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Federalism and the High Court in the 21st Century

The Honourable Robert Mitchell

The invitation asked that I address the topic of Federalism and the High Court. In the first century of the life of the Constitution, such a paper would have considered the outcome of a series of gladiatorial tournaments between the Commonwealth and the States over their respective legislative powers. A betting person would not have wanted to have backed the States in those contests too often. The States regularly lost, and a considerable body of precedent built up establishing the Commonwealth's broad legislative power to engage in and regulate most aspects of economic life in Australia.

Establishment of the Commonwealth's broad legislative powers in a range of areas has resulted in few of those State-Commonwealth gladiatorial contests since the turn of the century. The only significant spectacle was the *Work Choices* case.[1] There, various States challenged the Commonwealth's use of the corporations power[2] and other legislative powers to enact general provisions for industrial relations.[3] In that case, to maintain the analogy with Roman entertainment, the States played with aplomb the role of the Christians to that of the

Commonwealth's lion. As a result, I do not want to focus on the High Court's approach this century to the balance of Commonwealth and State legislative powers in the Federation.

An area of greater activity and more interesting developments has been the High Court's approach to the executive power of the Commonwealth. Here, the Commonwealth has not had things all its own way. The approach of the Court has identified significant limitations in the Commonwealth's executive power which indicate a continuing role for the States in relation to Commonwealth spending. During the same period, the High Court has raised, but not fully answered, questions about the capacity for Commonwealth and State governments to administer jointly national legislation which is enacted by more than one polity.

Cooperative federalism

While the Commonwealth's legislative power to regulate economic activity is broad, it is not complete. There remain limits in the Commonwealth's legislative powers which mean that the Commonwealth cannot always enact comprehensive national legislation which Parliament may consider desirable. Gaps, such as the regulation of industrial relations of certain individuals and partnerships which the Commonwealth's industrial relations laws do not catch, may remain. Cooperation with States may be required in order to develop a comprehensive national law which serves the country's best interests.

One way in which gaps in the Commonwealth's legislative powers may be plugged is for the States to refer legislative power to the Commonwealth.[4] That is not a particularly federal solution, and is one which State parliaments are often understandably reluctant to undertake. Referring power deals State parliaments out of the game and, at least substantially, deprives States of the capacity to influence the development of

legislative policy which may have a significant effect on the State's residents.

Another way of making a national law is for each of the nation's parliaments to pass legislation in the same terms. In practice this proves logistically difficult to achieve for legislation which is regularly amended. Even if it is feasible for each parliament to keep up with amendments so as to maintain uniformity, the question arises as to who is to administer the law. Consistency in administration of the law may be as important as consistency in the terms of the legislation.

An alternative approach which may be practically preferable is for the Commonwealth to pass a law which is adopted by other polities, but administered by a national regulator.

At the turn of the century, the High Court was called on to consider such a legislative scheme involving corporate regulation – the constitution, management and external administration of corporations. This was seen as an area pre-eminently calling for a uniform national approach.

The principal gap in the Commonwealth's legislative power concerned its capacity to make laws for the incorporation of companies, which the High Court had held stood outside the ambit of the corporations power.[5] In addition, the corporations power relevantly allows the Commonwealth to make laws with respect to trading or financial corporations. The view has been expressed that the question of whether a domestic corporation is to be characterised as a trading or financial corporation is to be determined by reference to its actual or intended activities.[6] On that view, there would be some companies which would not be trading or financial corporations, or which would move in and out of that status. This would give rise as to uncertainty about whether the Commonwealth provisions directed to trading and financial corporations would apply to certain companies.

After the High Court held provisions of the *Corporations Act* 1989 (Cth) invalid, which provided for the incorporation of companies,[7] Australian governments agreed on a national approach to corporate regulation. This involved enactment by various parliaments of the Corporations Law as a national law. The text of the Corporations Law was enacted by the Commonwealth Parliament as a law for the Australian Capital Territory,[8] relying on the territories power. The parliaments of the States and the Northern Territory adopted that law, as enacted from time to time, as their own law.[9] That is, outside of the territories, the Corporations Law operated as State law. The Corporations Law made comprehensive provision for the incorporation, internal administration and external administration of domestic corporations.

Although the Corporations Law operated as a State law throughout most of Australia, it was administered by a Commonwealth statutory authority. A Commonwealth Act established the Australian Securities and Investments Commission as the national regulator.[10] The Director of Public Prosecutions, the holder of a Commonwealth statutory office, prosecuted serious indictable offences against the Corporations Law.[11] Federal and non-federal jurisdiction in relation to civil matters arising under the Corporations Law was invested in State Supreme Courts and the Federal Court of Australia.[12]

The elements of the national legislative scheme which I have just described proved to be its undoing. In *Re Wakim; ex parte McNally*,[13] the High Court held that the structure of Chapter III of the Constitution was inconsistent with State parliaments having the capacity to invest the Federal Court with State jurisdiction. In *R v Hughes*,[14] the High Court raised the prospect of a similar structural limitation in relation to investing Commonwealth statutory authorities and officers with State executive power. It is the decision in *Hughes* on which I turn to

focus.

Mr Hughes and his alleged co-offender, Mr Bell, were indicted in the District Court of Western Australia on three counts of making available "prescribed interests" contrary to the Corporations Law of Western Australia.[15] Under the relevant provisions, only a public company could issue investment products classified as "prescribed interests". The charges related to Mr Bell and Mr Hughes, as individuals, raising $300 000 from investors in Western Australia for an investment scheme in the United States.

The indictment against Mr Bell and Mr Hughes was filed on behalf of the Commonwealth Director of Public Prosecutions. The Commonwealth DPP is empowered under her own legislation to prosecute for indictable offences against laws of the Commonwealth.[16] Of course, the Corporations Law as it applied in Western Australia was a State law, so the offences which it created were State offences. The Western Australian Act which adopted the Corporations Law also contained provisions which had the effect of conferring on the Commonwealth DPP power to prosecute offences under the Corporations Law as if they were Commonwealth offences.[17] The Commonwealth *Corporations Act* 1989 provided that the Commonwealth DPP had the functions and powers expressed to be conferred by the Western Australian law.[18]

Mr Hughes applied to quash the indictment on the ground that the Commonwealth DPP had no authority to prosecute the State offences with which he was charged. That application was removed to the High Court. A number of questions were stated for the Full Court.

The joint judgment was delivered by Gleeson, CJ, Gaudron, McHugh, Gummow, Hayne and Callinan, JJ. What the joint judgment actually decided may be shortly stated. The State provisions conferred prosecutorial power on the Commonwealth

DPP as a matter of State law.[19] The *Corporations Act* imposed a duty on the DPP to perform that function and, to the extent necessary, could be read down as limiting the duty to prosecute to State offences which the Commonwealth Parliament could have enacted.[20] The offences with which Hughes was charged related to trade and commerce with other countries, within the Commonwealth's legislative competence under the trade and commerce power. They also related to matters territorially outside Australia, but touching and concerning Australia, within the Commonwealth's legislative competence under the external affairs power.[21] The Commonwealth's *Corporations Act* was supported by these heads of Commonwealth legislative power so far as it authorised the Commonwealth DPP to prosecute the offences charged in the indictment.[22]

So, at the end of the day, the Commonwealth DPP was able to prosecute Mr Hughes. What, you may ask, is the problem? The problem for the Corporations Law arose from a number of questions which the joint judgment posed but did not always answer. Possible answers which were suggested by the discussion in the joint judgment would have imperilled the effective operation of the Corporations Law cooperative legislative scheme.

The joint judgment generally accepted that the Commonwealth Parliament may, in the exercise of the incidental power, permit officers of the Commonwealth holding appointments by or under statute to perform additional functions and accept additional appointments. That general acceptance was, however, expressed to be subject to "what may be the operation of negative implications arising from the Constitution". Reference was made to Chapter III of the Constitution, "The Judicature", concerned with the exercise of the judicial power of the Commonwealth, but it was not said that this exhausts the relevant negative implications which may arise

from the Constitution.[23]

The joint judgment then referred to two propositions which the relevant section of the Commonwealth's *Corporations Act* were said to illustrate. The first is that a State by its laws cannot unilaterally invest functions under that law in officers of the Commonwealth. The second is that a State law which purported to grant a wider power or authority than that the acceptance of which was prescribed by Commonwealth law would, to that extent, be inconsistent with the Commonwealth law and invalid under section 109 of the Constitution.[24]

The third proposition which the joint judgment went on to accept was that a Federal law which imposes duties to perform functions or exercise powers created and conferred by State law must be supported by an appropriate head of Commonwealth legislative power.[25] However, the joint judgment did not "stay to consider" 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.[26]

The joint judgment also identified, as an issue which it was unnecessary to decide, whether the legislative power with respect to matters incidental to the execution of the executive power of the Commonwealth could support a law imposing prosecutorial duties on the Commonwealth DPP. The relevant aspect of the executive power was entry into the Alice Springs Agreement with the States and Northern Territory establishing the Corporations Law cooperative legislative scheme.[27]

The prospect of the issues identified but not conclusively resolved in *Hughes* being determined against the validity of the legislation in some cases proved too troubling for Australian governments. The result was withdrawal of the Corporations Law cooperative arrangements, and substitution of the Corporations Law with the *Corporations Act* 2001 (Cth). The

Corporations Act is a Commonwealth Act applying of its own force throughout the nation, with any gaps in Commonwealth legislative power being covered by a reference of power by the States under section 51(xxxvii) of the Constitution.

The joint judgment in *Hughes* also made a point about Commonwealth spending. Their Honours said that it was the operation of Commonwealth law which enabled the Commonwealth DPP to expend Commonwealth resources in exercise of powers and functions "conferred" by State law.[28] Subsequently, it has been issues concerning the executive power, and particularly the expenditure of money by the Commonwealth, which have given rise to the most vexing constitutional questions for the Commonwealth concerning the balance of power in the Federation. I turn to consider three cases which have considered those issues.

The Commonwealth's spending power

Constitutional issues can arise for the High Court's determination in a number of ways. They can arise from a contest between different governments in the Federation, as in the *Work Choices* case. They can be raised by individuals fighting for their liberty, as in *Hughes*. But they can also arise when unusually determined individuals just get a bee in their bonnet. The tribulations of the Commonwealth in the spending area are largely attributable to two determined individuals.

The first such determined individual was Brian Pape, a law lecturer. More specifically, he was the least popular lecturer in Australia among students in 2009. That was because he challenged Commonwealth legislation providing for the payment of a tax bonus of between $250 and $900 to persons with an annual taxable income of less than $100,000.[29] The bonus was to be paid as a fiscal stimulus in response to the global financial crisis. Most students would have incomes that would entitle

them to the $900 payment, and be in a financial situation which would make them appreciate the money.

In *Pape v Federal Commissioner of Taxation*,[30] a majority of the High Court rejected the challenge, no doubt to the relief of the student population and others who had already spent their anticipated windfalls. But the way in which the Court decided the case exposed limits in the executive power of the Commonwealth to spend money, and Parliament's legislative power to authorise its expenditure.

The Commonwealth had relied on the provision, in sections 81 and 83 of the Constitution, for a Consolidated Revenue Fund from which money could be drawn under the authority of an appropriation law. The tax bonuses in *Pape* were held to be the subject of a standing appropriation of monies which the Commissioner of Taxation was required by relevant legislation to pay to another. Was it enough that the required funds were appropriated by Parliament? The answer by all members of the Court was "no"; that sections 81 and 83 did not confer a substantive spending power. The requirement that funds be appropriated from the Consolidated Revenue Fund ensures parliamentary control over the expenditure of public money. Once money had been appropriated, however, the power of the executive government to spend the money had to be found in the Constitution or statutes made under it.[31]

The legislation in *Pape* was held by a majority of the Court to be valid on the basis that the expenditure fell within the executive power of the Commonwealth, and the impugned laws providing for the payments were authorised by section 51(xxxix) of the Constitution as being incidental to the exercise of that executive power. The executive authority to spend the appropriated money was found to exist as an aspect of the "nationhood" power inherent in section 61 of the Constitution. Under the formulation accepted by Gummow, Crennan and Bell,

JJ, section 61 confers on the executive government power to engage in enterprises and activities peculiarly adapted to the government of the nation and which cannot otherwise be carried on for the benefit of the nation.[32] The joint majority judgment then repeated a point which had been made in *Hughes*. While section 51(xxxix) authorises the Parliament to legislate in aid of the executive power, that does not mean that it may do so in aid of any subject which the executive government regards as of national interest and concern. The tax bonus legislation was, however, seen to be valid on the basis that the global financial crisis represented a national emergency which only the Commonwealth had the financial resources to meet.[33]

The tax bonus legislation was therefore upheld on a rather narrow basis, in the context where the Court identified important limitations on the Commonwealth's spending power.

This decision set the scene for the entry of a second determined individual. Ronald Williams was the father of four children who attended the Darling Heights State School in Queensland. At that school was a chaplain whose services were provided pursuant to an agreement between the Commonwealth and the Scripture Union of Queensland, as part of the Commonwealth's funding of school chaplaincy services. Mr Williams resented this religious intrusion into the academic lives of his children enough to bring proceedings in the High Court seeking to restrain the Commonwealth from funding the chaplaincy service.

In *Williams v The Commonwealth*,[34] the majority of the Court rejected the proposition that, subject to appropriation, the executive power of the Commonwealth extended to the expenditure of public money and entry into contracts on any subject within Commonwealth legislative power. The Court also rejected the proposition that the Commonwealth's power to contract was to be equated with that of a natural person. The

Court held that entry into the agreement with the Scripture Union of Queensland and expenditure of public money on school chaplaincy services was not within the executive power of the Commonwealth in the absence of authorising legislation.

The immediate sequel to this litigation was enactment by the Commonwealth Parliament of legislation purporting to authorise the executive to undertake programs specified by regulation.[35] As you might anticipate, the school chaplaincy program made the cut in the regulations.[36] Mr Williams was not so easily defeated, however. He instituted fresh proceedings in the High Court challenging the validity of the new legislation.

In *Williams v The Commonwealth (No 2)*, that legislation was held to be invalid in its application to the chaplaincy services agreement with the Scripture Union and payments made under the agreement. This was on the basis that the legislation only authorised agreements and expenditure which was within the legislative power of the Commonwealth Parliament to authorise. Authorising entry into the agreement with the Scripture Union and expenditure under that agreement was held to be outside the Commonwealth's legislative power. It was not within the power conferred by section 51(xxiiiA) to make laws with respect to benefits to students, which the Court construed as essentially concerned with material aid. The fact that the Scripture Union might have been regarded as a trading corporation (which the High Court did not decide) did not make the provisions a law with respect to trading corporations. The Court reaffirmed the limits of the Commonwealth's executive power identified in *Williams No 1*.

In identifying these limits on the Commonwealth's executive power to contract and spend, the Court has been influenced by the federal nature of the Constitution. In rejecting the Commonwealth's arguments about the limits of executive power in *Williams No 2*, the plurality said that the

Commonwealth cannot be assumed to have an executive power to spend and contract which is the same as the power of the British executive. Their Honours continued:

> This assumption, which underpinned the arguments advanced by the Commonwealth parties about executive power, denies the 'basal consideration' that the *Constitution* effects a distribution of powers and functions between the Commonwealth and the States. The polity which, as the Commonwealth parties rightly submitted, must 'possess all the powers that it needs in order to function as a polity' is the central polity of a federation in which independent governments exist in the one area and exercise powers in different fields of action carefully defined by law. It is not a polity organised and operating under a unitary system or under a flexible constitution where the Parliament is supreme. The assumption underpinning the Commonwealth parties' submissions about executive power is not right and should be rejected.[37] [citations omitted]

Earlier, in *Pape*, the majority joint judgment had noted that it is only by some constraint having its source in the position of the executive governments of the States that the government of the Commonwealth is denied the power, after appropriation by the Parliament, of expenditure of moneys raised by taxation imposed by the Parliament.[38]

Conclusion

These cases illustrate that the federal nature of the Constitution of Australia carries with it inherent limitations in the Commonwealth's power to spend and contract. The limits in the Commonwealth's legislative and executive powers give rise

to a need for cooperation between governments to achieve national objectives. Frequently, the Commonwealth cannot act alone and requires the cooperation of the States to achieve a desired objective comprehensively. The breadth of the Commonwealth's legislative powers means that it can regulate much economic activity and provide or fund many services. The limits in those powers, however, leave room for exceptions which can imperil the effective administration of the Commonwealth law, if only by reason of a need to consider whether individual cases fall within or outside of the relevant constitutional limitation.

So far as spending and contracting is concerned, the Constitution provides a ready solution. Section 96 of the Constitution empowers the Commonwealth to provide financial assistance to the States on such terms and conditions as the Parliament thinks fit. The Commonwealth clearly has a broad power to give money to the States and either impose conditions or reach agreement with the States about how the money is to be spent. State governments have traditionally found it difficult to say no to offers of money from the Commonwealth. The States, however, cannot be forced to accept money for programs of which the State government does not approve. States will also have the opportunity to influence the policy to be adopted when the Commonwealth seeks to reach agreements with the States as to how the money will be spent.

For national regulation (as opposed to service provision), the challenges following the decision in *Hughes* are greater. It would be unfortunate if the Corporations Law model was not available under the Constitution. A national legislative scheme, administered by a national regulator, without requiring State parliaments to abdicate legislative power, can have significant advantages. While *Hughes* raises questions about the availability of such an approach, it does not necessarily answer the questions

in a manner which is incompatible with such a scheme.

There remain a number of national legislative schemes involving States adopting the laws of another polity. An example of such a scheme is that currently regulating the gas and electricity sector in the majority of States. South Australia is the host jurisdiction for these schemes, the National Law relating to gas and electricity being scheduled to South Australian legislation.[39] Corresponding laws in other States contain provisions which apply the relevant National Law as a law of that State,[40] similarly to the previous Corporations Law scheme.

The National Electricity scheme is administered by a number of bodies, two of which are South Australian bodies operating as national bodies.[41] The Australian Electricity Regulator (AER), however, is a Commonwealth body established by section 44AE of the *Competition and Consumer Act* 2010 (Cth).[42] Functions and powers are conferred upon it by the National Law, which is State law, and here potential obstacles exposed in *Hughes* may come into play.

One thing which is not clearly explained in *Hughes* is the reason why, in the absence of inconsistent Commonwealth legislation, State parliaments cannot unilaterally impose administrative duties on Commonwealth officers and agencies. *Hughes* seems to contemplate that administrative powers, which are not coupled with duties to exercise the power, can be imposed with Commonwealth legislative acquiescence. Why can powers be conferred but no duties imposed in the absence of an appropriate head of Commonwealth legislative power?

It may be that the answer to this question lies in the requirement for legislative authority for Commonwealth expenditure falling outside certain categories. Commonwealth officers will ordinarily exercise State functions by expending Commonwealth resources. The authorisation of that expenditure may be a matter for the Commonwealth Parliament. A

requirement for Commonwealth legislative authority may be thought inconsistent with State parliaments having the capacity to impose a duty on a Commonwealth agency or officer to incur that expenditure in the absence of an authorising Commonwealth law. It may be, therefore, that the key to understanding *Hughes* lies in the Court's observation that it was the operation of Commonwealth law which enabled the Commonwealth DPP to expend Commonwealth resources in exercise of powers and functions "conferred" by State law. If that is correct, the distinction between duties and powers may be of little practical significance. A State law which merely conferred a power with Commonwealth legislative acquiescence, but did not impose a duty to exercise the power and incur associated expenditure of Commonwealth resources, may be valid. Legislative authority from the Commonwealth Parliament to incur the expenditure of Commonwealth resources may, however, still be required for the non-compulsory exercise of that power.

Even if *Hughes* is understood in this way, there remains the question, not answered in *Hughes*, as to the extent to which the incidental power allows the Commonwealth Parliament to authorise expenditure in the implementation of an intergovernmental agreement establishing a national regulatory scheme. There is much to be said for the incidental power extending to authorising the exercise of powers and duties under a cooperative legislative scheme. Particularly where the Commonwealth and States are acting cooperatively, the federal considerations which inform the limits on Commonwealth executive power have much less force.

The Commonwealth Parliament has attempted to address *Hughes* when establishing the AER, which has functions conferred upon it by the National Electricity Law, by enacting a so-called "Hughes clause" into the *Competition and Consumer Act*.

Sections 44AI-44AL of that Act purport to authorise or consent to the conferral of functions on the AER in a way which maintains the constitutional validity of the provisions. In summary, the sections provide that a State or Territory energy law may confer functions or powers, or impose duties, on the AER but only as long as doing so does not contravene any constitutional doctrines restricting the duties that may be imposed on the AER, and as long as the authorisation does not otherwise exceed the legislative power of the Commonwealth. The provisions go on to provide that any duties imposed by a State law which are within the power of the State to impose, and are not inconsistent with any constitutional doctrines limiting the imposition of duties on the AER, are deemed to be imposed by the State law and not by the Commonwealth law. The provisions also deem the opposite to be the case, where it is constitutionally necessary that the duty be imposed by a Commonwealth law, but only to the extent that doing so is within the legislative powers of the Commonwealth and consistent with constitutional doctrines restricting the duties that may be imposed on the AER.

This is an interesting approach, and one which has not yet been tested in the High Court. If, however, *Hughes* is understood as requiring legislative authority from the Commonwealth Parliament to incur the expenditure of Commonwealth resources involved in the non-compulsory exercise of a power conferred by State law, whether this approach will be successful may be questioned.

One thing which is clear is that the last word has not been written on the limits of the Commonwealth's executive power. The area is likely to remain one in which the High Court remains active for some time, and brings with it new challenges for the implementation of national legislative schemes.

Endnotes

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

2. Section 51(xx) of the Commonwealth Constitution.

3. The *Workplace Relations Act* 1996 (Cth), as amended by the *Workplace Relations Amendment (Work Choices) Act* 2005 (Cth).

4. Under section 51(xxxvii) of the Commonwealth Constitution.

5. *New South Wales v The Commonwealth (The Incorporation Case)* (1990) 169 CLR 482.

6. See *The Incorporation Case* 503, cf *The Work Choices Case* [55], [58] [96]-[124]; *Williams v The Commonwealth (No 2)* (2014) 252 CLR 416 [51].

7. In *The Incorporation Case*.

8. Section 5 of the *Corporations Act* 1989 (Cth).

9. In Western Australia this was done by the *Corporations (Western Australia) Act* 1990 (WA).

10. *Australian Securities and Investments Commission Act* 1989 (Cth).

11. Under the *Director of Public Prosecutions Act* 1983 (Cth).

12. Section 42(3) of the *Corporations (Western Australia) Act* (and equivalent legislation in other States) read with section 56 of the Commonwealth *Corporations Act*. See also the *Jurisdiction of Courts (Cross-vesting) Act* 1987 (Cth), and corresponding Acts passed by the States.

13. *Re Wakim; ex parte McNally* (1999) 198 CLR 511.

14. *R v Hughes* [2000] HCA 22; (2000) 202 CLR 535.

15. Sections 1064 and s 1311 of the Corporations Law of Western Australia.

16. Section 6 of the *Director of Public Prosecutions Act* 1983 (Cth).

17. Sections 29 and 31 of the *Corporations (Western Australia) Act* 1990 (WA).

18. Section 47 of the *Corporations Act* 1989 (Cth).

19. *Hughes* [28].

20. *Hughes* [33], [43].

21. *Hughes* [42].

22. *Hughes* [44].

23. *Hughes* [31].

24. *Hughes* [31].

25. *Hughes* [32], [46].

26. *Hughes* [34].

27. *Hughes* [38]-[39].

28. *Hughes* [35].

29. Under sections 5 and 6 of the *Tax Bonus for Working Australians Act (No 2)* 2009 (Cth).

30. *Pape v Federal Commissioner of Taxation* (2009) 238 CLR 1.

31. See *Pape* [8], [111], [320], [357], [604].

32. *Pape* [228]. French, CJ, took a similar view at [132]-[133].

33. *Pape* [241]-[243].

34. *Williams v The Commonwealth* (2012) 248 CLR 156.

35. *Financial Framework Legislation Amendment Act (No 3)* 2012 (Cth), which amended the *Financial Management and Accountability Act* 1997 (Cth) and the *Financial Management and Accountability Regulations* 1997 (Cth).

36. The program described as the "National School Chaplaincy and Student Welfare Program" was specified as a program for which grants might be made in the new Schedule 1AA to the regulations, inserted by the amending Act.

37. *Williams No 2* [83].

38. *Pape* [220].

39. The *National Electricity (South Australia) Act* 1996 (WA), to which the National Electricity Law is a Schedule; the *National Gas (South Australia) Act* 2008 (SA), to which the National Gas Law is a Schedule; the *National Energy Retail Law (South Australia) Act* 2011 (SA), to which the National Energy Retail Law is a Schedule.

40. See, for example, in relation to the National Electricity Law, *Electricity (National Scheme) Act* 1997 (ACT), section 5; *National Electricity (New South Wales) Act* 1997 (NSW), section 6; *Electricity - National Scheme (Queensland) Act* 1997 (Qld), section 6; *Electricity - National Scheme (Tasmania) Act* 1999 (Tas), section 6; *National Electricity (Victoria) Act* 2005 (Vic), section 6.

41. The Australian Energy Market Commission which is established under section 5 of the *Australian Energy Market Commission Establishment Act* 2004 (SA), and the Australian Energy Market Operator which is a company whose functions are provided for under the *National Electricity (South Australia) Act* 1996 (SA) and the National Electricity Law.

42. Section 44AE of the *Competition and Consumer Act* 2010 (Cth).