 7*, p. 5; Dr Anne Twomey, *Submission 32*, pp 4–5.

62 House Standing Committee on Legal and Constitutional Affairs, *Harmonisation of Legal Systems within Australia and between Australia and New Zealand*, 2006, Recommendation 1, p. xv.

> There are two main ways these problems could be tackled. First, specific technical amendments could be made to the Constitution to permit cross-vesting, allow the conferral of State functions on Commonwealth officers (where the relevant governments agree) and clarify the application of s51(xxxvii), particularly concerning the capacity to revoke references and the manner in which references (and laws supported by a s 51(xxxvii) reference) may be amended.
>
> Secondly, a broader provision could be inserted in the Constitution to support inter-governmental cooperation. It could, perhaps, be modelled on s 105A of the Constitution and permit the making of agreements between the Commonwealth and the States concerning matters within their legislative, executive and judicial powers. It could confer the power to legislate to give effect to such agreements and deal with how those agreements could be altered or rescinded and the effect that such changes to the agreements would have on existing legislation that implemented them. The machinery for inter-governmental cooperation could also be upgraded, perhaps by clearing the inter-state commission provisions out of the Constitution and creating a new independent body with the role of monitoring the implementation of agreements and adjudicating upon disputes between governments on the operation of inter-governmental agreements. In short, a new architecture supporting cooperative federalism could be created.[63]

2.51 The New South Wales Government also supported constitutional amendment to address the effect of the High Court's decisions:

> The Commonwealth must also be willing to consider the removal of barriers imposed by the Australian Constitution as a means of ensuring the most consistent and cohesive application of law.[64]

2.52 While not calling for Constitutional amendment, the Law Council of Australia submitted that 'any high level process for broader consultation on the challenges posed by social change to the Australian Federation should include examination of the advantages and disadvantages of current co-operative legislative schemes.'[65]

2.53 Of the 44 referenda proposals, only eight have succeeded.[66] In a paper on constitutional reform, 'Processes for reforming Australian federalism', Professor Brian Galligan gave consideration to the frequent calls for amendment of the constitution to address some of the obstacles to greater cooperation between the different levels of Australian government. Professor Galligan argued that while attention is given to referenda, and the role of the High Court, as the means to affect Constitutional change

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63 Dr Anne Twomey, *Submission 32*, pp 4-5.

64 New South Wales Government, *Submission 39*, p. 9.

65 Law Council of Australia, *Submission 34*, p. 7.

66 Australian Electoral Commission, *Referendum dates and results: 1906 – present.*, http://www.aec.gov.au/Elections/referendums/Referendum_Dates_and_Results.htm (accessed 21 June 2011).

'these avenues are not in fact the most promising ones'. According to Professor Galligan 'political and intergovernmental processes...are the likely avenues for change.'[67]

Committee view

2.54 The committee acknowledges the broad support for a review of constitutional barriers to cross-vesting and other cooperative schemes. The committee also considers that there would be merit in exploring whether constitutional amendment is necessary to ensure the distribution of powers between the Commonwealth and the states remains, and continues to remain, appropriate as the Australian nation continues to evolve. Constitutional amendment is a way of addressing some of the existing constitutional impediments which can sometimes serve to frustrate the development of schemes intended to achieve cooperative federalism. In this connection it notes in particular the uncertainties created as a result of the decision in *Re Wakim* and *R v Hughes*. Given the need for change, the committee can see some merit in the first recommendation of the 2006 report of the House Standing Committee on Legal and Constitutional Affairs on the Harmonisation of Legal Systems mentioned earlier in this section. It further notes, however, the poor record of success of efforts to secure change through Constitutional amendment and suggests, in light of Professor Galligan's observations, that reform by other means may have a greater likelihood of success.

Recommendation 6

2.55 The committee recommends that proposed intergovernmental agreements between the Commonwealth and state and territory governments be referred for consideration and review to the Joint Standing Committee proposed in Recommendation 17 of this report.

Recommendation 7

2.56 The committee recommends that exposure drafts of legislation intended as the foundation for a referral of power to the Commonwealth be made available for examination by parliamentary committees, including, as appropriate, the Joint Standing Committee proposed in Recommendation 17 of this report and the Senate Standing Committee for the Scrutiny of Bills, prior to their adoption.

Recommendation 8

2.57 The committee recommends that the Joint Standing Committee proposed in Recommendation 17 of this report, inquire into the consequences and uncertainties created as a result of the decisions in *Re Wakim* and *R v Hughes*.

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67 Professor Brian Galligan, 'Processes for reforming Australian federalism', *UNSW Law Journal* 31(2) (2008), p. 627.