R v Hughes: Shuffling the Deck Chairs on the Titanic?

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I Introduction

When the High Court handed down its unanimous decision in *R v. Hughes*[1] on 3 May 2000, the regulators at the Australian Securities and Investments Commission (ASIC) no doubt at first breathed a sigh of relief. In two preceding decisions, [2] the High Court had struck down aspects of the criminal enforceability of the previous companies legislation, thereby preventing the Commonwealth Director of Public Prosecutions (DPP) from appealing against the inadequacy of sentences imposed in the lower courts. In the process of the earlier decisions, ASIC had watched helplessly as its nemesis Alan Bond walked free from prison only a few short years after he had pleaded guilty to committing Australia's largest corporate fraud.[3]

Although less public than the decision in *Bond*,[4] the stakes in *Hughes* were even higher. Two critical challenges were made to the indictment charging offences under the national scheme of the *Corporations Law*. First, the appellant challenged the ability of the Commonwealth DPP to prosecute an indictment for an offence brought under the present *Corporations Law*. Next, it was argued that the States had no power to make offences against State laws (remembering that the *Corporations Law* is in reality a State law) offences against Commonwealth law. To do so, it was contended, is beyond the competence of the State parliaments. In two separate judgments[5] the court considered that in this instance, the DPP's power to prosecute was supported by a head of power under the Commonwealth Constitution. Further, the court considered that the use by the State legislature of the so-called 'pick up' provision to pick up Commonwealth law did not involve any invalidity.

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[1] *R v Hughes* (2000) 74 ALJR 802 (hereinafter '*Hughes*').

[2] *Byrnes & Hopwood v R* (1999) 164 ALR 520; *R v Bond* (2000) 74 ALJR 597.

[3] For a discussion of *Bond v R* , see James McConvill and Darryl Smith, 'Interpretation and Cooperative Federalism: *Bond v R* from a Constitutional Perspective' (2001) *Federal Law Review* (forthcoming) (copy on file with author).

[4] *Bond v R* (2000) 74 ALJR 597.

[5] Gleeson CJ, Gaudron, McHugh, Gummow, Hayne & Callinan JJ delivered a joint judgment; Kirby J delivered a separate judgment.

Accordingly, the indictment was held to be valid, enabling the issue in *Hughes* to proceed to trial.

Yet a close examination of the reasons given in the judgments in *Hughes* gives little cause for comfort to those responsible for prosecuting corporate offences. In a number of ways, the judgments remind us that the full extent of the ramifications of *Re Wakim*[6] for co-operative federalism and the *Corporations Law* are still to be felt.

The national scheme of legislation by which the *Corporations Law* is administered is probably little understood. This case note seeks to analyse the paths of reasoning in the two judgments in *Hughes* and to explore the weaknesses perceived in the national scheme of corporations law. Whilst *Hughes* was able to uphold the efficacy of criminal enforceability in the case immediately under consideration, the court's observations as to the general means by which the *Corporations Law* is implemented left an impending sense of doom for the scheme which started its life with such hope.

II THE NATIONAL SCHEME OF REGULATION

Appropriately, the national scheme started life in the very heart of Australia. The Alice Springs Agreement of June 1990 was designed to replace the (then) existing co-operative scheme which had administered company law after the State uniform company codes.[7] Essentially, the Agreement required the Commonwealth to enact the *Corporations Law* for the Australian Capital Territory (ACT), and for each State polity as a party to the agreement to enact legislation to 'pick up' the *Law* 'as a law' of that State so that the adopted *Corporations Law* is 'taken to be' a law of the Commonwealth. The enabling legislation of each State provided that the *Law* was to apply 'as if those provisions were laws of the Commonwealth and were not laws of' that State.

The difficulty of, and need for, such contrivance lies in one simple omission from the Australian Constitution: the Commonwealth lacks the legislative power to make laws generally in respect to corporations.[8] Earlier in 1989, in *New South Wales v Commonwealth*[9] the High Court had considered an attempt by the Commonwealth Parliament to enact a national Corporations Act. Parliament did so by relying on s. 51(xx) of the Australian Constitution, which enables the Commonwealth to legislate in respect to "foreign corporations, and trading or financial corporations, formed within the limits of the Commonwealth". The High Court[10] held in that case that

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[6] *Re Wakim; ex parte McNally; Re Wakim; ex parte Darvall; Re Brown, ex parte Amann & anor; Spinks v Prentice* (1999) 163 ALR 270 (hereinafter '*Re Wakim*').

[7] See *Hughes* (2000) 74 ALJR 802, 804 and 815–16, and the notes thereto for the history of the implementation of Heads of Agreement — *Future Corporation Regulation in Australia,* 27 June 1990.

[8] See the *Commonwealth of Australia Constitution Act 1900* (Imp) ('*Australian Constitution*'), s.51 (xx). Nor is there a sufficiently comprehensive head of power to allow such legislation under the incidental power- *Australian Constitution*, s.51 (xxxix).

[9] (1990) 169 CLR 482.

[10] Mason CJ, Brennan, Dawson, Toohey, Gaudron & McHugh JJ; Deane J dissenting.

this clause of the Australian Constitution did not confer power on the Commonwealth Parliament to deal with the incorporation of companies.

The earlier State co-operative scheme had suffered from a number of problems.[11] Essentially, the problems identified included the lack of uniform administration by the State Corporate Affairs Offices and then the lack of accountability and duplication of functions between those offices and the National Companies and Securities Commission. Calls were also made for a more effective means of national enforcement.[12]

And so it was that in the absence of either constitutional amendment,[13] or consensus between the States to refer the power to legislate for the incorporation, administration, and enforcement of companies to the Commonwealth,[14] this further example of sophisticated co-operative federalism evolved.

Accordingly, the effect of the national scheme was to seek to operate as closely to, if not replicating, the operation of a law of the Commonwealth as if it were actually supported by a head of power under the Australian Constitution. Amendments to the *Corporations Law* passed by the Commonwealth Parliament were automatically 'picked up' in each State and given immediate and simultaneous effect.

Thus to ensure the uniform application of and enforcement of the *Corporations Law*, the *Australian Securities Commission Act*[15] charged the ASC with the administration of the *Law*. Further, the Commonwealth DPP was to 'have responsibility' to prosecute offences under the new scheme. At the same time, the responsibility for the function or power of prosecution was withdrawn from the officer or authority of each State. Uniformity of administration and enforcement, through these Commonwealth agencies, was therefore 'assured', or so it was thought.

Integral to the success of the *Law's* administration in this way was the other key means of ensuring uniformity: the *Corporations Law* purported to vest power to hear matters arising under the *Law* in the Federal Court of Australia. Of course, remembering the essential nature of the *Law,* this amounts to a conferral of jurisdiction on the Federal Court by each of the State legislatures. It was the issue of the validity of this essential requirement that has led to the eventual 'unravelling' of the federal system of corporations law.[16]

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[11] Senate Standing Committee on Constitutional and Legal Affairs, *The Role of Parliament in Relation to the National Companies Scheme* (1987).

[12] Ian Ramsay, 'Challenges to Australia's Federal Corporate Law' (2000) 31 *Corporate Law Electronic Bulletin*. For the full text see http://cclsr.law.unimelb.edu.au/research-papers.

[13] As Kirby J observes in *Hughes* (2000) 74 ALJR 802, 815, three early attempts to amend the Constitution to enlarge the Commonwealth Parliament's powers in respect to corporations have failed.

[14] As authorised by the *Australian Constitution* s 51 (xxxix).

[15] Amended in 1998 to *Australian Securities and Investment Commission Act 1989* (Cth) so that the regulator is known as ASIC.

[16] See the comments of Alex de Costa, 'The Corporations Law and Cooperative Federalism after The Queen v Hughes' (2000) 22 *Sydney Law Review* 451, 452.

III THE CROSS-VESTING DECISIONS

A Gould v Brown

In *Gould v Brown*[17] the High Court was required to consider the validity of the cross-vesting legislation. The court sat with only six judges, as it determined the appeal shortly after Sir Daryl Dawson announced his retirement from the bench; consequently, he did not sit.[18] The court divided equally on the validity of the legislation. Where a court is evenly divided, the *Judiciary Act* provides that the decision appealed from is upheld.[19] Accordingly, the cross-vesting legislation was granted a temporary reprieve.

B Re Wakim

However the reprieve proved to be short-lived. In June 1999, the High Court handed down the decision in *Re Wakim*.[20] There, the primary issue to be determined was whether the co-operative legislation of Commonwealth, State and Territory parliaments enacting cross-vesting schemes, by which State power was purported to be conferred on federal courts, was valid. By a six to one majority,[21] the High Court considered that the aspects of the cross-vesting legislation which purported to invest the Federal Court with State judicial power were invalid. More directly, the court also considered that the provisions of the *Corporations Law* which vested power in the Federal Court to hear matters under that *Law* were also invalid.

The joint judgment of Gummow and Hayne JJ followed the earlier decision in *Re Judiciary and Navigation Acts*[22] to hold that s 76 of the Australian Constitution is the exclusive source of power to confer jurisdiction on the High Court. The judgment concluded that likewise, the jurisdiction that may be conferred on a federal court (in this case the Federal Court) under s 77 of the Australian Constitution must also be limited to the matters defined under sections 75 and 76 of the Constitution. In other words, as there is no such express provision contained in sections 75 or 76, no other legislature but the Commonwealth Parliament can confer jurisdiction on the Federal Court. In a separate judgment, McHugh J considered that as s 77(iii) of the Australian Constitution gave the Commonwealth Parliament power to invest State courts with federal jurisdiction, but not vice versa, was "enough to indicate that the States lack the power to do so."[23]

The majority judgments in *Re Wakim* have necessarily redefined[24] the separation of powers doctrine implied from Chapter III of the Australian Constitution and de-

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[17] (1998) 193 CLR 346.
[18] (1999) 163 ALR 270 at 322.
[19] *Judiciary Act 1903* (Cth) s.23(2)(a).
[20] (1999) 163 ALR 270. Four sets of proceedings were heard together.
[21] Gummow & Hayne JJ with whom Gleeson CJ, Gaudron, McHugh & Callinan JJ agreed; Kirby J dissenting.
[22] (1921) 29 CLR 257.
[23] (1999) 163 ALR 270, 289 (McHugh J).
[24] (1999) 163 ALR 270, 304 (Gummow and Hayne JJ).

scribed in *R v. Kirby; ex parte Boilermakers' Society*[25] from the previous statement that only judicial power may be vested in federal courts to a statement that only judicial power of the *Commonwealth* may be vested in federal courts.[26]

The tenet of the national scheme of corporations law is, of course, co-operative federalism. The majority considered that there was no power for the Commonwealth Parliament to consent to a conferral by the States of jurisdiction on federal courts under either s 51(xxxix) or Chapter III of the Australian Constitution. The joint judgment of Gummow and Hayne JJ stated "no amount of co-operation can supply power where none exists."[27] McHugh J was even more blunt. He stated: "Co-operative federalism is not a constitutional term. It is a political slogan, not the criterion of constitutional validity or power."[28]

Nevertheless, the black-letter approach to constitutional interpretation does not mean that the court was not alive to, or even empathetic to the political and economic ramifications of striking down the cross-vesting legislation. McHugh J implied as much when he stated that the function of the court

> ...is to give effect to the intention of the makers of the Constitution as evinced by the terms in which they expressed that intention. That necessarily means that decisions, taken almost a century ago by people long dead, bind the people of Australia today even in cases where most people agree that those decisions are out of touch with the present needs of Australian society.[29]

Kirby J commenced his dissenting judgment in a bitter lament for the consequences of the decision that is carried through into the subsequent judgment of *Byrnes & Hopwood.*[30] His Honour acknowledged that the majority were not bound by, nor troubled by, the decision in *Gould v Brown.* His Honour continued:

> It is fruitless to pursue this debate. All other members of the Court are minded to address the substantive constitutional issues. Gould is swept aside as an untroubling obstacle on the path to the attainment of the Court's present conclusions. I will adopt the same approach. But the outcome demonstrates, with a starkness that I cannot remember in any previous decision of this Court, how an 'accident of the Court's constitution' can profoundly change, in a very short interval, the outcome of an important constitutional controversy. That controversy is significant to the present parties. But it is also one of great importance for the nine governments and Parliaments of the Australian federation. Their collective voice was heard in this Court, in unique

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[25] *The Boilermakers' Case* (1956) 94 CLR 254.
[26] See also the comments of Oren Bigos, 'Re Wakim: A Blow to the Federal Court and Cooperative Federalism' (1999) 21 *Corporate Law Electronic Bulletin.*
[27] (1999) 163 ALR 270, 305 (Gummow and Hayne JJ).
[28] Ibid 288. See the comments of James McConvill and Darryl Smith concerning this statement by McHugh J in McConvill and Smith, above n 3, forthcoming.
[29] Ibid 283.
[30] *Byrnes* (1999) 164 ALR 520, 542.

> harmony, to urge that the constitutional status quo, achieved after the Court's earlier decision, be maintained.[31]

The challenge in *Re Wakim* resulted in the High Court striking down the cross-vesting legislation, thereby affecting the means of determining civil disputes under the *Corporations Law*. One might readily argue that as the Federal Court does not exercise criminal jurisdiction,[32] except by way of appeal or review, such a comparison with *Hughes* might seem somewhat inappropriate. Of course, the criminal jurisdiction of the Commonwealth is exercised through the State court hierarchy.[33] However, soon after the decision in *Re Wakim* was delivered, the High Court considered two matters touching on the power of the Commonwealth DPP to appeal against the inadequacy of sentences imposed for offences committed under the earlier cooperative scheme of company law. *Re Wakim* had thus ignited the argument in *Hughes*, not through any cross-vesting argument directly, but because '... gaps are bound to appear in the scheme "when spectacles are applied to the magnifying glass through which lawyers search the text of the legislation at the behest of well funded clients."'[34]

C *"The point on which the appellants are entitled to succeed has no substantive merit..."*[35] – *The decisions of* Byrnes & Hopwood v R *and* R v Bond

It is important to point out at this stage that neither of the decisions in *Byrnes* nor *Bond* were directly determinative of the issues in *Hughes*; nor did the decision in *Re Wakim* figure directly in these matters. Nevertheless, these two cases represent an important step in one of the issues in *Hughes* — namely, what permissible role is open to the Commonwealth DPP in the enforcement of State corporations law?

The two decisions of the High Court in these cases held that under the co-operative scheme, the Commonwealth DPP lacked the power to appeal against the inadequacy of a sentence imposed by a lower court.[36] Whilst *Byrnes* and *Bond* were decided in respect to the now repealed State Companies Codes,[37] the High Court concluded that the power which a State legislature may give to the Commonwealth DPP was limited to a power to carry on a prosecution for offences against a law of the State and not to institute an appeal against sentence.

Of course, in the matter of *R.v Bond*, the effect of the decision was spectacular. In 1996, Alan Bond pleaded guilty to an indictment of two counts of failing to act

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[31] *Re Wakim* (1999) ALR 270, 322-3.

[32] Section 80 of the Australian Constitution provides that the trial on indictment of any law against the Commonwealth shall be by jury; the Federal Court does not conduct trials by jury.

[33] *Judiciary Act 1903* (Cth), s.39(2).

[34] de Costa, above n 15, 456, quoting in part from Kirby J in *Byrnes & Hopwood v R* (1999) 164 ALR 520, 542.

[35] *Byrnes v R* (1999) 164 ALR 520, 542-3 (Kirby J).

[36] See *Byrnes* (1999) 164 ALR 520, 535 and 537–8 (Gaudron, McHugh, Gummow and Callinan JJ), 543–4 (Kirby J).

[37] In *Byrnes* it was the *Companies (South Australia) Code*; in *Bond* it was the *Companies (Western Australia) Code*.

honestly in the exercise of his powers and duties as a company officer. The charges arose from the notorious 'Bell cash strip' where over $1 billion was stripped from the assets of Bell Resources Ltd.[38] On 5 February 1997, Bond was sentenced to a total effective term of four years' imprisonment to be served cumulatively on the sentence he was then serving. On appeal by the Commonwealth DPP, on 22 August 1997 the Western Australian Court of Appeal increased that sentence to an effective seven years' imprisonment to be served cumulatively on the sentence he was then serving.

The High Court allowed the appeal out of time to hold that the Commonwealth DPP lacked the power to institute the appeal, and that therefore the appeal itself was incompetent. Alan Bond had served his sentence, less remissions, and walked free. The media outcry at the time of his release needs no rehearsal here. Not only did the decision serve to highlight the vulnerability of the notion of this co-operative legislation, it foreshadowed the true frailty of the criminal enforcement of the present national scheme. At the date of the delivery of the decision in *Bond* [39] the High Court had already heard the argument in *Hughes,* and had reserved its decision.[40]

IV THE *HUGHES* DECISION

A *The Facts*

Hughes and another were charged under the now repealed 'prescribed interests' provision of the *Corporations Law.*[41] It was alleged that Hughes and Bell had organised a collective managed investment scheme. They had raised $300,000 from investors in Western Australia and invested this offshore through an American investment house. Although the scheme did not return a dividend, the promoters had promised the investors that they could double their money. After a period of over three years, the investors complained that they had only just received back the principal.

The filters through which the funds passed to and from the United States had the character and structure of a trust fund, but there was no trust deed. Further, although the offer was alleged to be of a prescribed interest, there was no prospectus. The DPP alleged that these breaches of the disclosure and other provisions, when read in conjunction with s 1311 of the *Corporations Law*, constituted criminal offences.

At the trial, counsel for the accused posed a simple enough question: Under what law was Mr Hughes to be tried? The accused then brought a motion to quash the indictment on the ground that the offence charged was not supported by Common-

[38] See Trevor Sykes, *The Bold Riders* (2nd ed, 1996) 570–1.
[39] 9 March 2000.
[40] 2, 3 March 2000.
[41] *Corporations Law* s 1064.

wealth or State law. The Commonwealth DPP argued against the removal, submitting that it was clear that a Commonwealth officer exercising conferred powers prosecuted the matter under State law.[42] Gaudron and Gummow JJ agreed to remove the matter to the High Court. Gaudron J commented: 'I assume that at the very least an accused person is entitled to know under what law he or she is charged. I would have thought that was the most fundamental of all aspects of a fair trial.'[43]

B *The Authority of the DPP*

Before the Full Court of the High Court, the appellant had argued that the Commonwealth DPP lacked the authority to prosecute offences against the *Corporations Law.* In the joint judgment, the High Court examined the statutory sources of power for the DPP's function under the *Corporations Law.*

Under the *Director of Public Prosecutions Act 1983* (Cth), the DPP may exercise both specific and conferred powers of prosecution.[44] Section 6(2) of this Act provides that the functions of the DPP include 'functions that are conferred on the Director by or under any other law of the Commonwealth.'

The court concluded that, notwithstanding *prima facie* the conferral of power to prosecute was made by the State Corporations Act (the State Act),[45] there was an identifiable statutory path and provenance for the Commonwealth DPP to prosecute offences under the *Corporations Law.*

To understand the path, it is necessary to return to the Commonwealth *Corporations Act,* which was enacted (it will be remembered) for the dual purpose of providing corporations law for the ACT, and then being 'picked up' by the States. By ss 47 and 73 of that Act, and Regulation 3(1)(d) of the *Corporations (Commonwealth Authorities and Officers) Regulations*, the Commonwealth DPP has prescribed functions and powers that are expressed to be conferred under a corresponding law. Section 38 of the Commonwealth *Corporations Act* provides by implication that each of the State Acts are 'corresponding laws'. Accordingly, the 'law of the Commonwealth' by which the powers and functions of prosecution of the state Act are conferred is not by the State Act but ss 47 and 73 of the Commonwealth *Corporations Act,* and their authorisation of Regulation 3(1)(d).

What then becomes of the powers and functions of the State authorities? By ss 31 and 33 of the State Act, the Commonwealth DPP is to exercise the powers and

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[42] Gaudron and Gummow JJ then engaged the Director in the following exchange before ordering removal:
Gaudron J: And this is a law for the government of the Territory, is it?
Counsel:...this is a law of the Commonwealth, for the government of the Territory, yes.
Gaudron J: In its operation in Western Australia?
Counsel: No, in its operation in the Australian Capital Territory.
Gummow J: We are a long way from there...[the trial Judge] was a long way from there.
[43] *Hughes v R* P46/1999, Transcript of Argument, 20 October 1999.
[44] *Director of Public Prosecutions Act 1983* (Cth), ss 6 and 7.
[45] In that case the *Corporations (Western Australia) Act*, but see also, for example, the *Corporations (Victoria) Act.*

functions conferred when a law is 'picked up' by s 29 to the exclusion of the state authorities. This process amounts to the designation of a responsibility as an obligation on the officer of the Commonwealth, and not merely a discretion that is permitted to be exercised by such an officer. Whilst the function or power must encompass the prosecutorial discretion (including the discretion to decide whether or not to prosecute a particular matter), the conferral of power under s 31 provides the bridge between the Commonwealth and State Acts.

Yet this only solves a fraction of the empowerment problem. The removal of authority from the State DPP, and the corresponding conferral of authority in the Commonwealth DPP, not in the exercise of a permitted prosecutorial discretion, but in the discharge of an obligation must nevertheless be supported by a head of Commonwealth legislative power under s 51 of the Australian Constitution.[46] The question the court then had to consider was whether the corresponding law validly confers the power to prosecute the subject offence on the DPP.

C *State Law*

The concatenation of ss 7 and 29(1) of the State Act operates to first, 'pick up' the Commonwealth Act 'as a law of' the State, and then to apply the *Law* as a law of the State, 'as if those provisions were laws of the Commonwealth and were not laws of' the State. Section 29(2) of the State Act continues, seemingly by way of reinforcement:

> For the purposes of a law of [the state], an offence against the applicable provisions of [the state] —
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> (a) is taken to be an offence against the laws of the Commonwealth, in the same way as if those provisions were laws of the Commonwealth; and
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> (b) is taken not to be an offence against the laws of [the state].

The establishment of the path for the conferral of power then led the court to conclude against three arguments raised by the appellant.

First, s 29 of the State Act did not amount to a dictation to the Commonwealth Parliament of what are Commonwealth laws. The use of this "novel legislative device",[47] whilst it may lead to some difficulties of interpretation, meant that the law was to be characterised as a law of the State and not the Commonwealth.[48]

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[46] *Hughes* (2000) 74 ALJR 802, 807 (Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ), 818–9 and 823–4 (Kirby J).

[47] Australia, House of Representatives *Parliamentary Debates* (Hansard) 8 November 1990, 3665. See Kirby J's comments in *Hughes* (2000) 74 ALJR 802, 816 and 820.

[48] *Hughes* (2000) 74 ALJR 802, 807 (Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ), 820 (Kirby J).

Second, there was no abdication of power and responsibility by the States. Both judgments referred to the earlier rejection of this argument in *Byrnes v. R.*[49]

Finally, the court considered that s 29 was not defective for want of a specification of power or command. The provision simply applies 'the Commonwealth laws' without specifically directing which laws they are. In this case the joint judgment[50] considered that s 29 can be taken to direct the Commonwealth DPP to act in the manner prescribed by the *Director of Public Prosecutions Act 1983* (Cth), and appropriate to the prosecution of ss 1064 to 1311 of the *Corporations Law.* In other words, the joint judgment was prepared to say no more than that the DPP was sufficiently specifically commanded to exercise the power conferred in the facts of this case.[51]

Kirby J considered the argument as to specification of the command by reference to principles of due process, that is "minimum requirements of certainty in relation to the making and expression of laws affecting the liberty and property of individuals."[52]

Under this principle, the failure to meet such requirements ought to deprive the law of legal efficacy. Justice Kirby considered that the operation of s 29 would not meet principles of due process.[53] In the course of argument, McHugh J indicated that if the Australian Constitution required due process, this law would be 'flat out passing muster.'[54] The Australian Constitution does not, however, contain such a requirement and, in the circumstances under consideration, Kirby J was likewise prepared to consider there was a sufficient specification of power to prosecute this offence. But, his Honour asked rhetorically, what other laws were 'picked up' under s 29? Kirby J considered that the answer to that question was far from clear, and thought the question was bound to be tested again in these or other proceedings.

D *The Validity of the Commonwealth Authorisation of such a Conferral.*

In *Hughes*, both the joint judgment and Kirby J accepted that a head of legislative power under the Australian Constitution must support the conferral of authority made by s 47 of the Commonwealth Act. Interestingly, this conclusion was resisted in the course of argument by the DPP, who argued that, whilst Commonwealth consent to the conferral of State authority on a Commonwealth officer was necessary to preclude the operation of s 109 of the Constitution,[55] no supporting constitutional power was required as there was consent. Neither judgment sought to decide

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[49] Ibid 808 (Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ) , 821–2 (Kirby J), referring to *Byrnes & Hopwood v R* (1999) 164 ALR 520, 523.
[50] Ibid 808–9 (Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ).
[51] Ibid 808 (Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ).
[52] Ibid 822–3 (Kirby J).
[53] Ibid.
[54] *R v Hughes,* Transcript of Argument, 2 March 2000.
[55] On this aspect see Cheryl Saunders, 'In the Shadow of *Re Wakim'* (1999) 17 *Company and Securities Law Journal* 507, 514.

conclusively on this argument, for it was clear that in this instance, this federal legislation involved the conferral of functions and powers as a matter of duty and not merely in the exercise of a permitted discretion.

Once that had been decided, it was necessary to consider what, if any, head of constitutional power supported the conferral of authority on the Commonwealth DPP. It was in this respect that the judgments in *Hughes* served to highlight the uncertain future of the *Corporations Law*. Kirby J comprehensively set out the options:[56]

> Amongst the sources of power mentioned were (1) the express incidental power, in aid of the execution of the Executive power of the Commonwealth;[57] (2) the powers supporting the establishment of the office of the Commonwealth DPP and the express incidental power enlarging those functions in the context of a national cooperative scheme;[58] (3) the implied legislative power to make provision for the acceptance of a State function and the power to give effect to such a scheme; (4) the corporations power[59]; (5) the powers in relation to trade and commerce with other countries and amongst the States and external affairs[60]; and (6) the implied nationhood power, being that which facilitates national cooperation and coordination of governmental activities in response to the 'complexity ... of a modern national society'.[61]

Of these heads of power, all except (5) might be thought to be heads of power which would support the *principle* of the conferral of authority, assuming that one or other did in fact support such a conferral. Yet Kirby J chose not to decide on these issues. Rather, he considered that

> [t]he validity of the federal law in question in this matter should be explored no further than is strictly necessary to establish validity in this case.[62]

Whilst his Honour conceded it was a "fragile foundation for a highly important national law",[63] Kirby J considered that the offence charged (under s 1064 of the Law) and the "peculiar circumstances of this case"[64] enabled a conclusion that the trade and commerce power and the external affairs power[65] supported the conferral of authority to prosecute.

The joint judgment principally considered the incidental power under s 51 (xxxix) of the Australian Constitution, which enables the Commonwealth Parliament to

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[56] Although it was the second judgment, for the purpose of this part of the analysis, it is set out first; see *Hughes* (2000) 74 ALJR 802, 826 (Kirby J).
[57] *Australian Constitution*, s 51 (xxxix).
[58] *R v Duncan; Ex parte Australian Iron and Steel Pty Ltd* (1983) 158 CLR 535 ('*Duncan*').
[59] *Australian Constitution*, s 51(xx).
[60] *Australian Constitution*, s 51(i) (trade and commerce) and s 51(xxix) (external affairs).
[61] *Victoria v. Commonwealth & Hayden* (1975) 134 CLR 338, 412.
[62] *Hughes* (2000) 74 ALJR 802, 826 (Kirby J).
[63] Ibid 827.
[64] Ibid.
[65] *Australian Constitution*, s 51(i) and s 51(xxix).

legislate in aid of the executive power under Chapter III of the Constitution.[66] The joint judgment referred to *Duncan*,[67] where the High Court had previously upheld legislation in aid of a Commonwealth/State distribution of powers for the coal industry tribunal. In *Duncan,* Mason J (as he then was) considered that the scope of this power was 'appropriate to that of a central government in a federation in which there is a distribution of legislative powers between the Parliaments of the constituent elements in the federation.'[68] In *Hughes* it was considered, however, that the incidental power did not necessarily allow the Parliament to legislate validly upon any subject thought by the executive to be in the national interest and concern.[69] The joint judgment did not state a firm opinion on whether or not the incidental power supported the conferral of authority on the DPP. Rather, it concluded enigmatically:

> The DPP Act in a sense is supported by as many heads of power as from time to time have been exercised by the Parliament to create offences against Commonwealth laws'.[70]

The joint judgment decided, as Kirby J did in his separate judgment, that the facts in this case invoked the trade and commerce and external affairs powers to support the conferral of authority on the DPP to prosecute Mr Hughes.[71]

V THE RAMIFICATIONS AND AFTERMATH OF *R V HUGHES*

A *Some Implications Flowing from* Hughes

The line of reasoning undertaken in both of the judgments in *Hughes* may have been constitutionally defensible, but it was never likely to satisfy those watching its delivery.

First, the court derived the principles to be applied from the facts under consideration, rather than considering the facts in light of the principles. In this way, the court considered that there was a sufficient specification of command under s 29 of the State Act and valid support for a conferral of authority to prosecute, thereby requiring Mr Hughes to stand his trial. It is however apparent that both of these principles were considered applicable and valid only within the parameters of this case, and were uncertain, perhaps even invalid in terms of their application beyond the facts under consideration. As Kirby J observed the next challenge 'may not present circumstances sufficient to attract the essential constitutional support'.[72]

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[66] *Hughes* (2000) 74 ALJR 802, 810 (Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ).
[67] *Duncan* (1983) 158 CLR 535.
[68] Ibid 560.
[69] *Hughes* (2000) 74 ALJR 802, 810 (Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ).
[70] Ibid 810–1.
[71] Ibid 810–.2
[72] Ibid 827 (Kirby J)

With respect, it seems somewhat ironic that on the one hand the court has some general concerns about the lack of specification of the 'pick up' provision in s 29, but then continues on to consider the conferral of authority is supported by as many unspecified heads of power as may be used to create offences against Commonwealth laws.

Next, the uncertainty as to the validity and parameters of the co-operative federalist scheme of corporations law resulting from *Re Wakim* was not assuaged in any way by the decision in *Hughes*. After *Re Wakim*, Professor Cheryl Saunders commented:

> It is now clear that the co-operative principle stands only for the proposition that the Constitution does not forbid and sometimes may encourage co-operation...But co-operation will not overcome an insufficiency of power.[73]

Hughes is clear and unambiguous in its requirement that a constitutional head of power must support the conferral of authority in such schemes. It seems almost certain that the ambit of the incidental power will not be interpreted widely to accommodate such conferrals. As *Hughes* further serves to demonstrate, the efficacy of any particular aspect challenged may turn entirely on the facts in that matter.

The most far-reaching aspect of *Hughes*, however, might not be felt through criminal enforcement, but by those charged with the regulation of the *Corporations Law*.[74] Statements as to the requirement of a supporting head of power for the conferral of authority must not only affect enforcement, but also general regulation of the *Corporations Law*. Given that the conferral of power on ASIC is achieved in much the same way as with the DPP,[75] many have raised the spectre that the regulator has invalidly administered the incorporation of over 660,000 companies since 1991.[76] Further, a High Court challenge has now been mounted in *GPS First Mortgage v. Lynch* where a bankrupt is arguing that the petitioning company was invalidly incorporated and does not exist.[77]

B *Statutory Amendments to Overcome* Wakim *and* Hughes

In the mean time, the Commonwealth Parliament has enacted legislation in order to clarify the jurisdiction of courts and the conferral of powers on Commonwealth officers as a result of *Re Wakim* and *Hughes*.

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[73] Saunders, above n 54, 514.

[74] See de Costa, above n 15, 462. The High Court's recent decision in *Australian Securities and Investments Commission v Edensor Nominees Pty Ltd* [2001] HCA 1 (8 February 2001) does, however, provide some hope as to ASIC's ability to regulate and enforce the *Corporations Law*. See the comments of Bill Pheasant, 'Federal Court's doors open again', *The Australian Financial Review*, 16 February 2001, 40.

[75] See *ASIC Act 1989* (Cth), s 11(7); and *Corporations (Victoria) Act 1990*, s 66.

[76] See de Costa, above n 15, 467, and the sources quoted there; and Ramsay, above n 11.

[77] The High Court will hand down its decision in *GPS First Mortgage v Lynch* sometime in 2001.

First, the *Jurisdiction of Courts Legislation Act 2000* (Cth) amends the jurisdiction of various courts and tribunals arising from the inability of the States to confer jurisdiction on federal courts. In particular, this Act inserts s 51AA into the *Corporations Law* which provides that once a criminal prosecution has commenced for an offence under the *Law*, no review of a criminal justice process decision[78] can be undertaken in either the Federal or Family Court. Ironically, there is no reported decision of any review of such a decision ever having been undertaken in the Family Court, but such is a mark of the determination of the Parliament to overcome the *Wakim / Hughes* problems. Schedule 5 of the Act inserts provisions into the *Director of Public Prosecutions Act* and thereby confirms the power of appeal granted to the DPP in criminal matters.

Next, the effect of *Hughes* is clearly demonstrable in the *National Crimes Authority Amendment Act 2000* (Cth). This Act confers specific powers on the NCA, members of the NCA and judges of the Federal Court. The Act provides that the main object of this new provision is to give legislative consent to the conferral on [those bodies] of certain duties, functions and powers under State laws. Moreover, the Act provides that 'in order to remove doubt' it does not impose any obligation upon the NCA or its members to perform a duty or function, or exercise a power that contravenes constitutional doctrine restricting the duties that may be conferred on authorities of the Commonwealth.[79]

These measures have been implemented in order to provide some certainty in the regulation, not only of matters affecting the *Law*, but also the criminal justice system, and of the schemes relying on co-operative federalism. However, the question must now be posed — does co-operative federalism provide a viable future for the scheme of corporations law in Australia?

C *Implementing a Viable National Corporations Scheme — Co-operative Federalism or Centralism?*

So far as Kirby J was concerned, there exist clear means for the adoption of an efficient national scheme, without the need for such 'unnecessary complexity' or the 'distasteful' 'novel legislative device'.[80] The solution that Kirby J envisaged was a referral of power by the States to the Commonwealth under s 51 (xxxviii) of the Australian Constitution. After months of (sometimes) tense negotiations, agreement was reached on 25 August 2000 for the States to refer so much of their power as supports the *Corporations Law* and the *ASIC Act*. The referral was sub-

[78] Being a decision relating to the institution of, or to a procedure assisting the investigation or prosecution of a criminal offence.
[79] *National Crimes Authority Amendment Act*, s 55C(1).
[80] *Hughes* (2000) 74 ALJR 802, 816 (Kirby J).

ject to a five-year sunset clause. In the meantime, the Commonwealth undertook to examine the options for constitutional amendment within this period.[81]

The States of Western Australia and South Australia initially resisted any form of referral of their corporations power to the Commonwealth.[82] It is questionable whether such a referral is truly an example of co-operative federalism or amounts to a surrender of power by the States to the further centralisation of financial and commercial powers to within Commonwealth control.

This agreement was due to take effect from 1 January 2001. However, the date for the referral of power has come and gone, with only Victoria and New South Wales having concluded agreements with the Commonwealth for the referral of corporations law powers.[83] At the time of writing, the position of the other States remains unclear.[84]

In light of the observations of Professor Saunders discussed above, and the clear requirement for a conferral of authority to be supported by a head of power enunciated in *Re Wakim* and *Hughes*, it now seems unrealistic to think of the implementation of a national corporations scheme through co-operative federalism. Yet it is clear that the present agreement for a referral of power is not a complete answer either. The tension between the insertion of a sunset clause in the agreement and the undertaking to consider the options for constitutional change by the Commonwealth may auger future disharmony before the matter is finally settled. As the sunset period draws closer, the States may compete for maintaining some influence (and a share of revenue) whilst the Commonwealth seeks either constitutional amendment or a permanent referral of power by the States.

The ultimate means by which certainty can be achieved is by constitutional amendment. Yet as Kirby J commented in *Hughes,* the path of such amendment to enlarge the corporations power has been littered with failure. In this sense, Australia stands at the crossroads. The certainty of corporate regulation may best be achieved by the increase in centralisation, at the expense of co-operative federalism.

VI CONCLUSION

Without doubt the greater significance to arise from the decision in *R v Hughes* should attach to the timely warning it sounded to defects in the *Corporations Law* than to the means by which the court upheld the criminal enforceability of the matter under consideration. For it would seem that greater State/Commonwealth

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[81] 'Corporations Law Referral – One Small Step Forward...' (2000) (19) *Australian Corporate News* 253.

[82] Margaret Hetherington, 'Deepening Clouds over the Corporations Law' (2000) 31 *Corporate Law Electronic Bulletin*, <http://cclsr.law.unimelb.edu.au/research-papers>.

[83] Joint News Release, Commonwealth Attorney-Gerneral (Mr Daryl Williams) and Commonwealth Minister for Financial Services and Regulation (Mr Joe Hockey), 21 December 2000.

[84] However, with the election of an ALP government in Western Australia in February 2001, it is expected that Western Australia will follow Victoria and New South Wales. See Cathy Bolt, 'WA may support companies law deal', *The Australian Financial Review*, 16 February 2001, 40.

agreement was achieved in the 11 months after the decision in *Hughes* was delivered than in the eleven months after *Re Wakim,* notwithstanding that similar warnings were evident after *Re Wakim.*

No doubt the fact of agreement is an achievement in itself. *Hughes* 'shuffled the deck chairs on the Titanic', yet also sounded a warning. So, the vessel is saved. Or is it? Certainly, the scheme implemented in 1990 is doomed. But further, the reluctance of some States to yield their constitutional power to the Commonwealth, and the limitations of the agreement so far reached suggest that from its inception, the national scheme has been attended by a series of 'band aid' rather than lasting solutions.

Yet the need for stability has probably never been greater. This requirement is essential in order to continue the work of the Wallis report in order for the *Corporations Law*:

> ...to become one element in a co-ordinated legislative set-up covering company and securities law and the financial system generally, with the regulatory bodies, ASIC, APRA and the RBA occupying the broadly separate functional domains of, respectively, market integrity (including consumer protection and corporations), prudential regulation (of organisations managing the public's superannuation, insurance and deposit funds) and financial safety (including systematic stability, payment systems and monetary policy).[85]

The development of a highly sophisticated and integrated corporations law system[86] can expect national and international derision if it cannot be effectively enforced and regulated. Such uncertainty may be a boon for litigators, but it can only harm investor confidence.

The challenge for the future, as the High Court in *Hughes* highlights, is the effective achievement of an integrated economic system in which a national corporations system is an essential component. In light of *Hughes*, many will watch with vital interest the means by which the corporations scheme is implemented into that system.

[85] Heatherington, above n 81.
[86] For example, the reforms made under CLERP.

QUICK REFERENCE FOR AUTHORS

The Deakin Law Review uses the citation model developed by the University of Melbourne in the *Australian Guide to Legal Citation* (1998). Below is a quick reference guide to the more common citations. Authors should refer to the guide for more detailed citation forms.

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Commissioner of Taxation v Payne (2001) 177 ALR 270.

Smith v ANL Limited (2000) 176 ALR 449.

Repeat citations of cases should be as follows:

[5] *Commissioner of Taxation v Payne* (2001) 177 ALR 270 ('*Payne*').

[6] Ibid.

[7] Ibid 279.

...

[10] *Payne* (2001) 177 ALR 270, 273.

Referencing Secondary Materials

Books should be cited in the following format:

Graeme Cooper, Richard Krever and Richard Vann (eds), *Income Taxation* (3rd ed, 1999) 243. [full names of authors where possible]

Chapters in books should be cited as follows:

Jeff Waincymer, 'Income Tax' in Robert Baxt and Gordon Kewley (eds), *An Annual Survey of Australian Law*, 1989 (1990) 132.

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Repeat citations of journals/books/essays:

[5] Sir Anthony Mason, 'The High Court as Gatekeeper' (2000) *24 Melbourne University Law Review* 784, 785.

[6] Ibid.

[7] Ibid 786.

...

[8] Mason, above n 5, 788.