The Constitutional Basis of the Competition Code

BRENDAN SWEENEY*

The Competition Code was introduced to fill in some of the gaps left exposed in the competition provisions of the Trade Practices Act 1974 (Cth) because of constitutional limitations. A significant objective of the Code was that Australia's competition laws be administered by a single national authority. The Australian Competition and Consumer Commission ('ACCC') was created for this purpose. Under the Code the States not only filled in the gaps in the law but also handed exclusive power to the ACCC to administer the Code. In this respect the Code follows the legislative device used in the Corporations Law. The effectiveness of that device is now under question following challenges to some of the enforcement provisions of the Corporations Law. This article investigates the extent to which the administration and enforcement provisions of the Code are constitutional.

INTRODUCTION

In 1993 the Hilmer Committee recommended that the competition laws contained in Part IV of the *Trade Practices Act* 1974 (Cth) be extended to cover all businesses enterprises.[1] At that time there were significant sectors of the economy which, for constitutional and other reasons, were not subject to the competition laws. Those that escaped regulation included most state government enterprises, non-corporate entities, unless engaged in interstate or overseas trade, and non-constitutional corporations, unless engaged in interstate or overseas trade. Following agreement between the Commonwealth, the States and the Territories,[2] a legislative program was put into place to implement the Hilmer recommendations.

Section 2B of the *Trade Practices Act* provides that Part IV of the Act applies to the Crown in right of the States and the Territories in so far as the Crown carries on a business either directly or by an authority of the State or Territory.[3] This removed the protection previously afforded to state government trading enterprises by virtue of the shield of Crown doctrine. To spread the regulatory net over non-corporate enterprises, such as partnerships and sole traders, and over non-constitutional corporations, the Competition Code ('Code') was introduced. This article is concerned with the constitutional validity of that Code.

The recent decision by the High Court in *The Queen v Hughes*[4] *('Hughes')* may pose problems for the effective operation of the Code.[5] The Code is based on a

* Lecturer, Department of Business Law and Taxation, Faculty of Business and Economics, Monash University. The author is grateful for the helpful comments of the anonymous referee.

1 Independent Committee of Inquiry, *National Competition Policy,* (August 1993) Referred to as: 'Hilmer Report'

2 Competition Principles Agreement, April 1995; Conduct Code Agreement, April 1995; agreement to implement the National Competition Policy and Related Reforms, April 1995.

3 The States and Territories may exempt some government business organizations from regulation but only on the basis that the test agreed to in the Competition Principles Agreement is satisfied.

4 (2000) 74 ALJR 802.

5 Similar considerations apply in respect of the New Tax System Price Exploitation Code.

similar legislative structure to the Corporations law, which was the subject of analysis in *Hughes*. The difficulty that the Corporations Law and the Code sought to solve was how to put in place uniform national legislation administered and enforced by a single national entity. The decision in *Hughes* has failed to allay fears that the legislative structure chosen is in part constitutionally invalid.

THE STRUCTURE OF THE COMPETITION CODE

Part IV of the *Trade Practices Act* 1974 (Cth) prohibits certain anti-competitive practices such as price fixing, boycotts and abuses of market power.[6] For constitutional reasons Part IV is expressed to apply to trading, financial and foreign corporations.[7] Part IV is given an extended application by the operation of s 5 and s 6 of the Act.[8] Despite this extended application there are many commercial enterprises not covered by the anti-competitive provisions. The *Trade Practices Act* also contains a schedule version of Part IV of the Act. The schedule version replicates Part IV save that it is not limited to corporations, but rather, is expressed to apply to persons (all commercial entities). The schedule version is intended to form the basis of uniform national competition regulation.

Each State has passed legislation (Competition Policy Reform (State) Acts) implementing the Competition Code (as defined) as a law of that State.

The Competition Code means (according to the context):

(a) the Competition Code text; or

(b) the Competition Code text, applying as a law of a participating jurisdiction, either with or without modifications.[9]

The Competition Code text consists of:

(a) the Schedule version of Part IV; and

(b) the remaining provisions of the *Trade Practices Act* (except sections 2A, 5, 6 and 172), so far as they would relate to the Schedule version if the Schedule version were substituted for Part IV of that Act; and

(c) the regulations under the *Trade Practices Act,* so far as they relate to any provisions covered by paragraph (a) or (b).[10]

For the purposes of interpreting the Competition Code the *Acts Interpretation Act* 1901 (Cth) applies as a law of each State as if the provisions of the Code were a Commonwealth Act.[11] The relevant State Act dealing with the interpretation of legislation within that State does not apply to the Code.[12]

6 Section 45 prohibits anti-competitive agreements including boycotts and price fixing between competitors, s 46 prohibits abuses of market power, s 47 prohibits exclusive dealing, s 48 prohibits resale price maintenance and s 50 prohibits mergers that would substantially lessen competition.

7 *Trade Practices Act* s 4. Section 51(xx) of the Constitution enables the Commonwealth to make laws with respect to foreign corporations, and trading or financial corporations formed within the limits of the Commonwealth.

8 Section 5 extends the provisions of Part IV to certain extraterritorial conduct. Section 6 extends Part IV to the activities of persons provided they are engaged in constitutional trade and commerce.

9 See, for example, *Competition Policy Reform (NSW) Act 1995* s 3.

10 *See Competition Policy Reform (NSW) Act 1995* s 4.

11 *Competition Policy Reform (NSW) Act 1995* s 7.

12 *Competition Policy Reform (NSW) Act 1995* s 7(3).

National Administration and Enforcement of the Codes

One of the objects of the Code is to ensure that competition law is administered on a uniform national basis, as if the Commonwealth and State laws that make up the Code constituted a single law of the Commonwealth.[13] The legislative device used to achieve this objective is similar to that employed to ensure national administration of company law. Responsibility for the administration of Part IV (the competition provisions) of the *Trade Practices Act* lies with the Australian Competition and Consumer Commission. The aim of the Code is to ensure that primary responsibility for the administration of the Code provisions shall also lie with the ACCC.

Section 150F of the *Trade Practices Act* provides that in respect of the Code the States may confer powers and functions on authorities and officers of the Commonwealth. To ensure, so far as possible, that the Code is administered on a uniform basis, in the same way as if the Code constituted a single law of the Commonwealth, the various application laws have conferred exclusive administration of the Codes on the ACCC and such other authorities and officers of the Commonwealth as are referred to in the instruments that make up the Codes.[14] State officers and authorities are excluded from exercising jurisdiction under the Codes.[15] Each application law also gives to the ACCC the power to exercise, in a State or Territory, the functions and powers conferred on it by the other States or Territories.[16]

The Commonwealth officer or authority, including the ACCC, 'must act as nearly as practicable'[17] in respect of carrying out its functions and powers under the State Acts as it would in performing or exercising its functions and powers under the *Trade Practices Act.*[18] To achieve this, State application laws provide that any offence under the State Acts is to be treated as if it were an offence against a law of the Commonwealth. Commonwealth laws are to apply in relation to an offence under the Codes as if the Codes were Commonwealth law and not State law. Commonwealth administrative laws (as defined in the state application laws) are to apply as state laws to any matter arising under the Codes as if the Codes were laws of the Commonwealth and not of the States'.

As previously mentioned this structure is essentially the same as that employed in the Corporations Law.[19] When introducing the Corporations Law the Attorney General referred to it as a 'novel legislative device whose effect will, in summary, be to 'federalise' such offences.'[20] This attempt to federalise matters of national concern has given rise to the present uncertainties.

13 *Competition Policy Reform (NSW) Act 1995* s 18.
14 *Competition Policy Reform (NSW) Act 1995* Part V.
15 *Competition Policy Reform (NSW) Act 1995* s 28.
16 *Competition Policy Reform (NSW) Act 1995* s 20.
17 *Competition Policy Reform (NSW) Act 1995* s 27(4)
18 *Competition Policy Reform (NSW) Act 1995* s 27.
19 For a discussion on the background to the Corporations Law see the comments of Kirby J in *The Queen v Hughes* (2000) 74 ALJR 802, 814-6.
20 *The Queen v Hughes* (2000) 74 ALJR 802, 816 (Kirby J).

THE CONSTITUTIONAL ISSUES

A co-operative scheme such as the Code raises a number of constitutional questions. First, do the State Acts that make up the Code purport to render offences against state law offences against Commonwealth law, and, if so, is this valid? Secondly, if the State Acts create State offences, is it within the competence of the States to pass exclusive responsibility for the administration and enforcement of their laws to a Commonwealth authority in the manner adopted in both in the Corporations Law and the Code? Finally, is it within the competence of a Commonwealth authority to accept such powers and functions? Before considering these issues in respect of the Code it is necessary to take a look at the decision in The Queen v Hughes.[21]

THE DECISION IN THE QUEEN v HUGHES

In *Hughes* the respondent was charged with a breach of the prescribed interest provisions of the *Corporations (Western Australia) Act 1990* ('WA Act'). The prosecution was brought by the Commonwealth Director of Public Prosecutions (DPP). The power of the DPP to bring the prosecution was derived from a combination of the WA Act, the *Corporations Act 1989* (Cth) ('Commonwealth Act') and the *Director of Public Prosecutions Act 1983* (Cth) ('DPP Act'). The Commonwealth Act gave the DPP power to bring prosecutions for a breach of the Commonwealth Act or any corresponding law, such as the WA Act. The WA Act conferred power on the DPP to prosecute breaches of the WA Act as if they were breaches of the Commonwealth Act. Any power conferred on the DPP by the WA Act could not be performed or exercised by an officer or authority of Western Australia.[22] Before the High Court, counsel for Hughes argued inter alia that the conferral by the Western Australian Parliament of power on the DPP to prosecute breaches of the WA Act as if they were breaches of Commonwealth law was not a valid exercise of power, either because Western Australia had invalidly attempted to create Commonwealth law or, alternatively, because the State had invalidly conferred its executive functions and powers on a Commonwealth authority. Hughes also argued that the conferral of power on the DPP to prosecute WA Act offences by the Commonwealth Parliament was not a valid exercise of federal constitutional power.

Hughes' first argument failed. The High Court accepted that the provisions in the WA Act conferring on the DPP, and withdrawing from its own State officers and authorities, the power and obligation to prosecute breaches of the WA Act as if they were breaches of Commonwealth law was a valid law of Western Australia.[23] The WA Act did not purport to transmute WA State offences into offences against Commonwealth law.[24] The offences remained State offences. It was a valid exercise of State legislative power for the WA Parliament to vest

21 (2000) 74 ALJR 802.
22 *Corporations (Western Australia) Act 1990 s 33.*
23 (2000) 74 ALJR 802, 808 (Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ), 822-4 (Kirby J).
24 (2000) 74 ALJR 802, 808.

prosecutorial powers in the Commonwealth DPP.[25]

Hughes also failed in his second argument, but on grounds that do not necessarily provide much comfort to a Commonwealth authority charged with administering and/or enforcing co-operative legislation such as the Corporations Law or the Code. A majority of the High Court held that the power given to the DPP under the Commonwealth Act to prosecute breaches of the WA Act imposed a duty on the DPP.[26] The majority said:

> It is submitted, principally by the DPP and the Attorney-General who intervened in his support, that reg 3(1)(d) of the Regulations and the federal laws which support it involve no more than an approval or consent to the exercise of State functions and powers by the DPP. It is said that the State provisions simply purport to confer powers upon the DPP, whose exercise may be the subject of general directions by the Attorney-General under s 8 of the DPP Act. However, what is involved in the federal legislation is more than consent or permission by the Commonwealth to the exercise by its officers of additional functions and powers derived entirely from State law. These additional functions and powers are imposed by federal law as a matter of duty or obligation, lest there be an abdication of State authority with no certainty of its effective replacement.
>
> We have stated above our acceptance of a proposition as to permissive provisions respecting the exercise of additional functions by Commonwealth officers. Whether the further step taken here of imposing duties by Commonwealth law was necessary not merely to implement the agreement between the respective Executive Governments, but as a constitutional imperative, we need not stay to consider. The immediate point is that, the step having been taken, the federal law taking it required support by an available head of power.
>
> To adapt what was said by Deane J in *R v Duncan; Ex parte Australian Iron and Steel Pty Ltd*,[27] what is involved here is more than an indication by the Commonwealth Parliament of 'a negative intention not to cover the field'; rather, there is a 'positive provision' which vests 'ancillary powers which the Commonwealth Parliament could alone confer'. Moreover, as the Attorney-General for the State of Victoria points out, it is the operation of Commonwealth law which enables the DPP to expend Commonwealth resources in exercise of powers and functions 'conferred' by State law.
>
> These points may be emphasised by reference to s 46 of the *Corporations Act*. This operates in the present case to direct the Attorney-General with respect to the exercise of the powers in relation to the DPP conferred on the Attorney-General by ss 7 and 8 of the DPP Act. The Executive Government of the Commonwealth, which is provided for in Ch II of the Constitution (ss 61-70) and of which the Attorney-General is part, involves the execution and maintenance of laws of the Commonwealth, not those of the States.[28]

25 (2000) 74 ALJR 802, 808 citing *Byrnes v The Queen* (1999) 199 CLR 1.

26 Kirby J (at 828) did not find it necessary to decide this point, although he suggested that the federal law appeared to be 'merely facultative and permissory', rather than imposing binding obligations.

27 (1983) 158 CLR 535, 592.

28 (2000) 74 ALJR 802, 809-10.

As the conferral of power on the DPP created a duty it was necessary that it be traced to an appropriate head of constitutional power. The scheme operated by *Hughes* involved raising funds in Australia for investment in the United States. The court determined that the prescribed interest provisions of the Corporations Law under which Hughes was charged could be read down pursuant to s 15A of the *Acts Interpretation Act 1901* (Cth) so as to be a valid exercise of the Commonwealth power to make laws with respect to trade and commerce with other countries (s 51(i)) or with respect to 'matters territorially outside Australia, but touching and concerning Australia' (s 51(xxix), the external affairs power).[29] The majority said:

> [T]his would be achieved by construing the phrase in s 47(1) of the *Corporations Act* 'functions and powers that are expressed to be conferred on them by or under corresponding laws' as limited to those functions and powers in respect of matters within the legislative powers of the Parliament of the Commonwealth.[30]

Because of this the majority found it unnecessary to determine the broader question whether the conferral of power on the DPP under the *Corporations Act 1989* (Cth) could be justified, without resort to the reading down provisions, as a valid exercise of the Commonwealth's power to legislate in aid of an exercise of Commonwealth executive power.[31]

This paper will turn now to an examination of the effects of the decision upon the Competition Code.

IS THE CONFERRAL ON COMMONWEALTH AUTHORITIES OF POWER TO ADMINISTER AND ENFORCE THE CODE A VALID EXERCISE OF STATE JURISDICTION?

In *The Queen v Hughes* [32] the High Court affirmed that it was within the power of the States to delegate enforcement of their *Corporations Act* to Commonwealth authority and to provide that enforcement proceedings shall be conducted according to Commonwealth law as if those proceedings were for a breach of Commonwealth law.[33] The Code follows the same legislative procedure as the Corporations Law. Thus, there is no reason to suspect that the conclusions drawn in respect of the Corporations Law in relation to the validity of State power do not apply equally to the Code.

29 (2000) 74 ALJR 802, 811 applying the principle from the joint judgement in *Victoria v The Commonwealth* (1996) 187 CLR 416, 501-3.

30 (2000) 74 ALJR 802, 811.

31 s 51(xxxix) of the Constitution, states: The Parliament shall, subject to this Constitution, have power to make laws for the peace, order, and good government of the Commonwealth with respect to:- Matters incidental to the execution of any power vested by this Constitution in the Parliament or in either House thereof, or in the Government of the Commonwealth, or in the Federal Judicature, or in any department or officer of the Commonwealth.

32 (2000) 74 ALJR 802.

33 In asserting the validity of the Western Australian Parliament's handing over of its powers of prosecution under its Corporations Act to the DPP, the Court relied on the decision in *Brynes v The Queen* (1999) 199 CLR 1.

CAN COMMONWEALTH AUTHORITIES ACCEPT POWERS AND FUNCTIONS FROM THE STATES UNDER THE CODE?

The issue of the competence of a Commonwealth authority to accept powers and functions from state parliaments is less easily resolved. It is clear that a State cannot unilaterally invest such powers in a Commonwealth authority; legislative approval from the Commonwealth Parliament is required.[34] If the State attempted to impose powers and functions without a corresponding Commonwealth legislative approval, there would be an inconsistency within the meaning of s 109 of the Constitution.[35] As a result the State provision would be invalid.

It seems that Commonwealth approval may take two forms. It may be a mere permission or consent to assume the powers and functions conferred by the States. The operative enactment would be the State legislation. Where the federal law is merely facultative or permissive the State provision conferring power on the Commonwealth entity must be no wider than the federal law otherwise there is likely to be an inconsistency within the meaning of s 109 of the Constitution. Alternatively, the operative enactment may be the Commonwealth legislation, in which case, the Commonwealth authority comes under a federal duty to exercise those powers and functions.[36] Whether it creates a duty or is merely permissive depends on the proper interpretation of the federal legislative provision.[37]

Where the Commonwealth legislation goes beyond being a mere permissive provision and imposes a duty or obligation on the authority as a matter of Commonwealth law, the imposition of that duty or obligation must be supported by a head of constitutional power.[38] In *Hughes* the majority said:

> The present case emphasises that for the Commonwealth to impose on an officer or instrumentality of the Commonwealth powers coupled with duties adversely to affect the rights of individuals, where no such power is directly conferred on that officer or instrumentality by the Constitution itself, requires a law of the Commonwealth supported by an appropriate head of power.[39]

The conclusion that the DPP was under a duty to exercise the powers and functions conferred on it under the Corporations Law seems to have rested on a number of factors, but primarily on the fact that those powers and functions were conferred exclusive of any State authorities. As the States have given exclusive authority to administer and enforce their Corporations Acts to the federal authorities (including the DPP), those federal authorities must come under a duty

34 *The Queen v Hughes* (2000) 74 ALJR 802, 809.

35 Ibid. See also *R v Duncan; Ex parte Australian Iron & Steel Pty Ltd* (1983) 158 CLR 535; *Re Cram; Ex parte NSW Colliery Proprietors' Association Ltd* (1987) 163 CLR 117; *Byrnes v The Queen* (1999) 199 CLR 1,15.

36 *The Queen v Hughes* (2000) 74 ALJR 802, 809.

37 Ibid.

38 Ibid. It is not at all clear what is required where the Commonwealth merely wishes to consent to one of its authorities accepting State powers and functions. The implication from Hughes is that where the federal approval is merely facultative or permissive something less is required than where the approval imposes a duty. There may be no more than a 'negative intention not to cover the field.' But the majority did not make clear the extent of any connection that must exist between that 'negative intention' and the relevant head of power.

39 *The Queen v Hughes* (2000) 74 ALJR 802, 812.

to exercise that authority otherwise there would be 'an abdication of State authority with no certainty of its effective replacement'.[40] It is suggested that the conclusion drawn by the High Court in respect of the Corporations Law must apply equally to the Code. Exclusive authority for administration and enforcement of the Code provisions has been given to Commonwealth entities, in particular, the ACCC. If the ACCC does not come under a duty to perform the functions and powers conferred on it by the States there would be an abdication of State authority without any effective replacement.

Additionally, according to the majority in *Hughes*, the Corporations Law vests ancillary powers in Commonwealth authorities which could only be conferred by the Commonwealth Parliament.[41] As an example the majority cited the DPP's power to 'expend Commonwealth resources in exercise of powers and functions 'conferred' by State law'.[42] If the majority in *Hughes* is correct, then the same observation may be made about the funding of the administration and enforcement of the Code. By agreement with the States the ACCC is fully funded by the Commonwealth.[43]

On the basis of *Hughes*, it is likely that the functions and powers conferred by the Code on the ACCC are only valid to the extent that they are referable to an appropriate head of constitutional power. The issue, then, is what constitutional powers may be employed to support the conferral of functions and powers on the ACCC under the Code.

WHAT CONSTITUTIONAL POWERS UNDERPIN THE CODE?

When examining this question it is useful to have in mind the objectives of the Code. Competition law is about the regulation of trade and commerce, or more particularly, the activities of trading and commercial enterprises. The Constitution, however, contains no express power enabling the Commonwealth to regulate the economy in general, or trading and commercial enterprises in particular. It is for this reason that the competition law provisions of the *Trade Practices Act* do not apply to all business entities. Part IV of the *Trade Practices Act* relies on a variety of constitutional powers. Foremost is the corporations power.[44] Other powers used to support the *Trade Practices Act* include:

- The trade and commerce power,[45]
- The external affairs power,[46]
- The banking power,[47]
- The insurance power.[48]

.40 *The Queen v Hughes* (2000) 74 ALJR 802, 809.

41 See *The Queen v Hughes* (2000) 74 ALJR 802, 809-10. See also *R v Duncan; Ex parte Australian Iron & Steel Pty Ltd* (1983) 158 CLR 535; *Re Cram; Ex parte NSW Colliery Proprietors' Association Ltd* (1987) 163 CLR 117. Included in this is the power to expend federal funds on state prosecutions.

42 *The Queen v Hughes* (2000) 74 ALJR 802, 810.

43 See Conduct Code Agreement signed by the Commonwealth and all States and Territories.

44 *Australian Constitution* s 51(xx).

45 *Australian Constitution* s 51(i).

46 *Australian Constitution* s 51(xxix).

47 *Australian Constitution* s 51(xiii).

48 *Australian Constitution* s 51(xiv).

Part VI which includes the remedial provisions relies on a similar range of constitutional powers other than the external affairs power.

This lack of universal application was seen as a major defect in the Australian economy.[49] Immunity from the competition provisions based simply on the form or structure of a commercial entity cannot be defended on public policy or any other grounds.[50] Thus, one of the main objectives of the Code is to ensure that the competition provisions which applied by virtue of Part IV of the *Trade Practices Act* to constitutional corporations and such other persons as come within the scope of Part IV by virtue of the operation of s 6 of the Act,[51] could be applied to all commercial entities irrespective of their form, including partnerships and sole traders.[52] A second objective of the Code is to put competition regulation in the hands of one national regulator.

The issue may be understood by considering the following question: if two professional partnerships operating entirely within one State agree to fix prices, are they liable to a suit brought by the ACCC? Part IV of the *Trade Practices Act* is not likely to apply. The Code was designed to catch just this situation. *Hughes* demonstrates two things. First, there is a real possibility that Code will not be upheld in its entirety. In particular, there is a real possibility that the administrative and enforcement provisions are not constitutionally valid. Secondly, if it is not possible to uphold the Code in its entirety, it may be read down.[53] The consequences of any reading down may be to render the Code of no more than marginal utility. This would be the case if the *Trade Practices Act* already largely covered the field that the read-down version of the Code would cover. If such were the case the main operative effect of the Code would be to entitle persons (other than Commonwealth authorities) to bring private actions against non-corporate enterprises.

This discussion will begin by looking at the heads of power most likely to be called in aid of the Code if reading down is required. By comparing the effect of these powers on the Code and their use in Part IV of the *Trade Practices Act* it is possible to get an idea of the usefulness of the Code.

The Corporations Power

Section 51(xx) of the Constitution provides that the Commonwealth Parliament 'shall, subject to this Constitution, have power to make laws for the peace, order,

49 Hilmer Report, above n 1, 15.

50 Ibid, 115-6.

51 Section 6 extends the application of Part IV to those engaged in constitutional trade and commerce.

52 The importance of extending the operation of the competition provisions to all business enterprises was summed up by the Hilmer Report, above n 1, 15, in the following terms: 'But the most pressing deficiency in the [Trade Practices] Act is that it remains limited in its application, with coverage often depending on questions of ownership or corporate form rather than considerations of community welfare. While the Act applies to Commonwealth businesses, the exemption of some State- and Territory-owned businesses appears increasingly anomalous in light of commercialisation and similar reforms. ... Similarly, the costs to consumers and the community generally of anti-competitive practices engaged in by professions such as lawyers has been receiving increasing attention.' See also Michael Coper, 'Constitutional Imponderables in the Path of a National Competition Policy' (1994) 2 *Trade Practices Law Journal* 68, 71.

53 There is nothing to suggest that the Code is incapable of being read down in the manner applied by the High Court to the Corporations law in *The Queen v Hughes* (2000) 74 ALJR 802..

and good government of the Commonwealth with respect to foreign corporations, and trading or financial corporations formed within the limits of the Commonwealth'. The full extent of the corporations power is not settled.[54]

The constitutional definition was largely used in formulating the operation of Part IV of the *Trade Practices Act.* Under that Part a corporation means a foreign corporation, a trading or financial corporation formed within the limits of Australia, a body corporate incorporated in a Territory or a holding company of any of the above.[55]

Generally a body corporate will be regarded as a trading corporation if a significant portion of its activities are properly characterised as trading activities.[56] This is so even if the dominant or primary undertaking of the corporation could not be characterised as a trading one.[57] Where this test is inadequate the courts may have regard to the purposes or objects of the corporation.[58] By analogy, the dominant test for characterising a company as a financial corporation is whether a significant portion of its activities can be categorised as financial activities.[59]

Clearly a professional partnership is not a corporation within the meaning of the Constitution. Consequently the activities of a professional partnership will only come within the constitutional ambit of the corporations power if that power is broad enough to encompass the activities (or at least some of them) of persons having dealings with constitutional corporations. Thus, price fixing by partnerships could only come within the scope of the corporations power if that power was interpreted to include those affected by (as opposed to those engaged in) the price fixing.

The corporations power has been held to be wide enough to cover the activities of persons involved in a contravention by a constitutional corporation of Part V of the *Trade Practices Act.* In *Fencott v Muller* [60] the High Court upheld the validity of s 82 of the *Trade Practices Act* in so far as it enabled any person who had suffered loss because of a constitutional corporation's breach of s 52 of the Act to recover that loss from any person involved in the contravention within the meaning of s 75B.

[54] See discussion in Peter Hanks, *Constitutional Law in Australia,* (2nd ed, 1996), 351-66; Leslie Zines, *The High Court and the Constitution*, (4th ed, 1997), 90-5

[55] *Trade Practices Act* s 4(1). Foreign corporation, financial corporation and trading corporation are also defined in s 4(1). A foreign corporation means a foreign corporation within the meaning of paragraph 51(xx) of the Constitution and includes a body corporate that is incorporated in an external Territory. A financial corporation means a financial corporation within the meaning of paragraph 51(xx) of the Constitution and includes a body corporate that carries on as its sole or principal business the business of banking (other than State banking not extending beyond the limits of the State concerned) or insurance (other than State insurance not extending beyond the limits of the State concerned). A trading corporation means a trading corporation within the meaning of paragraph 51(xx) of the Constitution. The meaning of a holding company is set out in s 4A. The application of the *Trade Practices Act* has been held to be unconstitutional in so far as it purports to apply to holding companies which cannot otherwise be characterised as trading, financial or foreign corporations: *Actors and Announcers Equity Association of Australia v Fontana Films Pty Ltd* (1982) 150 CLR 169. A holding company does not fall within the ambit of either s 51(xx) or s 122 of the Constitution.

[56] *R v Federal Court of Australia; Ex parte Western Australian National Football League Inc* (1979) 143 CLR 190, 233 (Mason J); *Hughes v WA Cricket Association* (1986) ATPR 40-736.

[57] *Commonwealth v Tasmania* (1983) 158 CLR 1; *State Superannuation Board v Trade Practices Commission* (1982) 150 CLR 282.

[58] *Fencott v Muller* (1983) 152 CLR 570.

[59] *State Superannuation Board v Trade Practices Commission* (1982) 150 CLR 282.

[60] (1983) 152 CLR 570.

Mason, Murphy, Brennan and Deane JJ said:

> Another way of expressing this approach is to say that where a law prescribing the way in which corporations shall conduct their trading activities is supported by the corporations power, an ancillary provision reasonably adapted to deter other persons from facilitating a contravention of the law by a corporation is supported by the same power. It is within the competence of the Parliament to enact such a provision to secure compliance with a valid statutory command.[61]

A similar result was reached in respect of a law imposing criminal liability on natural persons for being accessories to the unlawful activities (under Part V of the *Trade Practices Act*) of a constitutional corporation.[62]

A law based on s 51(xx) of the Constitution is not restricted to the regulation of the activities of a constitutional corporation. It may exist to *protect* the trading activities of a constitutional corporation. In *Actors and Announcers Equity of Australia v Fontana Films Ltd* [63] the High Court had to consider the validity of the secondary boycott provisions contained in s 45D(1)(b)(i) of the Trade Practices Act. Section 45D(1)(b)(i) prohibited persons acting in concert from impeding the supply, or acquisition, of goods or services by, or from, a constitutional corporation where the purpose and the likely effect of the concerted action was to cause substantial loss or damage to the constitutional corporation. Actors Equity prevailed on theatrical agents not to supply actors to Fontana Films because Fontana had refused to agree to hire only members of Actors Equity. This amounted to a secondary boycott within the meaning of s 45D(1)(b)(i). The Court unanimously upheld s 45D(1)(b)(i) as a valid exercise of s 51(xx) of the Constitution.

Whilst all members of the High Court agreed that the corporations power extended to validate Commonwealth laws designed to protect constitutional corporations as well as those designed to regulate them, they did not agree on the scope of the activities covered by the power. Gibbs CJ, with whom Wilson J agreed, held that s 45D(1)(b)(i) was a valid exercise of s 51(xx) because it was a 'law for the protection of the trading activities of a trading corporation formed within the limits of the Commonwealth'.[64] On the other hand, Mason J, with whom Aickin J agreed, regarded s 51(xx) as granting to the Commonwealth a plenary power in respect of constitutional corporations. According to Mason J, the constitutional power, therefore, extended to the regulation and protection of the activities, whether trading or not, of constitutional corporations.[65] Stephen J did not find it necessary to answer the question whether s 51(xx) was confined to the trading activities of a trading corporation.[66] However, the tenor of his comments was against such a restriction.[67] Brennan J refused to confine the operation of s 51(xx) to

61 Ibid, 599. See also (1983) 152 CLR 570, 582-4 (Gibbs CJ); 611, (Wilson J); 620 where Dawson J said: 'If Parliament has the power to control the trading activities of trading corporations, then it is for Parliament to determine how it will exercise the power. If by imposing liability, civil or criminal, upon natural persons involved in those activities, Parliament may be said to be adopting a means of effectuating that control, then a law imposing such liability is either within the power or incidental to it.'

62 See *R v Australian Industrial Court; Ex parte CLM Holdings Pty Ltd* (1977) 136 CLR 235 particularly at 243 per Mason J.

63 (1982) 150 CLR 169.

64 Ibid 185.

65 Ibid 207-8.

66 Ibid 195.

67 Ibid.

the trading activities of a trading corporation.[68] Neither, however, did he endorse the broader view of Mason J. His Honour said:

> A law which, discriminating between one or more of the corporations mentioned in par. (xx) and the public at large, protects both the trading and non-trading businesses of trading corporations, wears the appearance of a law with respect to those corporations. It is of the nature of the power that it is a power to make law with respect to corporate persons, not with respect to functions, activities or relationships. The subject matter of activities or relationships which the law affects may be relevant to the question whether the law is truly to be described as a law with respect to corporations mentioned in par. (xx), but the validity of the law cannot be determined as though the power were expressed as a power to make laws with respect to the trading or some other activity of or relationship with corporations mentioned in par. (xx).[69]

These divisions also appeared in *Commonwealth v Tasmania* (The Tasmanian Dams case).[70] Section 10(2) of the *World Heritage Properties Conservation Act* 1983 (Cth) prohibited, inter alia, a trading corporation from doing a number of acts on certain proclaimed property without the consent of the relevant Minister. Section 10(4) prohibited a trading corporation from doing, *for the purposes of its trading activities,* a number of acts on certain proclaimed property without the consent of the relevant Minister. Mason J, Murphy J and Deane J regarded the power conferred by s 51(xx) as covering all activities of a trading corporation.[71] Therefore, both s 10(2) and 10(4) were valid. Brennan J held that s 51(xx) extended to the regulation and protection of acts undertaken for the purposes of carrying out the trading activities of a trading corporation.[72] Section 10(4) was valid. His Honour found it unnecessary to decide whether the power extended further. In the opinion of Gibbs CJ, to have a sufficient connexion with s 51(xx) a law must relate to the trading activities of a trading corporation.[73] The Chief Justice found s 10(2) invalid, but that s 10(4) did have 'a sufficient connexion with the topic of power granted by s 51(xx)' and was valid.[74] The Chief Justice and Brennan J disagreed on what activities could be characterised as acts undertaken for the purposes of the trading activities of a trading corporation. According to Gibbs CJ the construction of a dam by a corporation involved in the provision of electricity was an act preparatory to the corporation's trade and was not an act carried on for the purposes of the trading activities of the corporation.[75] On the other hand, Brennan J held that it was.[76] According to Wilson J to 'be a law with respect to trading corporations, the substance of the law must bear a sufficient relation to those characteristics of such corporations which distinguish them from corporations which cannot be so described... In other words, the law

68 Ibid 222.
69 Ibid
70 (1983) 158 CLR 1.
71 (1983) 158 CLR 1, 149 (Mason J); 179 (Murphy J); 269-70 (Deane J).
72 (1983) 158 CLR 1, 241.
73 Ibid 117-8.
74 Ibid 119.
75 Ibid 118. See also Wilson J at 201. Gibbs CJ (at 117) found that the Tasmanian Hydro-Electric Commission was not a trading corporation within the meaning of s 51(xx) of the Constitution.
76 (1983) 158 CLR 1, 241.

must be about trading corporations.'[77] Dawson J adopted a similar approach. He said: 'For a law to be a valid law with respect to a trading or financial corporation the fact that it is a trading or financial corporation should be significant in the way in which the law relates to it.'[78] Both Wilson J and Dawson J held s 10 to be invalid.

The High Court returned to the issue of the corporations power in Re Dingjan; *Ex parte Wagner*.[79] The *Industrial Relations Act 1988* (Cth) permitted the Industrial Relations Commission to set aside or vary certain contracts for the performance of work by independent contractors which the Commission considered to be unfair, harsh or against the public interest provided 'the contract related to the business of a constitutional corporation'.[80] The Act provided that it was not necessary that a constitutional corporation be a party to the contract. The legislation was successfully challenged as unconstitutional. Although the majority (Dawson, Brennan, Toohey and McHugh JJ) agreed that the impugned provisions of the Act were invalid, they did not agree on the ultimate extent of the corporations power. Dawson J adopted the most restrictive approach.[81] Brennan J held that for a law to be supported by s 51(xx) it must do more than apply to constitutional corporations and other persons indifferently. It 'must discriminate between constitutional corporations and other persons, either by reference to the persons on whom it confers rights or privileges or imposes duties or liabilities or by reference to the persons whom it affects by its operation'.[82] In the opinion of Toohey J a Commonwealth law is a valid exercise of the corporations power if there is a sufficient connection between the law and the head of power. There will be a sufficient connection if the law operates on the rights, duties, powers or privileges of corporations and the connection is substantial, not merely tenuous.[83] McHugh J applied a similar test:

> Where a law purports to be 'with respect to' a s.51(xx) corporation, it is difficult to see how it can have any connection with such a corporation unless, in its legal or practical operation, it has significance for the corporation. That means that it must have some significance for the activities, functions, relationships or business of the corporation.[84]

The minority (Mason CJ, Deane and Gaudron JJ) preferred to give a more expansive operation to s 51(xx). In the opinion of Mason CJ s 51(xx) is meant to confer a plenary power on the Commonwealth in respect of constitutional corporations.[85] Gaudron J, with whom Deane J agreed, said that 'the power conferred by s 51(xx) extends, at the very least, to the business functions and activities of constitutional

77 Ibid 202. His Honour then characterised sections 7 and 10 of the *World Heritage Properties Conservation Act 1983* (Cth) as laws relating to the protection and conservation of certain property and not laws with respect to trading corporations, [45].

78 Ibid 316.

79 (1995) 183 CLR 323.

80 *Workplace Relations Act 1996* (Cth) formerly named the *Industrial Relations Act 1988* (Cth) ss 127A, 127B and 127C(1)(b).

81 (1995) 183 CLR 323, 345-6.

82 Ibid 336.

83 Ibid 353.

84 Ibid 369.

85 Ibid 333-4. See also *Actors and Announcers Equity Association of Australia v Fontana Films Pty Ltd* (1982) 150 CLR 169, 207.

corporations and to their business relationships'.[86] In *Re Pacific Coal Pty Limited; Ex parte Construction, Forestry, Mining and Energy Union*[87] Gaudron J said:

> I have no doubt that the power conferred by s 51(xx) of the Constitution extends to the regulation of the activities, functions, relationships and the business of a corporation described in that sub-section, the creation of rights, and privileges belonging to such a corporation, the imposition of obligations on it and, in respect of those matters, to the regulation of the conduct of those through whom it acts, its employees and shareholders and, also, the regulation of those whose conduct is or is capable of affecting its activities, functions, relationships or business.

Although they disagreed on the outcome in *Dingjan* the views of Toohey and McHugh JJ and the minority are not that far apart.[88] It seems clear that the corporations power is wide enough to support the regulation of persons whose conduct is capable of affecting the activities, functions, relationships or business of constitutional corporations provided there is sufficient connection between the regulation and the power.

In *Hughes* the majority referred to the possibility that the prescribed interest provisions of the *Corporations (Western Australia) Act 1990* may fall within the ambit of the corporations power:

> The privilege conferred by [the prescribed interest provisions of the WA Act] permitted financial corporations to do in relation to their financial activities what other entities were not permitted to do and, the Attorney-General submits, such a law if enacted by the Parliament of the Commonwealth would be supported by s 51(xx). The Attorney-General contends (and the Attorney-General for the State of Western Australia disputes) that passages in the various judgments in *Re Dingjan; Ex parte Wagner* support that conclusion.[89]

The majority, however, found it unnecessary to decide the matter. This was because the law could be justified on the basis of the trade and commerce power (s 51(1) or the external affairs power (s 51(xxix)).

The *Trade Practices Act* does not attempt to utilise the corporations power to its full extent. Subject to s 6, which is discussed below, most forms of conduct prohibited by Part IV of the *Trade Practices Act* are only prohibited when engaged in by a constitutional corporation. Only the secondary boycott provisions[90] and s 48 (resale price maintenance) purport to rely on the broader interpretation of the corporations power.

The secondary boycott provisions seek to protect constitutional corporations against the concerted actions of other persons. The forerunner of the current secondary boycott provisions was upheld in part and, rejected in part, in *Actors and Announcers*

86 (1995) 183 CLR 323, 365.
87 [2000] 74 ALJR 1034, 1048.
88 See Hanks above n 52, 364.
89 (2000) 74 ALJR 802, 811.
90 s 45D, 45DA. Note that s 45(1) applies to a person rather than a corporation. S 45(1) is transitional and refers only to agreements made before the introduction of the *Trade Practices Act* in 1974.

Equity of Australia v Fontana Films Ltd. [91]

Section 48 prohibits a corporation *or other person* from engaging in the practice of resale price maintenance. The acts which constitute resale price maintenance are set out in s 96. Section 96(2) provides:

> Subject to this Part, a person (not being a corporation and also in this section called the supplier) engages in the practice of resale price maintenance if that person does an act referred to in any of the paragraphs of subsection (3) where the second person mentioned in that paragraph is a corporation.

Thus, for example, it would be a breach of s 48 for a supplier (being a person and not a corporation) to make it known to a second person (being a corporation) that the supplier will not supply goods to the second person unless the second person agrees not to sell those goods at a price less than a price specified by the supplier.[92] Section 96(2) has not been tested constitutionally. However, on the basis of *Actors and Announcers Equity of Australia v Fontana Films Ltd* [93] there is some reason to believe that it is valid.

Even if the Code had to be read down so that its provisions fell within the corporations power it is likely to be broader in its application than the *Trade Practices Act.* For example, there is no reason why the primary boycott provisions (s 45, s 4D of the TPA) or the exclusive dealing provisions (s 47 of the TPA) could not be extended to protect constitutional corporations against boycotts or exclusive dealing by persons other than constitutional corporations. The same may be said for the abuse of market power provisions found in the Code (s 46 of the TPA). If the target of the boycott, the exclusive dealing or the abuse of power was a constitutional corporation then the law prohibiting such conduct would be valid on the basis of *Actors and Announcers Equity of Australia v Fontana Films Ltd.* [94] There would be a sufficient connection between the law and the activities, functions, relationships or business of a constitutional corporation. Any provision empowering the ACCC to bring an action against a person in such circumstances would also be constitutionally valid on the basis of *Fencott v Muller.*[95] Of course, it is not necessary to have the Code to achieve this result. The *Trade Practices Act* itself could be amended.

In the end, however, the corporations power can achieve only so much. There will be anti-competitive business activities which fall outside even the broad interpretation of the corporations power. This will occur because the firms engaging in the conduct are not constitutional corporations and the conduct lacks the sufficient connection mentioned above.

[91] (1982) 150 CLR 169. See discussion at n 63. Section 45D(5) of the *Trade Practices Act* deemed a trade union to be conspiring with its own officers wherever two or more of its officers engaged in conduct in concert with one another, unless the trade union established that it took all reason able steps to prevent the members or officers from engaging in the conduct. By a majority this was held invalid. In the opinion of Mason J, with whom Stephen and Aickin JJ agreed, s 45D(5) was a law with respect to trade unions which had such a remote connection with corporations that it could not be characterised as a law with respect to constitutional corporations: (1982) 150 CLR 169, 210-211.

[92] See *Trade Practices Act* s 96(3)(a).

[93] (1982) 150 CLR 169.

[94] Ibid.

[95] (1983) 152 CLR 570.

The Trade and Commerce Power

Section 51(i) of the Constitution provides that the Commonwealth Parliament 'shall, subject to this Constitution, have power to make laws for the peace, order, and good government of the Commonwealth with respect to trade and commerce with other countries, and among the States'. Thus, the Constitution expressly authorises power over interstate and international trade, but not intrastate trade.

Section 6(2) of the *Trade Practices Act* uses the trade and commerce power contained in s 51(i) of the Constitution to provide both an alternative basis for, and an extension of, the operation of Part IV of the Act.[96] Thus, for example, the price fixing prohibitions contained in s 45 of the Act apply to business entities other than constitutional corporations where the price fixing occurs in the course of or in relation to:

(i) trade or commerce between Australia and places outside Australia;
(ii) trade or commerce among the States;
(iii) trade or commerce within a Territory, between a State and a Territory or between two Territories; or
(iv) the supply of goods or services to the Commonwealth or an authority or instrumentality of the Commonwealth.

The *Trade Practices Act* probably utilises the trade and commerce power to its full extent. The scope of the federal power to make laws with respect to constitutional trade and commerce covers most aspects of such trade and commerce. For example, it would include such activities as fixing the price and other terms of supply of a good or a service.[97] Consequently, a law which regulated the supply conditions of constitutional trade and commerce (that is, trade or commerce falling witin the meaning of s 51(i) of the Constitution) would probably be a valid exercise of power.

It must be noted, however, that s 6(2) concentrates on the nature of the particular supply in question, not the supplier. Therefore, it is not sufficient that a person who allegedly engaged in conduct in breach of the competition provisions of Part IV of the TPA had some involvement in interstate or overseas trade. The relevant conduct itself must have that character or be inseparably connected with interstate or overseas trade.[98] Trade wholly within one State falls outside the net of potential federal regulation based on the trade and commerce power. A price fixing arrangement between legal firms operating solely within one State would probably not be caught by the *Trade Practices Act* as presently enacted or by any constitutionally valid amendments to the Act. Nor, on the basis of *Hughes*, would the Code be valid in so far as it purported to empower the ACCC to bring suit against the price fixers, if the constitutional power sought to be relied upon was the trade and commerce power.

Banking and Insurance Powers

Paragraph 51(xiii) of the Constitution provides that the Commonwealth 'Parliament

[96] The same applies to the GST Price Exploitation Code. See Explanatory Memorandum to *A New Tax System (Trade Practices Amendment) Bill* 1999.
[97] *Bank of NSW v The Commonwealth* (1948) 76 CLR 1.
[98] *Attorney General (Western Australia); Ex rel Ansett Transport Industries (Operations) Pty Ltd v Australian National Airlines Commission* (1976) 138 CLR 492.

shall, subject to this Constitution, have power to make laws ... with respect to:- Banking, other than State banking; also State banking extending beyond the limits of the State concerned, the incorporation of banks, and the issue of paper money.' The insurance power is similarly worded.[99] This does not mean that the regulation of State banks or State insurance offices is beyond federal power. It simply means that the Commonwealth has no power to make laws regulating the activities of State banks or insurance offices which occur within the State. If the state bank or insurance office is a corporation, as it is certainly likely to be, the Commonwealth has power to make laws with respect to that corporation pursuant to para 51(xx) of the Constitution, subject to the limitation imposed by para 51(xiii). This means, for example, that the power to regulate State banks does not extend to activities that occur wholly within the State even though the bank is a financial corporation.[100]

The banking power and the insurance power are used to define the meaning of a 'corporation' within the *Trade Practices Act*. A financial corporation is defined to include a 'body corporate that carries on as its sole or principal business the business of banking (other than State banking not extending beyond the limits of the State concerned) or insurance (other than State insurance not extending beyond the limits of the State concerned).'[101]

POST AND TELEGRAPH POWER IS CAPABLE OF UNDERPINNING PARTS OF THE CODE

The Commonwealth Parliament has power to make laws with respect to 'postal, telegraphic, telephonic, and other like services' (s 51(v)). This power is used to expand the operation of Parts IVA and Divisions 1, 1A and 1AA of Part V and of the *Trade Practices Act*.[102] Thus, a non-constitutional commercial entity operating wholly within one State may engage in misleading or deceptive conduct in breach of s 52 of the *Trade Practices Act* if the impugned conduct involves the use of postal, telegraphic or telephonic services, or takes place in a radio or television broadcast.[103]

In light of the widespread use of electronic communications throughout the economy, it seems reasonable to suggest that the scope of Part IV of the Trade Practices Act would be enhanced by use of the 'post and telegraph' power. Section 51(v) almost certainly gives the Commonwealth the power to regulate the Internet and other forms of electronic communication.[104] To the extent that anti-competitive activities, such as exclusive dealing supply contracts, use the Internet, they could have been captured by the *Trade Practices Act* irrespective of the nature of the supplier, if the scope of Part IV of the Act had been extended by use of the post and telegraph power.

If it is necessary to read down the Code, it will be given this broader application by utilising the post and telegraph power. In this respect the Code is clearly wider than the *Trade Practices Act*.

99 *Australian Constitution* s 51(xiv).

100 *Bourke v State Bank of NSW* (1990) 170 CLR 276; (1990) ATPR 41-033.

101 *Trade Practices Act* s 4.

102 See *Trade Practices Act* s 6(3).

103 See *Nixon v Slater & Gordon* (2000) 175 ALR 15 where a brochure distributed by a firm of solicitors was held to contain misleading or deceptive material. Because the brochure had been sent through the ordinary post s 52 of the Trade Practices Act applied.

104 See *R v Brislan; Ex parte Williams* (1935) 54 CLR 262 (in which it was held that s 51(v) covers wireless telegraphy) and *Jones v Commonwealth* (1965) 112 CLR 206 (s 51(v) covers television).

THE INCIDENTAL POWERS

Even allowing for a liberal interpretation of the powers just discussed, certain business enterprises will escape regulation under the Code. This prompts two questions. First, are the constitutional gaps of sufficient economic consequence to make this an issue of any practical importance? It may be that given the widespread use of corporate entities to operate businesses coupled with the expansive interpretation of the corporations power, the gaps in the Code are not overly significant. This is a matter that can only be answered empirically and is beyond the scope of this article. For present purposes it will be accepted that the gaps are important. Secondly, if the regulatory lacunae are economically important, is there a constitutional principle, based perhaps on the co-operative nature of Australian federalism, that would validate the administrative and enforcement provisions of the Code without the need to read down the legislation?

To fully achieve the outcome seen as beneficial by all Australian governments[105] it is preferable that the administration and enforcement provisions of the Code be constitutionally valid without the need to read down the legislation. The only source of constitutional power likely to support this objective is the express incidental power contained in s 51(xxxix). Section 51(xxxix) provides that the Commonwealth Parliament shall have power to make laws with respect to:

> matters incidental to the execution of any power vested by this Constitution in the Parliament or in either House thereof, or in the Government of the Commonwealth, or in the Federal Judicature, or in any department or officer of the Commonwealth.

Gummow and Hayne JJ discussed the meaning of 'incidental' power in *Re Wakim; Ex parte McNally*:[106]

> Various descriptions of what is meant by 'incidental' power can be found in the cases: '[e]verything necessary to the effective exercise of a power';[107] 'everything that is reasonably necessary to carry [the power] into effect';[108] a provision that is 'conducive to the success of the legislation';[109] a 'choice of means to an authorised end [that] was to complement, and not to supplement, the power granted';[110] and no doubt the examples could be multiplied. The central idea is that stated by Marshall CJ in *McCulloch v Maryland*,[111] cited with approval in *Grannall v Marrickville Margarine Pty Ltd*:[112]
>
> 'Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional'. The first focus of inquiry must therefore be on the subject matter of the power to which the step in question is said to be incidental.'

[105] All Australian governments are parties to the Conduct Code Agreement, April 1995.
[106] (1999) 198 CLR 511, 580.
[107] *Baxler v Ah Way* (1909) 8 CLR 626, 637 (O'Connor J)
[108] *Victoria v The Commonwealth* (1957) 99 CLR 575, 631 (Williams J)
[109] *Stemp v Australian Glass Manufacturers* Co Ltd (1917) 23 CLR 226, 235 (Barton A(CJ)
[110] *Stemp v Australian Glass Manufacturers* Co Ltd (1917) 23 CLR 226, 235 (Barton A(CJ)
[111] (1819) 17 US 159, 206
[112] (1955) 93 CLR 55, 77 (Dixon CJ)

In *Wakim* the High Court ruled federal cross vesting legislation invalid. According to Gummow and Hayne JJ the cross vesting legislation was not necessary for, or conducive to the success of, the primary power, namely, the judicial power of the Commonwealth.[113] It is unlikely that vesting exclusive administration and enforcement of the competition laws in a Commonwealth authority is necessary for,

or conducive to the success of, the corporations power. Even less likely is this to be the case in respect of the other powers used to underpin the *Trade Practices Act.*

To invoke the incidental power in aid of a national competition regulator such as the Code envisages it will be necessary to argue for an expansive understanding of federal executive power. In turn, this requires a generous acceptance of some principle based on co-operative federalism. If the Code could be supported as a necessary exercise of federal co-operation, and if the vesting of powers and functions under the Code in federal authorities could be supported as a valid exercise of Commonwealth executive power, then any legislation necessarily required to achieve that vesting may be a valid exercise of the express incidental power contained in s 51(xxxix) of the Constitution.

Alternatively, it may be argued that the source of legislative power necessary to support a national competition regulator is implied in the Constitution to give effect to the executive power deriving from the national status of the Commonwealth.[114] The implication of such a power, particularly in respect of domestic legislation, is controversial. In *Davis v The Commonwealth of Australia* [115] the implied power was recognised without evident disapproval by Mason CJ, Deane and Gaudron JJ,[116] but was clearly rejected by Wilson and Dawson JJ[117] and probably by Toohey J (at least to the extent that the power involves domestic legislation not concerned with the protection of the very existence of the Commonwealth).[118] Brennan J treated the matter solely as a question of applying the express incidental power contained in s 51(xxxix). For the purposes of this paper the source of the power is not so critical as its scope. Whether the legislative power is to be sourced from a combination of s 61 and s 51(xxxix) or is to be implied on the basis of the Commonwealth's constittional status as a nation, the fundamental issue for the present inquiry remains the scope of the power.[119]

[113] (1999) 198 CLR 511, 580.

[114] For a discussion on the concept of nationhood as a source of power see Zines, above n 54, 297-303.

[115] (1988) 166 CLR 79.

[116] (1988) 166 CLR 79, 95. Ultimately their Honours found it unnecessary to determine whether the requisite legislative power to enact the *Australian Bicentennial Authority Act* 1980 (Cth) for regulating the administration and procedures of the Australian Bicentennial Authority was to be found in s 51(xxxix) or 'deduced from the nature and status of the Commonwealth as a national polity'.

[117] (1988) 166 CLR 79, 101-4.

[118] (1988) 166 CLR 79, 117-9.

[119] Zines, above n 54, 256 commented: 'It is not clear, however, whether a judge's reliance on any implied power, or, on the other hand, a combination of s 61 and s 51(xxxix) would, in any particular case, produce different results.'

Co-operation under the Constitution

The Constitution permits co-operative action between the Commonwealth and the States.[120] In *R v Duncan; Ex parte Australian Iron and Steel Pty Ltd* the High Court upheld a legislative scheme whereby the Commonwealth and NSW jointly set up the Coal Industry Tribunal to hear disputes in the coal industry. [121] Gibbs CJ said:

> The Constitution effects a division of powers between the Commonwealth and the States but it nowhere forbids the Commonwealth and the States to exercise their respective powers in such a way that each is complementary to the other. There is no express provision in the Constitution, and no principle of constitutional law, that would prevent the Commonwealth and the States from acting in co-operation, so that each, acting in its own field, supplies the deficiencies in the power of the other, and so that together they may achieve, subject to such limitations as those provided by s 92 of the Constitution, a uniform and complete legislative scheme.[122]

However, the ambit of permitted co-operation is constrained by the Constitution. In *Wakim* Gummow and Hayne JJ said:

> But no amount of co-operation can supply power where none exists. To hold to the contrary would be to hold that the Parliaments of the Commonwealth and the States could, by co-operative legislation, effectively amend the Constitution by giving to the Commonwealth power that the Constitution does not give it.[123]

Thus, where co-operation requires the vesting of powers and duties in a Commonwealth officer or instrumentality the legislative competence to make that investment must be properly referable to a direct or incidental power of the Commonwealth. In *Hughes* the majority commented:

> *Duncan* is one of a number of decisions which recognise that co-operation on the part of the Commonwealth and States may well achieve objects that could be achieved by neither acting alone. Nothing in these reasons denies that general proposition. The present case emphasises that for the Commonwealth to impose on an officer or instrumentality of the Commonwealth powers coupled with duties adversely to affect the rights of individuals, where no such power is directly conferred on that officer or instrumentality by the Constitution itself, requires a law of the Commonwealth supported by an appropriate head of power.[124]

[120] *R v Duncan; Ex parte Australian Iron and Steel Pty Ltd* (1983) 158 CLR 535, 552 (Gibbs CJ), 563 (Mason J), 589 (Deane J); *Re Wakim: Ex parte McNally* (1999) 198 CLR 545 (Gleeson CJ), 577 (Gummow and Hayne JJ); *Deputy Federal Commissioner of Taxation (NSW) v W R Moran Pty Ltd* (1939) 61 CLR 735, 774 (Starke J); *Wilcox Mofflin Ltd v State of NSW* (1952) 85 CLR 488, 508-11 (Dixon, McTiernan and Fullagar JJ), 526-528 (Williams J); *R v Lydon; Ex parte Cessnock Collieries Ltd* (1960) 103 CLR 15, 20; *Airlines of NSW Pty Ltd v New South Wales* (1964) 113 CLR 1, 40, 42 (Taylor J), 48 (Menzies J), 51-2 (Windeyer J); *Clark King & Co Pty Ltd v Australian Wheat Board* (1978) 140 CLR 120, 179 (Mason and Jacobs JJ); *Re Cram; Ex parte NSW Colliery Proprietors' Association Ltd* (1987) 163 CLR 117, 130 (Mason CJ, Wilson, Brennan, Deane, Dawson, Toohey and Gaudron JJ); *The Queen v Hughes* (2000) 74 ALJR 802, 812 (Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ).

[121] (1983) 158 CLR 535. See also *Re Cram; Ex parte NSW Colliery Proprietors' Association Ltd* (1987) 163 CLR 117.

[122] (1983) 158 CLR 535, 552.

[123] (1999) 198 CLR 511, 577.

[124] (2000) 74 ALJR 802, 812.

In *Wakim* Gleeson CJ suggested that the co-operation could operate provided there was no express or implied prohibition in the Constitution and provided the law giving expression to the principle could be traced to a constitutional head of power.[125]

Consequently, in determining the constitutional validity of the administrative and enforcement procedures of the Code the first step is to determine whether the Constitution expressly or implicitly prohibits co-operation in the vesting of administrative functions and powers in a Commonwealth entity for the purposes of competition regulation. Such co-operation is not expressly prohibited. In *Wakim* a majority of the High Court found an implied prohibition in Chapter III of the Constitution against the vesting of state judicial power in Commonwealth courts. Generally, however, care must be taken in drawing implications from the Constitution.[126] The vesting of administrative powers and functions in the ACCC pursuant to the Code involves an exercise of executive power rather than judicial power. Unlike *Wakim* the prohibition on Commonwealth power, if it exists, is not to be found in Chapter III. In *Duncan* no express or implied prohibition prevented Commonwealth and State co-operation in setting up the Coal Industry Tribunal. *Hughes* also involved an exercise of executive power. The majority found no constitutional prohibition against the vesting in the DPP of State power to prosecute State Corporations Law offences.

If there is no relevant constitutional prohibition at work, the issue is whether the legislation can be supported by a head of power. *Wakim* does not stand as a barrier to the acceptance of the co-operative principle as a principle of constitutional substance. *Wakim* was concerned with the implied limitations of federal judicial power, not with the limits of executive power.

What is the scope of federal executive power? Section 61 is rather vague. It provides that the 'executive power of the Commonwealth is vested in the Queen and is exercisable by the Governor-General as the Queen's representative, and extends to the execution and maintenance of this Constitution, and of the laws of the Commonwealth'. Whatever its limits the executive power is constrained by the Constitution.[127] In *Duncan* Mason J explained the scope of federal executive power and its relationship to legislative co-operation in the following terms:

> The executive power of the Commonwealth is not ... limited to heads of power which correspond with enumerated heads of Commonwealth legislative power under the Constitution. ... The scope of the executive power is to be ascertained, as I indicated in the AAP Case, from the distribution of the legislative powers effected by the Constitution and the character and status of the Commonwealth as a national government. Of necessity the scope of the power is appropriate to that of a central executive government in a federation in which there is a distribution of legislative powers between the Parliaments of the constituent elements in the federation. It is beyond question that it extends to entry into governmental agreements between Commonwealth and

[125] (1999) 198 CLR 511, 544-6.

[126] Graeme Hill , 'The Demise of Cross Vesting' (1999) 27 *Federal Law Review* 547; Jenny Lovric, 'Re Wakim: an overview of the fallout' (2000) 19 *Australian Bar Review* 237, 240.

[127] *The Commonwealth v Colonial Combing, Spinning and Weaving Co. Ltd* (1922) 31 CLR 421, 432; *The Commonwealth v Australian Commonwealth Shipping Board* (1926) 39 CLR 1, 10; *Victoria v Commonwealth* (1975) 134 CLR 338, 378-9 (Gibbs J), 396 (Mason J); *R v Duncan; Ex parte Australian Iron and Steel Pty Ltd* (1983) 158 CLR 535.

> State on matters of joint interest, including matters which require for their implementation joint legislative action, so long at any rate as the end to be achieved and the means by which it is to be achieved are consistent with and do not contravene the Constitution.[128]

If the co-operative scheme is constitutional, then any necessary vesting of administrative powers and functions in the officers of one legislature by another to make the scheme operable is likely to be valid.[129]

It is suggested that the comments of Mason J in *Duncan* indicate that he envisaged an expansive interpretation of executive power based on the notion of nationhood. This was consistent with his Honour's earlier comments in *Victoria v The Commonwealth* ('the AAP case')[130] where he said:

> [I]n my opinion there is to be deduced from the existence and character of the Commonwealth as a national government and from the presence of ss 51 (xxxix) and 61 a capacity to engage in enterprises and activities peculiarly adapted to the government of a nation and which cannot otherwise be carried on for the benefit of the nation.[131]

An expansive interpretation, however, was not necessary to decide *Duncan*. The legislation governing the creation and operation of the Coal Industry Tribunal could be supported on more conventional grounds. The Commonwealth's involvement in the co-operative coal industry scheme could be supported on the basis of the conciliation and arbitration power (s 51(xxxv)) combined with the incidental power contained in s 51(xxxix).[132]

In the AAP case [133] Jacobs J also adopted an expansive view of the role of nationhood in the determination of the ambit of federal power.[134] Both Barwick CJ and Gibbs J, however, took a more cautious view.[135] According to Barwick CJ:

> [To] describe a problem as national, does not attract power. Though some power of a special and limited kind may be attracted to the Commonwealth by the very setting up and existence of the Commonwealth as a polity, no power to deal with matters because they may conveniently and best be dealt with on a national basis is similarly derived. However desirable the exercise by the Commonwealth of

128 (1983) 158 CLR 535, 560.
129 Ibid 563 (Mason J).
130 (1975) 134 CLR 338.
131 *Victoria v Commonwealth* (1975) 134 CLR 338, 397. Mason J cited as examples the establishment of the CSIRO by the *Science Research Act* 1951 (Cth) and the expenditure of 'money on inquiries, investigation and advocacy in relation to matters affecting public health, notwithstanding the absence of a specific legislative power other than quarantine - see the *Pharmaceutical Benefits Case* (1945) 71 CLR 237, 257.
132 (1983) 158 CLR 535, 591-2 (Deane J). In Hughes (2000) 74 ALJR 802, 812 this was accepted as the basis of the decision in *Duncan*. See also *Wakim* (1999) 198 CLR 511, 545-6; (1999) 73 ALJR 839, 846 (Gleeson CJ).
133 *Victoria v Commonwealth* (1975) 134 CLR 338.
134 *Victoria v Commonwealth* (1975) 134 CLR 338, 405-7.
135 McTiernan J, Stephen J and Murphy J did not discuss either the source or ambit of Commonwealth power, legislative or executive, based on notions of national status. McTiernan J and Murphy J held that the relevant Appropriations Act was for the purpose of the Commonwealth within the meaning of the expression of 'for the purposes of the Commonwealth' in s 81 of the Constitution. What was a purpose of the Commonwealth was a matter for the Parliament to determine. Stephen J decided the matter on the grounds of standing.

> power in affairs truly national in nature, the federal distribution of power for which the Constitution provides must be maintained.[136]

In *Davis v Commonwealth*[137] the issue was whether certain provisions of the *Australian Bicentennial Authority Act 1980* (Cth) were constitutional. All members of the High Court held that the Commonwealth had power to commemorate the bicentenary, including setting up the Australian Bicentennial Authority. All justices, however, held invalid certain provisions of the legislation which purported to proscribe, without Ministerial consent, the use in connexion with a business, trade, profession or occupation of a range of expressions, such as '200 years', 'Australia', 'Sydney' and 'Melbourne', when used in conjunction with other expressions including '1988'. All justices commented on the relevance of nationhood in the determination of Commonwealth power.

Wilson and Dawson JJ were primarily concerned to refute suggestions that an implied legislative power existed in the Constitution. However, they also appeared to warn against using nationhood as a basis for expanding federal executive power and therefore federal legislative power:[138]

> The Commonwealth cannot be accorded a legislative power to cross the boundaries between State and Commonwealth responsibility laid down by the Constitution. It is as axiomatic in constitutional law as it is elsewhere that the sum cannot be greater than its parts. Even if it be convenient in some circumstances to look at the totality rather than individual heads of power, the Commonwealth remains confined to that which is granted to it by the Constitution. Moreover, the range of activities which, not being expressly referred to elsewhere in the Constitution, are found on its proper construction to fall within s.61 will necessarily of their very nature lie outside the competence of the States for the reason that such powers will be exercisable only by the Commonwealth and for Commonwealth purposes. The truth is that the character and status of the Commonwealth as a national government are qualities which are themselves to be found within the confines of the Constitution.

It is suggested that the tight circle of Commonwealth power envisaged by this test would not include the vesting of administrative and prosecutorial functions in a national body to regulate economic activities beyond those found in the enumerated heads of the Commonwealth's constitutional legislative power. The administration of wholly intrastate economic activities is clearly not beyond the legislative competence of the State in which the activity occurs. Even if the creation of a national Competition Code regulator, such as the ACCC, is beyond the collective competence of the States, can it be said that this so because the subject matter, in the words of Wilson and Dawson JJ, is one 'exercisable only by the Commonwealth and for Commonwealth purposes'? Such language is not immediately suggestive of legislative co-operation.

[136] (1975) 134 CLR 338, 364. See also (1975) 134 CLR 338, 378 where Gibbs J said: 'The legislative power that is said to be incidental to the exercise by the Commonwealth of the functions of a national government does not enable the Parliament to legislate with respect to anything that it regards as of national interest and concern; the growth of the Commonwealth to nationhood did not have the effect of destroying the distribution of powers carefully effected by the Constitution.'

[137] (1988) 166 CLR 79.

[138] Ibid 103-4.

On the other hand, Mason CJ, Deane and Gaudron JJ took a broader view:

> The scope of the executive power of the Commonwealth has often been discussed but never defined. By s 61 of the Constitution it extends to the execution and maintenance of the Constitution. As Mason J. observed in *Barton v. The Commonwealth* (1975) 131 CLR 477, at p 498, the power:
> 'extends to the execution and maintenance of the Constitution and of the laws of the Commonwealth. It enables the Crown to undertake all executive action which is appropriate to the position of the Commonwealth under the Constitution and to the spheres of responsibility vested in it by the Constitution.'
> These responsibilities derived from the distribution of legislative powers effected by the Constitution itself and from the character and status of the Commonwealth as a national polity: *Victoria v The Commonwealth*[139].... So it is that the legislative powers of the Commonwealth extend beyond the specific powers conferred upon the Parliament by the Constitution and include such powers as may be deduced from the establishment and nature of the Commonwealth as a polity: see the discussion by Dixon J. in *Australian Communist Party v The Commonwealth*[140] (the Communist Party Case). ... The Constitution distributes the plenitude of executive and legislative powers between the Commonwealth and the States: ... On this footing, as Isaacs J. pointed out in *The Commonwealth v Colonial Combing, Spinning and Weaving Co. Ltd* [141], s 61 confers on the Commonwealth all the prerogative powers of the Crown except those that are necessarily exercisable by the States under the allocation of responsibilities made by the Constitution and those denied by the Constitution itself. Thus the existence of Commonwealth executive power in areas beyond the express grants of legislative power will ordinarily be clearest where Commonwealth executive or legislative action involves no real competition with State executive or legislative competence.[142]

On this view the exclusive role given to the ACCC under the Code, being quite evidently a matter in which cooperation between the Commonwealth and the States was necessary if the agreed objective was to be achieved, could very well be justified as a valid exercise of Commonwealth legislative power necessarily incidental to a valid exercise of federal executive power.

The most forthright statement in support of the expansive view of federal executive power was made by Brennan J in *Davis v Commonwealth*:

> With great respect to those who hold an opposing view, the Constitution did not create a mere aggregation of colonies, redistributing powers between the government of the Commonwealth and the governments of the States. The Constitution summoned the Australian nation into existence, thereby conferring a new identity on the people who agreed to unite 'in one indissoluble Federal Commonwealth', melding their history, embracing their cultures, synthesizing their aspirations and their destinies. The reality of the Australian nation is manifest, though the manifestations of its existence cannot be limited by definition. The end and purpose of the Constitution

[139] (1975) 134 CLR 477, 498
[140] (1951) 83 CLR 338, 396(7
[141] (1922) 31 CLR 421, 437(9
[142] (1988) 166 CLR 79, 92-4.

> is to sustain the nation. If the executive power of the Commonwealth extends to the protection of the nation against forces which would weaken it, it extends to the advancement of the nation whereby its strength is fostered. There is no reason to restrict the executive power of the Commonwealth to matters within the heads of legislative power. So cramped a construction of the power would deny to the Australian people many of the symbols of nationhood - a flag or anthem, for example - or the benefit of many national initiatives in science, literature and the arts. It does not follow that the Executive Government of the Commonwealth is the arbiter of its own power or that the executive power of the Commonwealth extends to whatever activity or enterprise the Executive Government deems to be in the national interest. But s.61 does confer on the Executive Government power 'to engage in enterprises and activities peculiarly adapted to the government of a nation and which cannot otherwise be carried on for the benefit of the nation', to repeat what Mason J. said in the A.A.P. Case. In my respectful opinion, that is an appropriate formulation of a criterion to determine whether an enterprise or activity lies within the executive power of the Commonwealth. It invites consideration of the sufficiency of the powers of the States to engage effectively in the enterprise or activity in question and of the need for national action (whether unilateral or in co-operation with the States) to secure the contemplated benefit. The variety of enterprises or activities which might fall for consideration preclude the a priori development of detailed criteria but, as cases are decided, perhaps more precise tests will be developed. [143]

Hughes also involved questions of executive power. However, as with *Duncan*, it was unnecessary to decide the extent of s 61. It was unnecessary to determine whether the conferral of power on the DPP under the Corporations Law was a valid exercise of the Commonwealth's power to legislate in aid of an exercise of Commonwealth executive power because the particular provisions under which *Hughes* was charged (the prescribed interest provisions) could be read down so as to be unquestionably a valid exercise of enumerated Commonwealth power.

> The Court in Hughes did not rule out an expansive interpretation of the executive power:
>
> It may be that in their present operation these provisions are to be supported as laws with respect to matters incidental to the execution of a power vested by Ch II of the Constitution in the Government of the Commonwealth or in any department or officer of the Commonwealth. That is the language of s 51(xxxix) of the Constitution. The Alice Springs Agreement may be an illustration of the propositions stated by Mason J in *Duncan*.[144]

However, neither did it endorse such an interpretation. Indeed the following passage may be taken as a warning against attempts to expand the principle:

[143] (1988) 166 CLR 79, 110-11.
[144] (2000) 74 ALJR 802, 810.

> It is plain enough that s 51(xxxix) empowers the Parliament to legislate in aid of an exercise of the executive power. However, it would be another matter to conclude that this means that the Parliament may legislate in aid of any subject which the Executive Government regards as of national interest and concern, a point made by Wilson and Dawson JJ in *Davis v The Commonwealth* [(1988) 166 CLR 79 at 102-103]. In the same case, Brennan J expressed his opinion that [(1988) 166 CLR 79 at 113]:
>
> 'the legislative power with respect to matters incidental to the execution of the executive power does not extend to the creation of offences except in so far as is necessary to protect the efficacy of the execution by the Executive Government of its powers and capacities'.
>
> Of course, what is involved in the present case is not the creation of new federal offences but the conduct of prosecutions for State offences. Nevertheless, the scope of the executive power, and of s 51(xxxix) in aid of it, remains open to some debate and this is not a suitable occasion to continue it. This is because it is unnecessary to do so, given the other matters to which we now turn.[145]

Similar reservations may be detected in *Wakim.* For example, Gummow and Hayne JJ, commenting on the scope of an implied nationhood power suggested by Kirby J,[146] said:

> No doubt the legislative and executive powers of the Commonwealth must be understood in light of the fact that the Commonwealth is established as the national polity.[147] It may be, then, that there is power in the Commonwealth 'to protect its own existence and the unhindered play of its legitimate activities'. But whatever may be the content of any legislative power implied from the creation and existence of the Commonwealth as the national polity, that power does not authorise the Parliament to consent to the vesting of State jurisdiction in federal courts. Characterising a set of circumstances as having an Australian rather than a local flavour or as a desirable response to the complexity of a modern national society is to use perceived convenience as a criterion of constitutional validity instead of legal analysis and the application of accepted constitutional doctrine.[148]

Efficient, effective and consistent national regulation of Australia's competition law is a matter of benefit to the economy.[149] The economy is national.[150] Its regulation must be national. As with corporate regulation such regulation under the present Constitution cannot be achieved except by co-operative action between the Commonwealth and the States. There is a compelling case to suggest that if the co-operative principle has any real substance it is to be found in validation of the Corporations Law and Competition Code. However, it is suggested that the signs are

145 (2000) 74 ALJR 802, 810.
146 *Re Wakim* (1999) 198 CLR 511, 614-6.
147 Gummow and Hayne JJ referred to many cases to illustrate this point
148 (1999) 198 CLR 511, 581-2.
149 See Hilmer Report, above n 1. Also see *General Motors of Canada Ltd v City National Leasing* [1989] 1 SCR. 641.
150 See the comments of Barwick CJ in the AAP case (1975) 134 CLR 338, 362.

not necessarily good. Although the majority in *Hughes* described the scope of the executive power and of s 51(xxxix) in aid of it as remaining open to some debate,[151] it would seem in light of the decision in *Wakim* and the implications to be drawn from the comments of the majority in Hughes that it is unlikely that the co-operative principle will be permitted to significantly broaden federal executive power beyond the enumerated heads of power. Writing in the aftermath of *Wakim* Professor Saunders described the scope of the co-operative principle in these terms: '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.'[152] Whilst there are compelling reasons for drawing a distinction between the constitutional limits of federal judicial power and executive power, at the end of the day it would seem that a co-operative scheme, even one amounting to something like a national imperative, is not likely to be saved just because it has nationwide consent, is nationally beneficial and is not prohibited by the Constitution.

CONCLUSION

Hughes presents problems for the administrative and enforcement procedures of the Code. There is a real chance that those provisions are constitutionally valid only to the extent that they are able to be read down. A variety of powers would ensure the Code a broader application than Part IV of the *Trade Practices Act.* To this extent it may be said that the Code has more than marginal utility as a regulatory tool. However, this still leaves some constitutional gaps. Whether those gaps are economically important will determine what, if any, steps ought to be taken to close the gaps. It is unlikely that the government would choose to make broad control of the national economy the subject of constitutional reform.[153] The more likely avenue is a reference of powers by the States to the Commonwealth pursuant to s 51(xxxvii). The difficulty is getting the States to refer the necessary powers.[154] Paradoxically, the smaller the constitutional gap,and thus the less compelling the need for any action, the more likely it is that the States would be amenable to such a proposal. Failing constitutional reform or a referral of powers the States must amend their application Acts so that administrative and enforcement powers and functions are shared by Commonwealth and State authorities. Where a breach of the Code involves a commercial entity falling outside the constitutional grasp of the ACCC, the conduct of any proceedings must be in the hands of the relevant State.

[151] (2000) 74 ALJR 802, 810.

[152] Cheryl Saunders, 'In the Shadow of Re Wakim' (1999) 17 *Company and Securities Law Journal* 507, 514.

[153] For some proposals on constitutional reform see Coper, above n 52, 73.

[154] See *The Queen v Hughes* (2000) 74 ALJR 802, 815 (Kirby J); Lovric, above n 126, 282.