THE ARCHITECTURE OF PUBLIC HEALTH LAW REFORM: HARMONISATION OF LAW IN A FEDERAL SYSTEM

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[In this article, the author examines the processes for harmonising public health law in Australia. He indicates the range of processes available for the harmonisation of laws in a federal system of government, illustrates how these processes have operated in selected areas of public health law and appraises these alternative processes so that informed choices may be made. The author concludes that whether or not available mechanisms should be invoked to harmonise public health law in Australia depends on what substantive values can be advanced and at what cost. He also considers that it is unrealistic to expect the same method of harmonisation to be suitable for all areas of public health law. The challenge is to ensure that the processes are harnessed to achieve high standards of public health in Australia while simultaneously accommodating other values at the core of Australia's federal system of government.]

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I INTRODUCTION

Every federal system of government must embrace a mixture of unity and diversity of laws. Without some degree of centralisation, the constituent States of a federation would be independent political entities, and not a federation in any meaningful sense of the term. On the other hand, a governmental structure that promotes excessive centralisation, with little regional responsibility, tends toward a unitary rather than a federal system of government. The very notion of federalism thus implies some amalgam of these polar States. The mixture will vary from one federation to another, from one time to another, and from one subject area to another — it is thus highly contingent on the social and political circumstances of the federation.

Whether legal regulation should take place at the State or federal level may often be a contested issue. There are many Commonwealth statutes in the field of public health, each of which creates uniform law on its respective subject matter throughout Australia. However, on the whole, the Commonwealth has had only limited involvement in public health law and a great deal of the relevant regulation exists at the State and Territory level.[1] Indeed, this fragmentation of responsibility between the Commonwealth, States and Territories has been identified as a major barrier to achieving 'best practice' health care.[2]

The need to find an appropriate mix between unity and diversity in federal systems has generated considerable interest in the process of harmonisation of laws. Historically, writers have used the term 'unification of law' rather than 'harmonisation of law' to describe the legal integration of two or more communities. The implication of the term 'unification' is that one should aim to achieve uniformity in the laws of relevant communities — a line-by-line identity of their statute books. More recently, there has been a discernible shift away from the unattainable goal of unification towards the less ambitious but indeterminate notion of harmonisation.[3] It is possible to debate the meaning of this term, but for the purposes of this article, any measure that promotes the legal integration of a political community qualifies for the appellation. This encompasses traditional

[1] Ian Bidmeade and Chris Reynolds, *Public Health Law in Australia: Its Current State and Future Directions* (1997) 8.

[2] Karen Wheelwright, 'Commonwealth and State Powers in Health: A Constitutional Diagnosis' (1995) 21 *Monash University Law Review* 53.

[3] Ronald Cuming, 'Harmonization of Law in Canada: An Overview' in Ronald Cuming (ed), *Perspectives on the Harmonization of Law in Canada* (1985) 4; Martin Boodman, 'The Myth of Harmonization of Laws' (1991) 39 *American Journal of Comparative Law* 699, 707–8; Arthur Close, 'Harmonization of Provincial Legislation in Canada' (1986) 12 *Canadian Business Law Journal* 425, 425–7.

processes for the unification of law, but also includes processes that hinge on legislative complementarity and coordination rather than on legislative identity.[4]

The purpose of this article is to examine the processes of harmonisation as they impact on the reform of public health law in Australia. Public health law covers a wide and diverse range of subject matter, from its core concerns about food, drugs, poisons, therapeutics, tobacco and radiation, to its wider concerns about product safety, environmental protection and occupational health and safety. Indeed, public health law may be seen to cover any area of legal regulation that affects the maintenance and improvement of the health of individuals in a community.[5] Given this broad range of subject matter, this article cannot serve as a comprehensive analysis of the processes of harmonisation of public health law. Its more limited aims are to indicate the range of processes that may be utilised for the harmonisation of laws in a federal system of government; to illustrate how these processes have operated in selected areas of public health law; and to appraise these alternative processes so that informed choices may be made, conscious of the advantages and disadvantages of each method.

A review of the harmonisation of public health law is a timely exercise. In the past, the impetus for change to public health law often came about as a result of reaction to the perceptions of immediate health threats, such as those posed by food poisoning or infectious diseases like legionnaires disease and HIV/AIDS. This often led to piecemeal and uncoordinated reform. Today, public health laws throughout Australia are in a state of flux as they are being systematically reviewed and rewritten in all jurisdictions. This process of review and reform has come about for several reasons.

First and foremost was the endorsement of the National Public Health Partnership by Health Ministers on 4 July 1996, with the general aim of improving collaboration and coordination of activities for the betterment of public health in Australia. Under the Memorandum of Understanding comprising the agreement, the Commonwealth is obliged to facilitate negotiation and agreement between governments in respect of public health, while the States and Territories have undertaken to participate in collaborative efforts with each other.[6] A second impetus for reform has come from the national competition policy adopted by Australian governments in April 1995 in response to the recommendations of the 1993 Hilmer Report.[7] Under clause 5 of the Competition Principles Agreement, every jurisdiction is required to undertake a review of existing legislation that restricts competition by the year 2000,[8] and many of these have a potential impact on public health legislation. Third, there has been increasing pressure on government, particularly at the federal level, to reduce the paperwork and

[4] Cuming, above n 3, 3–4.

[5] Bidmeade and Reynolds, above n 1, 3.

[6] National Public Health Partnership, *Memorandum of Understanding* (endorsed 4 July 1996) <http://hna.ffh.vic.gov.au/nphp>.

[7] Independent Committee of Inquiry into Competition Policy in Australia, *National Competition Policy* (1993) ('Hilmer Report').

[8] National Competition Council, *Compendium of National Competition Policy Agreements* (1997) 16.

compliance burden on small business. In 1996, the Small Business Deregulation Task Force reported to the Commonwealth on ways to reduce the cost to small business of complying with regulatory requirements of all kinds.[9] In his formal response to the report, Prime Minister Howard announced a range of measures to reduce the 'red tape' and to this end, the government has sought to find less burdensome ways to meet the legitimate regulatory goals of protecting health, safety and the environment.[10] Fourth, the mutual recognition laws, which are described later in this article, have generated some pressure to adopt uniform national standards in public health-related fields.[11] Although these laws are premised on the acceptance of disparate product and occupational standards throughout Australia, in practice they have encouraged agreement amongst participating jurisdictions on appropriate national standards in order to avoid a 'race to the bottom' in product regulation.

In addition to the above factors, further pressure for reform of public health law at the Commonwealth level is likely to arise in the future from the enactment of the Legislative Instruments Bill 1996 (Cth). The Bill will formalise the Regulation Impact Statement requirements by mandating comprehensive cost–benefit analysis and consultation requirements prior to the passage of legislative instruments.[12] New and existing legislative instruments will be placed on a register and will be subject to a five-year sunset clause. The Bill is likely to reduce the flow of new legislative instruments in the future, as well as require the remaking of many existing instruments as the sunset period expires. The excoriation of obsolete legislative provisions through this mechanism is undoubtedly a positive force in the review and reform of public health law, as has already proven to be the case in those States whose legislative instruments are subject to sunset clauses in much the same way as that proposed by the Commonwealth Bill.[13]

This article examines the processes for harmonising public health law in Australia as follows. Part II examines unilateral (ie non-cooperative) approaches to harmonisation through federal regulation, on the one hand, and individual State modelling, on the other. Part III considers multilateral (ie cooperative) approaches to harmonisation of public health law. Part IV explores two other important influences on harmonisation, namely, the permeation of international standards into the domestic system and the way in which the uncoordinated actions of individuals may produce beneficial public health outcomes without recourse to legal regulation — for instance, through programs for health promotion. Part V critically appraises the alternative methods of harmonisation by reference to a number of values including government accountability, efficiency and conformity with the principles of federalism. Finally, Part VI seeks to

9 Small Business Deregulation Task Force, *Time for Business* (1996).

10 John Howard, *More Time for Business* (1997).

11 See text accompanying below nn 57–58.

12 Industry Commission, *Regulation and Its Review 1996–97* (1997) 5, 53–66.

13 See, eg, *Statutory Instruments Act 1992* (Qld); *Subordinate Legislation Act 1994* (Vic); *Subordinate Legislation Act 1978* (SA); *Subordinate Legislation Act 1992* (Tas); *Subordinate Legislation Act 1989* (NSW).

synthesise the discussion and present some general conclusions about the harmonisation of public health law in a federal system.

II UNILATERAL APPROACHES TO HARMONISATION

A *Unilateral Federal Action*

> There is no secret about the key to uniformity of law. It is centralization, centralization in the making of law and centralization in the administration of law.[14]

The use of centralised power is a key mechanism through which public health laws may be harmonised in Australia. Two sources of power invite particular comment in the present context. The first is the increasing use that has been made since federation of the legislative powers conferred on the federal Parliament by the *Australian Constitution*; the second is the influence that the Commonwealth exerts over State policy through the grant of conditional financial assistance to the States.

1 *The Growth of Federal Legislation*

The *Australian Constitution* is one which ascribes limited powers to the federal legislature — primarily those enumerated in s 51 of the *Constitution*. Of the many listed powers, only two appear at first sight to have any significant connection with public health law — the power in s 51(ix) to make laws with respect to 'quarantine', and the power in s 51(xxiiiA) to make laws with respect to pharmaceutical, sickness, hospital and other benefits. Since 1908, the Commonwealth has exercised the quarantine power to provide for the quarantine of persons, goods, vessels, animals and plants for the purpose of preserving and maintaining the public health of the 'island continent'.[15] Since the mid 1940s, the Commonwealth has regulated the provision of benefits in relation to health and medical services pursuant to the power in s 51(xxiiiA).[16]

However, there are many general heads of federal legislative power that permit a more expansive regulation of public health in Australia. Bidmeade and Reynolds have identified thirty federal Acts covering instrumentalities, funding and core legislation in the field of public health.[17] It is unnecessary to detail those Acts here, suffice to say that the heads of power used by existing federal Acts and examples of their use include:

- the trade and commerce power (s 51(i)), prohibiting the importation of illicit drugs under the *Customs Act 1901* (Cth);

[14] John Willis, 'Securing Uniformity of Law in a Federal System: Canada' (1944) 5 *University of Toronto Law Journal* 352.

[15] *Quarantine Act 1908* (Cth).

[16] Terry Carney and Peter Hanks, *Australian Social Security Law, Policy and Administration* (1986) 26–7.

[17] Bidmeade and Reynolds, above n 1, 13. See also Wheelwright, above n 2.

- the communications power (s 51(v)), restricting the promotion of unhealthy products through the media under the *Tobacco Advertising Prohibition Act 1992* (Cth);
- the corporations power (s 51(xx)), regulating the safety of products manufactured by corporations under the *Trade Practices Act 1974* (Cth); and
- the external affairs power (s 51(xxix)), implementing for Australia international treaties relating to public health, as described further below.

Sometimes it is not apparent what constitutional heads of power are being relied on to support a piece of federal legislation. On other occasions the legislation is clearly drafted so as to rely on particular heads of power. An example of this is the *Therapeutic Goods Act 1989* (Cth), which regulates the manufacture of goods used for preventing, diagnosing, curing or alleviating diseases and ailments. Section 6 of the Act specifically provides that its operation extends to things done by corporations, things done by natural persons in the course of interstate or overseas trade or commerce, and things done under a law relating to pharmaceutical or repatriation benefits, thus relying on ss 51(xx), (i) and (xxiiiA) of the *Constitution*, respectively. Similarly, the *Tobacco Advertising Prohibition Act 1992* (Cth) prohibits the publication of a tobacco advertisement in Australia by a 'regulated corporation' or by a person in the course of 'regulated trade and commerce', where those terms are defined by reference to the relevant constitutional head of power.[18]

The extent to which federal legislation has been utilised to regulate public health in Australia has not been static over time, for three principal reasons. First, the courts' approach to the interpretation of heads of Commonwealth power is one that has been gradually liberalised over the course of this century. The High Court's preference for broad rather than narrow interpretations of legislative powers,[19] its willingness to embrace an expanded denotation of a term with fixed connotation,[20] and the irrelevance of motive to the characterisation of a law,[21] have all aided this process. The latter principle is particularly important. For example, a law prohibiting the importation of illicit drugs is still a law with respect to overseas trade and commerce and thus within Commonwealth power (ie s 51(i)), although one of the purposes of such a prohibition is obviously the promotion of public health.

Second, the scope for Commonwealth influence has expanded as the substratum of facts, on which the heads of legislative power depend, has changed. This is clearly demonstrated in relation to the external affairs power in s 51(xxix), which authorises the Commonwealth Parliament to enact laws implementing treaties to which Australia is a party. At the time of federation, international law was in its infancy. However, the rise of international law-making in the United Nations era has been phenomenal and is likely to continue its exponential growth. It has been estimated that over 50,000 treaties have been concluded worldwide in

[18] *Tobacco Advertising Prohibition Act 1992* (Cth) ss 8, 15.
[19] *Jumbunna Coal Mine NL v Victorian Coal Miners' Association* (1908) 6 CLR 307, 367–8.
[20] *R v Brislan; Ex parte Williams* (1935) 54 CLR 262.
[21] *Murphyores Inc Pty Ltd v Commonwealth* (1976) 136 CLR 1, 20.

the last 50 years,[22] and Australia is itself party to over 900 bilateral and multilateral treaties.[23] This has dramatically increased the legislative power that the Commonwealth is capable of wielding. This is as true in the field of public health as in other fields, since there are many treaties concerned with maintaining and improving the health and wellbeing of individuals. Some of these, such as the *International Covenant on Economic, Social and Cultural Rights*, seek to advance the health of individuals in general terms.[24] Others set out detailed regulatory regimes in specific areas of public health, under the auspices of specialised agencies of the United Nations, such as the World Health Organisation ('WHO'), the Food and Agricultural Organisation ('FAO'), the United Nations Economic, Scientific and Cultural Organisation ('UNESCO'), and the International Labor Organisation ('ILO'). Other treaties are less directly aimed at health issues but may nonetheless have a significant impact on this area through the regulation of international trade. For example, Australia's treaty with New Zealand on the establishment of closer economic relations has been the impetus for the ongoing harmonisation of the two countries' food standards,[25] and general international trade laws such as the *General Agreement on Tariffs and Trade* ('GATT') may also have indirect effects on public health.[26] Australia is party to many of these international treaties, many of which have been implemented by legislation. Examples are the *Narcotic Drugs Act 1967* (Cth), the *Psychotropic Substances Act 1976* (Cth), and the *Crimes (Traffic in Narcotic Drugs and Psychotropic Substances) Act 1990* (Cth), which have partially implemented several multilateral treaties on drug trafficking.[27]

The third reason for the dynamic nature of this method of harmonisation is that not all federal governments are equal in the use they make of their legislative powers. When the *Constitution* was drafted, it was thought that federal legislative powers would be used only to a limited extent. Yet the Commonwealth has gradually moved into legislative fields once occupied by the States in accordance with the perceived needs of the times and the philosophy of the government of the day. There is still an enormous reservoir of unused Commonwealth power in relation to matters of public health, and the extent to which these latent powers are used remains a matter of discretion. It has often been observed that Labor

[22] Sir Ninian Stephen, 'The Expansion of International Law: Sovereignty and External Affairs' (1995) 39 *Quadrant* 20, 20.

[23] Senate Legal and Constitutional References Committee, *Trick or Treaty? Commonwealth Power to Make and Implement Treaties* (1995) 24–5.

[24] *International Covenant on Economic, Social and Cultural Rights*, opened for signature 16 December 1966, 993 UNTS 3, art 12 (entered into force 3 January 1976).

[25] *Australia–New Zealand Closer Economic Relations Trade Agreement, and Exchange of Letters*, 28 March 1983, Australia–New Zealand, [1983] ATS No 2.

[26] *General Agreement on Tariffs and Trade*, opened for signature 30 October 1947, 55 UNTS 187 (entered into force 1 January 1948).

[27] *Single Convention on Narcotic Drugs*, opened for signature 30 March 1961, [1967] ATS No 31 (entered into force 13 December 1964); *Convention on Psychotropic Substances*, opened for signature 21 February 1971, [1982] ATS No 14 (entered into force 16 August 1976); *United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances*, opened for signature 20 December 1988, [1993] ATS No 4 (entered into force 11 November 1990).

governments have been much more willing to use their legislative powers than conservative governments, due to the former's historic antipathy to federalism and their ideological commitment to the centralisation of power.[28] Conservative governments have often been vigorous in their claims to respect federal values, such as the Fraser government's policy of 'cooperative federalism' in the late 1970s. In this regard, it is interesting to note that John Howard, when Leader of the Opposition in 1995, referred to the widespread disquiet that had been caused by 'illicit use' of the external affairs power,[29] and in government has vowed not to make use of the external affairs power unless absolutely necessary. However, this political dichotomy is obviously an oversimplification. Sir Robert Menzies, a conservative Prime Minister, has reflected on the need for power if great policies are to be achieved,[30] while some Labor administrations have sought to work more cooperatively with States, such as the Hawke government's 'new federalism' of the early 1990s.[31]

2 *Fiscal Coercion*

> The rights of self-government of the States have been fondly supposed to be safeguarded by the Constitution. It left them legally free, but financially bound to the chariot wheels of the central Government.[32]

The dominance of the Commonwealth government in the fiscal arena gives it substantial power to influence or control public health policy in the States, even though the subject matter in question might be beyond the Commonwealth's direct legislative competence. The principal tool at the Commonwealth's disposal is the power in s 96 of the *Constitution* to grant financial assistance to the States on such terms and conditions as it thinks fit. This power would not be such a forceful weapon were it not for the fact that the States have limited sources of revenue and are, in practice, highly dependent on the Commonwealth for the money necessary to fund their expenditure programs.[33]

Three types of grants have been made under s 96. Special assistance grants have been made to the States on a one-off basis for the purpose of alleviating immediate financial stress from any cause — but these are of little continuing

[28] Brian Galligan and David Mardiste, 'Labor's Reconciliation with Federalism' (Discussion Paper No 5, Federalism Research Centre, 1991); Michael Crommelin and Gareth Evans, 'Explorations and Adventures with Commonwealth Powers' in Gareth Evans (ed), *Labor and the Constitution 1972–1975: Essays and Commentaries on the Constitutional Controversies of the Whitlam Years* (1977) 24; Peter Durack, 'The External Affairs Power' (Issues Paper No 1, Melbourne Institute of Public Affairs, 1994) 18.

[29] Hilary Charlesworth, 'International Human Rights Law and Australian Federalism' in Brian Opeskin and Donald Rothwell (eds), *International Law and Australian Federalism* (1997) 288.

[30] Robert Menzies, *Central Power in the Australian Commonwealth: An Examination of the Growth of Commonwealth Power in the Australian Federation* (1967) 9.

[31] Marcus Haward and Graham Smith, 'What's New about the "New Federalism"?' (1992) 27 *Australian Journal of Political Science* 39.

[32] Letter from Alfred Deakin to the *Morning Post*, 1 April 1902, in John La Nauze (ed), *Federated Australia: Selections from Letters to the Morning Post 1900–1910* (1968) 97.

[33] Currently around 40 per cent of the States' income comes from Commonwealth grants: Russell Mathews and Bhajan Grewal, *The Public Sector in Jeopardy: Australian Fiscal Federalism from Whitlam to Keating* (1997) 769. This figure is likely to jump as a result of the High Court's invalidation of State franchise taxes in *Ngo Ngo Ha v New South Wales* (1997) 146 ALR 355.

significance. General revenue grants are provided by the Commonwealth to the States as part of their general budgets and serve to compensate the States for the income tax lost in consequence of the Commonwealth's exclusive occupation of that field. Nominally, at least, general revenue grants are 'un-tied' and may be expended by the States for any purpose.[34] The third type of grant — the specific purpose grant — is the most important for present purposes. Although they were not used until 1923,[35] they have become a regular feature of the federal landscape. In 1997–98, specific purpose grants are expected to account for around 52 per cent of total gross payments to the States from the Commonwealth; this is consistent with the general upward trend over the last 20 years.[36] These grants enable the Commonwealth to give financial assistance on the condition that the money be spent in particular areas (eg schools, health) or that the recipient implement specific policies. Conditions of the former type are not necessarily coercive, especially where the grant designates an area that the States would have already spent money on had the grant been a general purpose grant. However, the stipulation of detailed policies is a different issue, since it has been a principal means by which the Commonwealth has extended its influence into areas of traditional State responsibility.[37] Needless to say, the States have often objected to the Commonwealth taking over the planning and direction of State programs in this way.

Health, like education, has been an area in which the Commonwealth has exerted considerable influence through the mechanism of conditional federal funding. Of all specific purpose grants for current (rather than capital) purposes in 1997–98, health accounts for 36 per cent of outlays and education a further 43 per cent.[38] A complete analysis of the federal influence on public health law would require a detailed examination of all relevant appropriations legislation and the specific terms on which the grants have been made. In the absence of such a study, some evidence of that influence is indicated by the variety of health-related programs receiving conditional funding from the federal government. The 1997–98 Budget Papers list the following items amongst the special purpose grants for health — health program grants, dental programs, hospital funding, Medicare, magnetic resonance imaging, repatriation hospitals, broad-banded health services, highly specialised drug programs, national public health, aged care, home and community care, essential vaccines, youth health, rural obstetrics, rural health, student scholarships and youth suicide.[39] When these broad categories are further broken down, it is apparent that the federal purse strings reach the

[34] Cf Geoffrey Brennan and Jonathon Pincus, 'An Implicit Contract Theory of Intergovernmental Grants' (1990) 20 *Publius: The Journal of Federalism* 129, who argue that general revenue grants can have significant effects on the spending behaviour of recipient States.

[35] David Chessell, 'Financial Centralisation: The Lion in the Path' in Samuel Griffith Society, *Upholding the Australian Constitution* (1992) 96; A J Myers, 'The Grants Power: Key to Commonwealth–State Financial Relations' (1970) 7 *Melbourne University Law Review* 549.

[36] Commonwealth, *Federal Financial Relations 1997–98*, Budget Paper No 3 (1997) 39.

[37] Ibid 37; Mathews and Grewal, above n 33, 753; Bidmeade and Reynolds, above n 1, 7.

[38] These figures are derived from Commonwealth, *Federal Financial Relations 1997–98*, above n 36, 50–63.

[39] Ibid 52–5.

very core of public health law in Australia. For example, the items listed under 'national public health' grants include subsidies for health promotion, disease prevention, HIV/AIDS control, drug strategies, childhood immunisation and cancer screening.

B *Unilateral State Action*

> Pre-packaged models have enormous appeal to actors in both legislative and executive branches of the state for a simple reason. They have limited time and energy and a limitless range of issues on which they would like to be seen to be making progress. ... Hence, when someone can deliver to them a pre-packaged model that is good enough, it is often an efficient use of their time to buy it instead of initiating a search for the best solution.[40]

Federal action is not the only means by which law may by harmonised through unilateral, noncooperative mechanisms. Many State statutes relating to public health law in Australia have a high degree of commonality, not because of conscious cooperation between the States, but because the statutes are derived from a common source. The first major piece of public health legislation in the United Kingdom — the *Public Health Act 1848* (UK)[41] — was used as a model for legislation in the colony of Victoria in 1854 and later by other colonies.[42] Similarly, many English laws were substantially copied by colonial and State legislatures in areas as diverse as sale of goods, partnership and bills of exchange.[43]

The English origin of many State laws is a product of Australia's colonial history, yet the practice of borrowing legislative developments from other jurisdictions continues unabated. Today, however, there is much greater eclecticism of the borrowing — suitable models are more likely to be found in innovative legislation of other Australian States and foreign countries than in the laws of England. Examples of this may be seen in the public health field, where State legislation representing 'best practice' may serve as a useful basis for modelling. It has been noted, for instance, that the *Tobacco Act 1987* (Vic) was used as a model for other States in restricting tobacco advertising and sponsorship;[44] and the *Smoke-Free Areas (Enclosed Public Places) Act 1994* (ACT) is regarded as the leading legislation of its kind and a useful model for other States and Territories in so far as it addresses the health risks associated with passive exposure to tobacco smoke.[45]

In the social sciences, 'modelling' is the term used to describe a process whereby one actor observes, interprets and copies the action of another. How-

[40] John Braithwaite, 'A Sociology of Modelling and the Politics of Empowerment' (1994) 45 *British Journal of Sociology* 445, 462.

[41] *Public Health Act 1848* (UK) 11 & 12 Vict, c 63.

[42] *Public Health Act 1854* (Vic). See generally Bidmeade and Reynolds, above n 1, 4; Christopher Reynolds, *Public Health Law in Australia* (1995) 91–7.

[43] John Goldring, '"Unification and Harmonisation" of the Rules of Law' (1978) 9 *Federal Law Review* 284, 309–10.

[44] Bidmeade and Reynolds, above n 1, 36.

[45] Ibid 18.

ever, the term signifies more than mere imitation or mimicry — modelling is observational learning, with the consequence that there may be substantially common behaviour without identical outcomes. An interesting feature of harmonisation through modelling is that it is a voluntary process that has its foundations in the behaviour of independent and uncoordinated actors — in short, it is unilateral.

There is voluminous sociological literature on modelling, particularly in relation to the diffusion of innovations,[46] though little of it addresses the modelling of institutions of government or the dissemination of laws. In particular, a major empirical study of the modelling of laws in Australia is yet to be written. However, the American and Canadian literature is instructive in so far as it indicates that modelling is not a random process but follows significant patterns.[47] It is strongest amongst actors who share similar attributes, who are geographically proximate, and who have well-developed channels of communication.[48] However, although these factors describe the way in which modelling is patterned, they do not explain why modelling occurs. Here it is important to realise that there are many actors in the public health field who have an interest of one kind or another in promoting model laws for consideration by governments and legislatures. Sometimes these are independent professional bodies. An example is the National Health and Medical Research Council ('NHMRC'), which developed model legislation regulating radiation control in the 1950s, as well as drafting the model Food Act in 1980. The latter Act resulted in similar legislation being adopted first in Queensland and then in all Australian jurisdictions, although there was no line-by-line uniformity in the food laws due to different drafting styles, legislative changes and interpretation.[49] Since then, the NHMRC has remained involved in the ongoing review of food legislation in Australia, though its formal role has declined somewhat. The Australian New Zealand Food Authority ('ANZFA') is currently undertaking a review of the model Food Act with a view to achieving a degree of national uniformity that eluded the laws based on the NHMRC model.

III MULTILATERAL APPROACHES TO HARMONISATION

> As the Australian states seek to use their own powers in a positive way to abort Commonwealth expansion at their expense, they will find, even as have the

[46] See, eg, Klaus Musmann and William Kennedy, *Diffusion of Innovations: A Select Bibliography* (1989); Everett Rogers, *Diffusion of Innovations* (3rd ed, 1983).

[47] Rogers, above n 46; Bradley Cannon and Lawrence Baum, 'Patterns of Adoption of Tort Law Innovations: An Application of Diffusion Theory to Judicial Doctrines' (1981) 75 *American Political Science Review* 975; Jack Walker, 'The Diffusion of Innovations among the American States' (1969) 63 *American Political Science Review* 880; Dale Poel, 'The Diffusion of Legislation among the Canadian Provinces: A Statistical Analysis' (1976) 9 *Canadian Journal of Political Science* 605.

[48] Braithwaite, above n 40.

[49] Bidmeade and Reynolds, above n 1, 50.

> American states, that interstate co-operation is a powerful bow and uniform law provides a sound and reliable arrow.[50]

For many government regulators, the heartland of harmonisation of law is intergovernmental cooperation. In this constellation of processes, the executive arm of the Commonwealth, State and Territory governments (or some of them) agree to uniform principles, standards or laws, which are then implemented by legislation in each participating jurisdiction. The literature on the economics of collective action seeks to explain the conditions under which such cooperation may resolve certain economic problems without the need for centralised action.[51] Yet it seems intuitive that in a federation such as Australia — where the number of players is small, the interactions amongst the players are repeated and the costs of mutual monitoring are low — cooperative arrangements are likely to be highly successful mechanisms for coordinating intergovernmental activity.

In contrast to the United States and Canada, Australia has been a relative latecomer to the processes of cooperative harmonisation. Early attempts at cooperation included coordinated action in the 1930s in respect of air navigation, in the 1950s in respect of hire purchase, and in the 1960s in respect of company law.[52] Since then, intergovernmental relations have bloomed. Ministerial Councils, and their supporting committees of government officials, now exist in every major portfolio. A compendium of Commonwealth–State Ministerial Councils currently lists 21 functional groupings (excluding Heads of Government meetings), representing a conscious consolidation of Ministerial Councils, which numbered 45 in 1993.[53] Several of these Councils have jurisdiction over matters affecting public health, including the Health and Community Services Ministerial Council, the Ministerial Council on Drug Strategy and the National Environment Protection Council. It is a matter of some concern that there is a fragmentation of responsibility for public health issues, and it is worth noting that the possibility has been raised of creating a Ministerial Council on Public Health in conjunction with the National Public Health Partnership.[54]

Multilateral harmonisation can be achieved in a variety of ways. The most important methods of cooperation are as follows.[55]

[50] Richard Leach, 'The Uniform Law Movement in Australia' (1963) 12 *American Journal of Comparative Law* 206, 222.

[51] See, eg, Russell Hardin, *Collective Action* (1982); Mancur Olson, *The Logic of Collective Action: Public Goods and the Theory of Groups* (1965).

[52] For an historical account of cooperative schemes, see Leach, above n 50; Harold Nicholas, *The Australian Constitution: An Analysis* (2nd ed, 1952) 37–54; Royal Commission on the Constitution of the Commonwealth, *Report of the Royal Commission on the Constitution* (1929) 176–86.

[53] Commonwealth–State Relations Secretariat, *Commonwealth–State Ministerial Councils: A Compendium* (1994) i.

[54] Bidmeade and Reynolds, above n 1, 86.

[55] Working Party of Chairs of Scrutiny of Legislation Committees throughout Australia, *Scrutiny of National Scheme Legislation and the Desirability of Uniform Scrutiny Principles* (Discussion Paper No 1, 1995) 6.

A *Reciprocal Schemes*

Reciprocity is a well-tried but relatively low-level form of harmonisation. It permits variations in the laws of the participating jurisdictions but enables one jurisdiction to recognise, on a reciprocal basis, a status conferred by another jurisdiction.[56] A good example in Australia is the mutual recognition scheme, which originated in a Special Premiers' Conference in 1990 and came into force for most States in 1993.[57] One of the objects of the scheme is to ensure that goods meeting prescribed product standards in their State of origin are entitled to be sold in all other States and Territories. The difference between this process and unification is that whereas the latter is concerned with the *definition* of uniform standards, mutual recognition is concerned with the *recognition* of possibly divergent standards. However, in practice, mutual recognition has generated some pressure to adopt uniform national standards so that the lowest common denominator does not prevail.[58] An example of a reciprocal scheme affecting public health at the international level is the *Convention for the Mutual Recognition of Inspections in respect of the Manufacture of Pharmaceutical Products*,[59] which allows for reciprocal exchange of information relating to pharmaceuticals.[60] The convention has been in force in Australia since 1993.

B *Mirror Legislation*

The hire purchase and company law schemes adopted in the 1950s and 1960s took the form of a ministerial agreement on a detailed draft statute, which was then enacted by separate legislation in each participating jurisdiction. This mechanism produces virtual uniformity at the outset, but this often erodes over time as local legislators exercise their independent political judgment and make piecemeal changes as they see fit — as happened both in the case of hire purchase and company law. This type of scheme, which is often described as 'mirror legislation', is still an option for cooperative harmonisation but it has been supplemented with several alternative mechanisms.

C *Application of Laws Method*

To overcome the difficulty experienced in keeping mirror legislation uniform over time, an alternative mechanism has recently become popular. This method involves the enactment of a law in one jurisdiction (the host jurisdiction), and the

[56] Giandomenico Majone, 'Mutual Recognition in Federal Type Systems' in Anne Mullins and Cheryl Saunders (eds), *Economic Union in Federal Systems* (1994) 69.

[57] See generally Commonwealth–State Committee on Regulatory Reform, *The Mutual Recognition of Standards and Regulations in Australia: A Discussion Paper* (1991) and various papers in Tony Thomas and Cheryl Saunders (eds), *The Australian Mutual Recognition Scheme: A New Approach to an Old Problem* (1995).

[58] Bidmeade and Reynolds, above n 1, 6, 11.

[59] *Convention for the Mutual Recognition of Inspections in respect of the Manufacture of Pharmaceutical Products*, opened for signature 8 October 1970, [1993] ATS No 2 (entered into force 26 May 1971).

[60] Bidmeade and Reynolds, above n 1, 53. See also KPMG, *Review of Therapeutic Goods Administration on behalf of the Department of Health & Family Services* (1997) 66–71.

application of that law in other participating jurisdictions. The host legislation contains all the substantive provisions that are to be enacted and its precise terms are agreed to by the relevant Ministerial Council prior to enactment by the host. Every other participating jurisdiction then passes a statute giving the host legislation the force of law within that jurisdiction. The advantage of this is that later amendments to the scheme require legislative change in the host jurisdiction alone — the application provisions of the other States and Territories simply pick up any changes so made.[61] Two popular hosts have been the Commonwealth and Queensland — the Commonwealth because of its ability to pass a law for a Territory (usually the Australian Capital Territory) under s 122 of the *Constitution*, and Queensland because it is the only unicameral State legislature in Australia,[62] and therefore the only State whose executive government can guarantee passage of the agreed law through Parliament without alteration. A slight variation of the application of laws method has been used to considerable effect in relation to food standards in Australia — that is, the rules specifying the maximum contaminants or residues in food products and the microbial status of those products. Under current arrangements, the Australia New Zealand Food Authority ('ANZFA') drafts a Food Standards Code for consideration by the Australia New Zealand Food Standards Council (a Ministerial Council). If approved by the Council, the Food Standards Code is (for the most part) adopted by reference and without amendment in each participating State and Territory,[63] thereby producing a high degree of consistency between food standards throughout Australia. Unfortunately, this consistency has not extended to State and Territory food legislation itself, which still reflects the patchy modelling of the NHMRC's 1980 model Food Act discussed above in Part II(B).

D *Agreed Policies: Separately Drafted Laws*

In some cases, Ministerial Councils do not agree to specific laws, but rather to detailed policies, which must then be implemented by appropriate legislation in each State. This was done in relation to the 'uniform' gun laws following the Port Arthur massacre. In a succession of meetings in 1996, the Australasian Police Ministers' Council made detailed resolutions concerning the regulation of firearms, which each State and Territory was then expected to implement faithfully by legislation.[64] This method of harmonisation is less prescriptive than some other methods of cooperative harmonisation, since each jurisdiction has

61 See generally *Gould v Brown* (1998) 151 ALR 395, 491–2, where Kirby J rejects the view that this constitutes an abdication of legislative function and duty by the State applying the law of the host jurisdiction.

62 The Northern Territory and the Australian Capital Territory legislatures are also unicameral.

63 Bidmeade and Reynolds, above n 1, 50; Reynolds, above n 42, 153–4. Eg, the *Food Standards Code (Incorporation) Regulation 1995* (NSW) provides in s 4 that 'the Food Standards Code, as in force from time to time, is incorporated in this Regulation and applies as a law of New South Wales'.

64 See generally Australasian Police Ministers' Council, Special Firearms Meeting (Canberra, 10 May 1996) Resolutions; Australasian Police Ministers' Council, Special Firearms Meeting (Canberra, 17 July 1996) Resolutions; The Honourable Daryl Williams, *Attorney-General*, Press Release, No 136 (23 August 1996).

some flexibility in deciding the precise manner by which the agreed policies are implemented. It is necessary to strike a balance here — the more detailed the agreed policies, the greater the degree of harmonisation but the less the autonomy of the States in drafting their own laws.

E *Complementary Schemes*

Complementary schemes are used where no jurisdiction can achieve a desired objective by itself, so complementary laws must be enacted cooperatively by several jurisdictions if the legislative goal is to be met. A typical example is where the Commonwealth cannot completely regulate a subject matter because of limitations on its constitutional power. This was the case in relation to therapeutic goods, as federal constitutional power did not extend to regulating unincorporated bodies engaged in purely intrastate trade.[65] State legislation was therefore required to fill in the gaps, although the particular method of doing so varied amongst different States. New South Wales adopted the application of laws method — applying the Commonwealth *Therapeutic Goods Act 1989* (Cth) as a law of New South Wales, but modified to extend the operation of that Act to unincorporated bodies engaged in intrastate trade or commerce.[66] In contrast, Victoria adopted the mirror legislation method — enacting parallel legislation for the State (though extended in respect of unincorporated bodies, etc) with the familiar difficulty that the State law must be amended each time the Commonwealth Act is amended.[67]

F *Joint Federal–State Bodies*

One example of a complementary arrangement is the establishment of a permanent federal–State body charged with the joint administration of a particular area. Typically, the body is established by federal legislation and vested with specified powers by other participating governments. The Murray River Commission created in 1914 is generally regarded as a prototype of this kind of arrangement, but many similar bodies have been established since then to deal with problems that are beyond the capacity of any single government to manage alone.[68] The High Court has adopted a generous attitude toward such schemes, recognising that the purpose and advantage of cooperation is that the Commonwealth and States may achieve objects that neither could achieve alone.[69] As Gibbs CJ observed in one of the central cases in this field:

[65] For a discussion of the ambit of the *Therapeutic Goods Act 1989* (Cth), see above Part II(A)(1).

[66] *Poisons Amendment (Therapeutic Goods) Act 1996* (NSW), inserting a new Part 4A into the *Poisons and Therapeutic Goods Act 1966* (NSW). See generally Bidmeade and Reynolds, above n 1, 54.

[67] *Therapeutic Goods (Victoria) Act 1994* (Vic).

[68] Roger Wettenhall, 'Intergovernmental Agencies: Lubricating a Federal System' (1985) 61 *Current Affairs Bulletin* 28.

[69] See, eg, *Deputy Federal Commissioner of Taxation (NSW) v W R Moran Pty Ltd* (1939) 61 CLR 735, 774 (Starke J).

> 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 ... a uniform and complete legislative scheme.[70]

G *Reference of Power to the Commonwealth*

The *Constitution* provides an important mechanism by which State and federal governments may cooperate to solve problems arising from limitations on federal legislative power. Section 51(xxxvii) empowers the federal legislature to make laws with respect to

> [m]atters referred to the Parliament of the Commonwealth by the Parliament or Parliaments of any State or States, but so that the law shall extend only to States by whose Parliaments the matter is referred, or which afterwards adopt the law.[71]

The section thus contemplates two independent paths — a reference of power from a State to the Commonwealth, or a later adoption by a State of a Commonwealth law that has been made pursuant to another State's reference.[72] Successful use of the reference power is premised, at the very least, on cooperation between the Commonwealth and one State. This is because the Commonwealth's power is only enlivened by the State's reference, and is limited to the subject matter and duration of that reference. However, this type of cooperation cannot harmonise law throughout Australia because any federal legislation made pursuant to an isolated State reference will apply to that State alone. There may be an additional aspect of cooperation where the States have agreed amongst themselves to refer the same matter to the Commonwealth as part of a national scheme, as was the case with the mutual recognition scheme. A similar reference of power by all States does have the capacity to harmonise law because federal legislation, if it ensues, will have national application.

Although s 51(xxxvii) has been subject to little judicial analysis and academic commentary,[73] several aspects of its operation are clear. First, a matter can be referred to the Commonwealth by a State either in specific terms[74] or in general terms. In the latter case, the Commonwealth has a discretion as to the precise

[70] *R v Duncan; Ex parte Australian Iron and Steel Pty Ltd* (1983) 158 CLR 535, 552.

[71] See also s 51(xxxviii), which empowers the federal Parliament to make certain laws at the request or with the concurrence of the State Parliaments directly concerned.

[72] As to the latter path, see James Thomson, 'Adopting Commonwealth Laws: Section 51(xxxvii) of the *Australian Constitution*' (1993) 4 *Public Law Review* 153.

[73] See generally Ross Anderson, 'Reference of Powers by the States to the Commonwealth' (1951) 2 *University of Western Australia Law Review* 1; J T Ludeke, 'The Reference of Industrial Powers from the States to the Commonwealth' (1980) 22 *Journal of Industrial Relations* 231; Graeme Johnson, 'The Reference Power in the *Australian Constitution*' (1973) 9 *Melbourne University Law Review* 42; Greg Craven, 'Death of Placitum: The Fall and Fall of the Reference Power' (1990) 1 *Public Law Review* 285.

[74] See, eg, the references by New South Wales and Queensland in relation to mutual recognition: *Mutual Recognition (New South Wales) Act 1992* (NSW) s 4; *Mutual Recognition (Queensland) Act 1992* (Qld) s 5.

content of the legislation that it enacts in reliance on the reference.[75] Second, legislative power over the referred matter does not become exclusive to the federal Parliament by virtue of the reference — it may be exercised concurrently by the States, subject to s 109 of the Constitution.[76] Third, a State need not refer a matter for all time.[77] A reference may be conditional, for example, on a similar reference being made by other States, or terminable on the happening of a particular event (such as the Governor's proclamation).

Given the apparent flexibility of s 51(xxxvii) and the notorious difficulty of securing constitutional change in Australia by means of referendum, the section might have been thought of as an attractive mechanism for securing change. In fact, until recently, little effective use was made of the section. However, since the early 1980s, there has been a much greater willingness on the part of many States to refer powers to the Commonwealth to solve certain intractable problems. Notable examples in public health law are references in respect of meat inspection by New South Wales and Victoria between 1983 and 1987, and those in respect of mutual recognition by all States between 1992 and 1996.[78] The potential to use the reference of power mechanism to achieve cooperative solutions to problems of public health law in Australia has probably been undervalued and is a matter deserving further attention by government.

IV HARMONISATION AND THE LIMITS OF THE LAW

The processes of harmonisation considered above focused on the actions of Australian legislators in enacting laws, and on Australian governments in making cooperative agreements about the enactment of laws. However, the harmonisation of disparate *laws* is not the only path to achieving harmonised public health *outcomes*. Accordingly, this section considers two further harmonising processes — the harmonisation 'from above' that comes from the percolation of supranational standards into the domestic environment and the harmonisation 'from below' that comes from the similar but uncoordinated action of individuals with respect to health.

A *Harmonisation from Above: Supranational Standard-Setting*

Many important principles affecting public health law in Australia are derived from the myriad of international declarations, recommendations, principles, rules and standards promulgated by international organisations — so-called international 'soft law'.[79] These instruments lack binding legal effect for nation-states,

[75] The breadth of the discretion may be limited by the terms of any intergovernmental agreement that supports the reference.

[76] *Graham v Paterson* (1950) 81 CLR 1, 19–20 (Latham CJ), 25 (Williams J).

[77] *R v Public Vehicles Licensing Appeal Tribunal (Tas); Ex parte Australian National Airways Pty Ltd* (1964) 113 CLR 207, 226.

[78] New South Wales and Queensland referred power to the Commonwealth; other States adopted the Commonwealth Act in accordance with s 51(xxxvii).

[79] Christine Chinkin, 'The Challenge of Soft Law: Development and Change in International Law' (1989) 38 *International and Comparative Law Quarterly* 850, 851. See also R Baxter, 'Interna-

but there is little doubt that they have significant political and moral effects.[80] An example in the public health field is the International Food Standards promulgated by the Codex Alimentarius Commission ('Codex').[81] This body was established in 1962 under the auspices of two United Nations agencies, WHO and FAO, and is increasingly becoming a benchmark for national food standards. From 1953 to 1987, when the NHMRC played a significant role in formulating Australian food standards, the NHMRC took 'due cognizance' of the Codex standards in making recommendations to the States and Territories regarding their respective food laws.[82] The current arrangements do not differ significantly in this regard — the Australia New Zealand Food Authority 'ANZFA' makes recommendations on food standards that are also based on, though not necessarily tied to, the Codex standards.[83]

The reason for the patterning of Australian standards on non-binding international standards may be readily explained.[84] Not only is the exportability of Australian food products affected by our compliance with the minimum standards set by the Codex Commission, but unjustifiably stringent Australian standards on imported foods may be subject to challenge under the World Trade Organisation ('WTO') dispute resolution procedures.[85] This issue arose in 1997 in relation to the importation of foreign cheese.[86] Emmental, Gruyère and some other foreign cheeses are made from raw (ie unpasteurised) milk and do not meet Australian quarantine regulations requiring all foreign cheeses to be made with pasteurised or 'thermised' milk.[87] The prohibition on importation has led to diplomatic negotiations with French and Swiss authorities, who regard the Australian regulation as an unjustifiable trade barrier amenable to WTO procedures. If the matter is resolved in favour of the foreign producers there will undoubtedly be pressure to authorise the manufacture of raw milk cheese in Australia. In short, economic, social and political pressures promote Australia's compliance with

tional Law in "Her Infinite Variety"' (1980) 29 *International and Comparative Law Quarterly* 549.

80 Tadeusz Gruchalla-Wesierski, 'A Framework for Understanding "Soft Law"' (1984) 30 *McGill Law Journal* 37, 65–70; Michael Bothe, 'Legal and Non-Legal Norms: A Meaningful Distinction in International Relations?' (1980) 11 *Netherlands Yearbook of International Law* 65, 70–5.

81 See generally Louise Sylvan, 'Global Trade, Influence and Power' in Philip Alston and Madelaine Chiam (eds), *Treaty-making and Australia: Globalisation versus Sovereignty?* (1995) 107.

82 National Health and Medical Research Council, *Model Food Legislation* (revised edition, 1986) 'Introduction'. See also Helen Nelson, 'Recipes for Uniformity: The Case of Food Standards' (1992) 27 *Australian Journal of Political Science* 78.

83 This is given legislative force under s 10(e) of the *Australia New Zealand Food Authority Act 1991* (Cth) which requires the Authority to have regard to the objective of promoting 'consistency between domestic and international food standards where these are at variance'. This is the last of five objectives to be considered by the Authority in hierarchical order. The first is the protection of public health and safety.

84 Sylvan, above n 81, 108–9.

85 *Marrakesh Agreement Establishing the World Trade Organization*, opened for signature 15 April 1994, [1995] ATS No 8, Annex 2: Understanding on Rules and Procedures Governing the Settlement of Disputes (entered into force 1 January 1995).

86 Cherry Ripe, 'Cheesed Off', *The Australian* (Sydney), 30 December 1997, 12.

87 Pasteurised milk is taken to 72°C for 15 seconds. Milk is 'thermised' when it is effectively cooked during the process of cheese-making: ibid.

international standards, notwithstanding that those standards are not legally binding on Australia.

B *Harmonisation from Below: The Role of Individuals*

Public health law has traditionally been regarded as 'top down' and prescriptive — typically, statutes and regulations have specified in great detail the processes to be followed or outcomes to be achieved in pursuit of public health.[88] However, legal regulation is only one means of influencing conduct so as to advance public health — individual action taken without the threat of violation of law may have a like effect. This does not mean that laws do not play a significant role in influencing the background conditions against which individuals make their health-related decisions. Rather, individuals, in responding to parameters that include legal regulation, make health-related decisions in ways that may produce harmonised public health outcomes, and this may be achieved without the need to harmonise laws themselves.

There are several ways in which individual actors may be encouraged to achieve a desired public health outcome without legal regulation.[89] First, favourable public health outcomes may be achieved by enabling individuals to make their own decisions on the basis of relevant and accessible information. An example is the 'Slip Slop Slap' campaign conducted in the 1980s to increase people's awareness of the health dangers posed by sun exposure and to encourage the taking of protective measures. Clearly, governments may actively assist in health promotion through general health authorities, dedicated health promotion agencies and laws requiring manufacturers to disclose information on product labels.[90]

A second method of influencing the choice of individuals is by providing economic incentives to change behaviour. Examples of this approach include the imposition of high rates of taxation on deleterious products, such as cigarettes, or the provision of subsidies for activities that are beneficial to public health, such as childhood immunisation against infectious diseases. The use of price incentives to affect behaviour is one means of correcting market externalities. In the case of smoking, the social cost of the activity is greater than the financial cost borne by the individual smoker because of the cost to the health care system of attending to that person during subsequent ill health. In the case of immunisation, the benefit to the community of a child being immunised is greater than the benefit to that child alone because the community as a whole gains from the reduced prevalence of the disease. Appropriate correction of these externalities will depend on setting the right level of taxes or subsidies.

A third method is self-regulation through voluntary codes of conduct or industry standards, which have been promoted in recent times as an alternative and less

[88] Bidmeade and Reynolds, above n 1, 5.

[89] For an overview, see Commonwealth, Office of Regulation Review, *A Guide to Regulation* (1997) E.

[90] Ibid E 9–10; Reynolds, above n 42, 254–60.

burdensome means of regulating business activity. In 1996, the Small Business Deregulation Task Force recommended that '[g]overnments should consider industry self-regulation as one of the first regulatory options',[91] and cited the potential advantages over prescriptive regulation as flexibility, efficiency, reduced compliance costs, responsiveness and effectiveness.[92] In its formal response, the government agreed, stating that it was 'keen for industry to take ownership and responsibility for developing effective and efficient self-regulatory mechanisms where this is appropriate'.[93] An example from the field of occupational health and safety is the Codes of Practice that are often agreed to between industry representatives, employee representatives and the government regulator as guides for the conduct of employers. Failure to comply with a Code does not directly result in legal sanctions — as would, say, breach of a statutory regulation — but it may be evidence that the employer failed to comply with a statutory duty of care, hence providing an incentive to comply.[94]

V APPRAISAL

> Integration, in the sense of harmonization, is not an end in itself, but a means to some ends and a hindrance to others.[95]

The current governmental interest in the harmonisation of public health law calls for a critical appraisal of the role of harmonisation in Australia. An assessment is called for at two levels. The first and more abstract question is whether harmonisation is a worthwhile goal at all; the second is what mechanisms are best suited to achieve harmonisation if it is thought to be desirable. Clearly, the two questions are interrelated — the costs and benefits arising from harmonisation are often dependent on the particular mechanisms chosen to achieve it. However, with that caveat in mind, this section will consider the broader question before evaluating particular mechanisms.

A *Is Harmonisation Worthwhile?*

There is a tendency in many quarters to assume that harmonisation is an inherently beneficial process. Ian Bidmeade and Chris Reynolds, for example, appear to make this assumption in their report on *Public Health Law in Australia* when they state that '[t]here is little doubt that Australians will benefit from increased harmonisation of most public health laws'.[96] In my view, however, we ought to be more circumspect in embracing harmonisation. Mauro Cappelletti and David

91 Small Business Deregulation Task Force, above n 9, 128.
92 Ibid 127.
93 Howard, above n 10, 77.
94 Reynolds, above n 42, 229–30.
95 Mauro Cappelletti and David Golay, 'The Judicial Branch in the Federal and Transnational Union: Its Impact on Integration' in Mauro Cappelletti, Monica Seccombe and Joseph Weiler (eds), *Integration through Law: Europe and the American Federal Experience* (1986) vol 1, book 2, 261, 266.
96 Bidmeade and Reynolds, above n 1, 2.

Golay capture an important truth in the quotation that prefaces this section when they state that harmonisation may advance some goals and hinder others.[97] The following discussion addresses some of the general benefits and costs of harmonisation of public health law. A comprehensive analysis of the benefits and costs of harmonisation would obviously have to be sensitive to the specific question at issue — thus, one might come to different conclusions about the merits of harmonisation in the contexts of, say, nuclear radiation, food laws and swimming pool fencing.

There are many potential benefits from the harmonisation of public health law in Australia. First, harmonisation may promote economic efficiency in so far as it can lighten the regulatory burden on business in meeting the legal requirements of different jurisdictions without jeopardising public health. This factor has been used to justify calls for uniform product labelling and standards,[98] uniform food hygiene regulations[99] and uniform licensing requirements for handlers of radiation.[100] Second, harmonisation may address national problems generated by changes in the nature of commerce and transportation. For example, in colonial times, outbreaks of disease were often confined to local communities, but today, an outbreak may have nationwide ramifications due to the ease of travel and the broad distribution of food products. National problems of public health may require national solutions. Third, harmonisation promotes certainty and predictability in the law. As the actions of individuals and corporations increasingly span State borders, harmonisation enhances the ability of people to plan their future on the basis of known legal rules — an issue that goes to the heart of the rule of law.[101] Fourth, harmonisation may promote equality before the law in the sense of providing equal protection of the law on a non-discriminatory basis. Although diversity between State laws may be acceptable in some matters, one may take the view that certain laws protecting public health ought to be available to all Australians on an equal basis irrespective of their State of residence.[102] Finally, harmonisation may promote the abstract goal of national unity. As one commentator has said of Canada, every time a citizen notices a basic similarity between the laws of one part of Canada and another, it promotes the idea of the nation.[103] The same may be said of Australia.

Harmonisation of public health law may also entail significant costs. First, harmonisation may discourage innovation and experimentation. Justice Brandeis of the United States Supreme Court made the point when he remarked that

[97] See also F S Knippenberg and William Woodward, 'Uniformity and Efficiency in the Uniform Commercial Code: A Partial Research Agenda' (1990) 45 *Business Lawyer* 2519, 2521; Boodman, above n 3, 702.

[98] Bidmeade and Reynolds, above n 1, 6.

[99] Ibid 51.

[100] Ibid 64.

[101] Joseph Raz, *The Authority of Law: Essays on Law and Morality* (1979) 210–29.

[102] For a similar argument, see Justice Michael Kirby, 'Uniform Law Reform: Will We Live to See It?' (1977) 8 *Sydney Law Review* 1, 4.

[103] H W Hurlburt, 'Symposium: Harmonization of Provincial Legislation in Canada — The Elusive Goal' (1986) 12 *Canadian Business Law Journal* 387, 395.

> [i]t is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.[104]

There is a genuine concern that moves towards harmonisation may stifle the evolution and growth of public health law by discouraging legal and social experimentation.[105] A second and related cost is that harmonisation may fail to accommodate regional diversity, which is an important value in any federal system. This is a particular concern in public health law where some Australian communities face special difficulties or challenges. For example, the Northern Territory may need public health laws that differ from those in other parts of Australia in recognition of the special needs created by the size of its indigenous population, its geographically remote communities and its particular problems of substance abuse of methylated spirits and petrol.[106] Harmonisation should not be allowed to impinge on the ability of State and local communities to address their particular needs. Third, harmonisation may undermine the sovereign autonomy of constituent States of the federation, though the extent to which this is so depends on the particular method of harmonisation employed. To the extent that harmonisation can be achieved only by a State refraining from exercising independent judgment and power, harmonisation may be seen as a surrender of legislative authority.[107] This loss of freedom is a major reason why States may be reluctant to embrace it. Finally, harmonisation is often a time-consuming and arduous process. This is especially so where intergovernmental agreements are the chosen means of harmonisation, since it is necessary to secure the agreement of up to nine executives followed by legislation of their respective Parliaments. It may be difficult to galvanise support in a timely fashion for harmonisation proposals that require the adoption of new standards that are not of immediate local interest.[108]

B *What Methods Should Be Employed?*

Mechanisms for harmonisation differ significantly in the degree to which they generate the benefits and costs outlined above. In this section, the various mechanisms for harmonisation of law are appraised by reference to six key values: the effectiveness of the mechanism in achieving harmonisation; the speed, cost and flexibility of implementation; the extent to which the chosen method

104 *New State Ice Co v Liebmann*, 285 US 262, 311 (1931) (Brandeis J, dissenting).

105 For observations to this effect not confined to public health law, see J A Grant, 'The Search for Uniformity of Law' (1938) 32 *American Political Science Review* 1082, 1087; Cuming, above n 3, 14; Hartmut Schmidt, 'Economic Analysis of the Allocation of Regulatory Competence in the European Communities' in Richard Buxbaum et al (eds), *European Business Law: Legal and Economic Analyses on Integration and Harmonization* (1991) 58; Andrew McGee and Stephen Weatherill, 'The Evolution of the Single Market: Harmonisation or Liberalisation' (1990) 53 *Modern Law Review* 578, 582.

106 Bidmeade and Reynolds, above n 1, 22–3, 76.

107 Goldring, above n 43, 286; Alan Rose, 'The Challenges for Uniform Law in the Twenty-First Century' [1996] *Uniform Law Review* 9, 13.

108 E J Wright, 'Mutual Recognition and the National Market for Goods' (1993) 21 *Australian Business Law Review* 270, 273. On the other hand there have been occasions (eg uniform gun laws) where acute political interest has prompted rapid agreement and implementation.

respects the autonomy of States within the federal system; its impact on innovation and experimentation; the implications for open and accountable government; and the compatibility of that method with global developments. These are not, of course, the only criteria by which the alternative methods might be judged, but they highlight many of the critical choices facing governments when selecting a particular means of achieving harmonisation.

1 *Effectiveness in Achieving Harmonisation*

A primary consideration in assessing the mechanisms available for achieving harmonisation of public health law is their effectiveness in actually achieving that goal. The use of federal legislation has a strong advantage on this score since federal laws run throughout the land and are binding 'on the courts, judges, and people of every State and of every part of the Commonwealth'.[109] Accordingly, a single federal law or regulation may be able to replace a multitude of divergent State and Territory legislation. An instance of this occurred in relation to tobacco advertising in 1994 when the failure of one State to implement arrangements for uniform law agreed to by Health Ministers in 1992, induced the Commonwealth to make regulations on this topic for the whole of Australia.[110] The ability of federal legislation to transcend State boundaries is aided by the fact that federal laws are usually subject to centralised administration, thereby ensuring that uniformity is carried beyond the statute books to uniformity in the interpretation and application of the law. These qualities make federal legislation well-suited to dealing with public health problems that extend beyond the borders of one State, particularly where cooperative mechanisms are likely to be too slow or cumbersome in their response to immediate threats to public health. Fiscal coercion has also been a very effective tool in ensuring State compliance with federal policy, as judged by the general reluctance of the States to forego federal funding for the sake of determining their own spending priorities. In this way, the Commonwealth has been highly successful in extending its influence beyond its allocated fields of legislative power and setting Australia-wide policies in the field of public health.

On the other hand, it must be borne in mind that there are limits to the ability of the Commonwealth to achieve uniformity. The legislative power of the Commonwealth is not a plenary power, but is limited to the subject matters conferred on it by the *Constitution*. This means that the federal legislature is not always competent to regulate a particular public health issue, at any rate, not completely. For this reason, federal legislation is sometimes patchy in its coverage, requiring State action to fill the gaps.[111] Similarly, there are political constraints on the ability of the Commonwealth to dictate State policy through conditional federal grants. An example of this was the collapse of the Council of Australian Governments meeting in March 1998 over the unwillingness of the State and Terri-

[109] *Australian Constitution* covering cl 5.

[110] Bidmeade and Reynolds, above n 1, 8.

[111] See, eg, *Therapeutic Goods Act 1989* (Cth) and *Trade Practices Act 1974* (Cth), which rely on State legislation to fill the constitutional gaps left by the Commonwealth. The former is discussed above Part III(E).

tory governments to accept conditional funding offered by the Commonwealth for the health care system.[112] Some governments subsequently relented, and others may yet do so, but the political difficulties of this episode are evidence of the constraints on federal policy-making.

Multilateral approaches to harmonisation offer a less comprehensive means of achieving harmonisation. Cooperation through mirror legislation or agreed policies with separately drafted laws is usually ineffective in achieving lasting harmonisation because these methods are highly susceptible to policy changes in individual States and Territories. This was borne out by the history of the 'uniform' gun laws that were forged on the anvil of the Port Arthur tragedy in 1996. The particular mode by which the uniform gun laws were implemented — namely, agreed policies with separate laws drafted by each jurisdiction — are particularly vulnerable to political pressure. In this case, strong pressure from the pro-gun lobby, combined with the political sensitivity of conservative governments facing general elections, created a climate ripe for the unilateral dilution of the 'uniform laws' by maverick states.[113]

By contrast, some other forms of cooperative arrangement may be highly successful in achieving harmonisation. For example, use of the reference power has the advantage of combining the unifying effect of a federal law with the participatory advantages of cooperation. The application of laws method gives the host law an application analogous to that of a federal law by virtue of the State legislation that applies the host law in its territory. It should also be borne in mind that complementary schemes are sometimes the only means of achieving harmonisation because the problems are otherwise incapable of legal resolution through individual State or federal action.

Of all the mechanisms considered in this article, unilateral State action is least likely to be effective in achieving harmonised law. Modelling is an uncoordinated and unsystematic process and can therefore be haphazard in its harmonising effect. This point was made by Gareth Evans when speaking of the extent to which a law reform introduced in one part of Australia is adopted in another. In his view, it is very much a matter of chance, combined with the haphazard efforts of lobby groups, rather than the 'systematic, routine and orderly examination ... of the success or failure of law reform experiments introduced elsewhere.'[114] Modelling may thus make a smaller contribution to harmonisation of law than some alternative methods of harmonisation because the voluntary and flexible

[112] See generally Sid Marris, 'Health Deadlock Threat to Elderly: Premiers', *The Weekend Australian* (Sydney), 21–2 March 1998, 4; Alan Wood, 'Farcical Game with No Winners', *The Weekend Australian* (Sydney), 21–2 March 1998, 4; John Kerin, Chip Le Grand and Scott Emerson, 'States Split over Medicare Funding', *The Australian* (Sydney), 29 April 1998, 6.

[113] Michael Bachelard, 'States Undermine Gun Laws', *The Australian* (Sydney), 3 March 1998, 1–2; Rachel Hawes, 'Kennett Attacks Walter Mikac on Gun Control', *The Australian* (Sydney), 6 March 1998, 4; Georgina Windsor, Rachel Hawes and Matthew Abraham, 'PM Faces Showdown on Gun Changes', *The Australian* (Sydney), 12 March 1998, 5; Rachel Hawes, 'Nats Leader Sides with Shooters on Gun Code', *The Australian* (Sydney), 13 March 1998, 4.

[114] Gareth Evans, 'Uniform Law Reform and the Case for a National Law Reform Advisory Council' (Paper presented at the Eighth Australian Law Reform Agencies Conference, Brisbane, 2 July 1983) 13. See also Cuming, above n 3, 49.

nature of the process means that States are free to vary their laws at will. This problem has arisen in Australia in relation to scheduled drugs and poisons, where Tasmania does not directly incorporate the Uniform Schedule of Drugs and Poisons into its law, but amends its own legislation on the basis of changes to the Schedule. This is inefficient and time-consuming and may lead to a significant lack of uniformity between the States.[115]

2 *Speed, Cost and Flexibility of Implementation*

Additional considerations in assessing alternative mechanisms are the speed with which harmonisation can be achieved and the cost of achieving it. Furthermore, the flexibility of the process in adapting to future change is an important consideration because of the desirability of maintaining harmonisation over time rather than settling for the one-off attainment of uniformity. As Arthur Rossett has remarked, '[i]n today's world, any code that does not build a process for prompt and sustained reconsideration into its structure becomes part of the problem, not part of the solution.'[116] On these criteria, unilateral approaches have clear advantages over cooperative solutions, precisely because they do not rely on the cooperation and agreement of others. To give some examples of a unilateral approach, fiscal coercion is a flexible tool that may bring about rapid harmonisation, since the level of grants and their terms may be varied from year to year, as needs dictate. This is facilitated by the frequent practice of the Parliament delegating the power to determine grant conditions to the relevant federal Minister. Grants are thus able to be varied in the light of current policy, both as to the subject area in question (eg childhood immunisation) and the general desirability of using conditional grants. Similarly, the unilateral modelling of State laws can be timesaving and cost-efficient. Modelling is a spontaneous process that responds to the demand for change — foreign models will be adopted so long as there are gains to be realised from change.[117] Modelling is also a flexible tool of harmonisation because the local offspring need not be an exact replica of its parent — the adopting State therefore retains the freedom to adapt the model in accordance with local needs, and later to amend the law as circumstances require.

In contrast, many methods of cooperative harmonisation can be both time-consuming and cumbersome. The need to consult and reach agreement in up to nine jurisdictions (the Commonwealth, the six States and the two Territories) may be labour intensive and slow. In the absence of strong political imperatives, many negotiations continue over many years. For this reason, cooperative processes may be slow to respond to change, particularly where amendments require separate legislation in all participating jurisdictions.

[115] Bidmeade and Reynolds, above n 1, 32.

[116] Arthur Rossett, 'Unification, Harmonization, Restatement, Codification, and Reform in International Comparative Law' (1992) 40 *American Journal of Comparative Law* 683, 688.

[117] Cuming, above n 3, 48.

3 *Respect for State Autonomy*

Every federal state, if it is to have a vital existence as a federation, requires a system of government that respects certain federal values. These are not the only values that one should seek in a system of government, but they are fundamental to differentiating a federation from a unitary state, on the one hand, and a collection of independent sovereignties, on the other. Foremost amongst these values is respect for the autonomy of constituent States of the federation as viable polities capable of governing on behalf of their inhabitants and of adopting policies responsive to the needs of those inhabitants. State autonomy is not an absolute good — it must be tempered by the fact that federal systems purposefully give their central government defined powers to make laws for the whole nation and, moreover, give these laws supremacy over State laws in the event of conflict. But within these bounds, respect for State autonomy is something to be valued and weighed when assessing competing mechanisms for achieving harmonisation.

Federal legislation is sometimes seen as a mechanism that infringes State autonomy, especially where the legislation takes over areas of traditional State responsibility. Bidmeade and Reynolds have noted the tendency to disparage any further exercise of federal power in the field of public health, commenting that those consulted in their study preferred federal legislation to be confined to its traditional subject areas or, at most, to remedy breaches of national schemes relating to public health.[118] However, while additional federal legislation may engender political resistance from the States on the ground of a perceived loss of autonomy, it is important not to capitulate to this argument without deeper consideration. Federal legislative powers exist to fulfil national purposes. If public health concerns cannot be adequately addressed through other means and the matter falls clearly within the scope of defined federal powers, federal action is clearly an appropriate response.

A stronger argument against unilateral federal action can be made in relation to conditional federal grants. The danger of conditional grants for State autonomy is that they enable the Commonwealth to reach into areas of State policy over which the Commonwealth has no power to legislate directly. In practice, conditional grants are coercive in their effect and limit the ability of the States to set their own policies and priorities, as is evident in the areas of health and education. It is curious, then, to note the High Court's fanciful but persistent pronouncements that s 96 grants are purely voluntary on the basis that the Commonwealth has no power to compel acceptance of the grant and with it the accompanying terms and conditions.[119] This may be true, but it elevates form over substance and denies the practical operation of tied grants.[120]

[118] Bidmeade and Reynolds, above n 1, 8.

[119] *Victoria v Commonwealth* (1957) 99 CLR 575, 605 (Dixon CJ); Cheryl Saunders, 'Section 96 Grants: The Problem of Enforcement' (Papers on Federalism No 12, Centre for Comparative Constitutional Studies, The University of Melbourne Law School, 1989) 19.

[120] Cheryl Saunders, 'Intergovernmental Arrangements: Legal and Constitutional Framework' (Papers on Federalism No 14, Centre for Comparative Constitutional Studies, The University of Melbourne Law School, 1989) 10–11; Saunders, 'Section 96 Grants', above n 119, 18.

In contrast to unilateral federal action, modelling and multilateral approaches to harmonisation are more respectful of the autonomy of constituent States of the federation. This is clearly so in relation to modelling, which is a voluntary and spontaneous process in which each State responds individually to the demand for change, adopting foreign models so long as there are gains to be realised from doing so. Cooperative mechanisms, too, are based on the voluntary engagement of the States. For example, Western Australia declined to join the mutual recognition scheme until 1995 — two years after it had come into force for other States — pending a report of a Parliamentary Committee on the benefits of the scheme to the State.[121] Moreover, even where States are willing to participate in a cooperative process in principle, they sometimes differ in the precise pathway they wish to take to achieve that end. For example, New South Wales and Victoria adopted different approaches to extending the Commonwealth scheme for regulating therapeutic goods to their respective States — New South Wales using the application of laws method and Victoria using the mirror legislation method.[122] Thus, cooperative schemes may simultaneously give States some flexibility in their choices whilst avoiding the need for the Commonwealth to assert an ever greater role in regulating matters within the traditional domain of the States. Finally, it should be noted that to the extent that States experience strong political pressure to participate in cooperative schemes for the harmonisation of law, their autonomy and freedom of action are correspondingly impaired.

4 *Diversity and Innovation*

A further consideration is the extent to which each harmonisation mechanism encourages innovation and promotes respect for diversity of laws, thereby embracing a cosmopolitanism that recognises the differences between States. The former President of the Canadian Law Reform Commission, Francis Muldoon, has accurately remarked that:

> The benefit of being diverse and not monolithic resides in the freedom to experiment, to tailor laws to perceived provincial or jurisdictional needs and to learn from the work and recommendations of other innovators.[123]

This sentiment is also expressed in the Memorandum of Understanding establishing the National Public Health Partnership, which places responsibility on both the Commonwealth and the States to 'foster innovation in population health programs'.[124] This goal builds on the many notable State and Territory innovations in the field of public health law in Australia, including the regulation of

[121] Phillip Pendal, 'Uniform Law in Australia: An Alternative Approach' (Issues Paper No 6, The Federalism Project, Institute of Public Affairs, Melbourne, 1996) 16, 25–6.

[122] See above Part III(E).

[123] Francis Muldoon, 'Law Reform in Canada: Diversity of Uniformity?' (1983) 12 *Manitoba Law Journal* 257, 268.

[124] National Public Health Partnership, *Memorandum of Understanding*, above n 6, cll 7(f), 8(c).

passive smoking in the Australian Capital Territory[125] and the introduction of alcohol-free days in a Tennant Creek community in the Northern Territory.[126]

Nearly all mechanisms for harmonisation have a negative impact on diversity and innovation. Federal legislation runs the risk of imposing a 'dull blanket of uniformity' over Australian law in ways that pose 'a threat to experimentation and ... hamper[s] the cause of law reform.'[127] This is not to say that federal legislation may not itself embrace innovative solutions to particular problems, but that the possibilities of experimentation are significantly reduced when a matter is controlled by one legislature rather than nine. Yet the same criticism may be made of many multilateral approaches to harmonisation. Although some cooperative mechanisms are more tolerant than others of slight variations between the laws of different States, they almost invariably result in a loss of freedom of choice for the participating parties. The institutional reality of interjurisdictional meetings of Ministers and departmental officials is that where harmonisation is the goal, standardisation rather than diversification will be the order of the day. The only cooperative mechanisms that stand apart on this score are the reciprocal schemes, such as mutual recognition, where disparate State laws are recognised in other participating jurisdictions. However, as previously discussed, even in this context there has been pressure to adopt uniform national standards to avoid a 'race to the bottom'.[128]

5 *Open and Accountable Government*

Any method of harmonisation that depends heavily on the executive branch of government for its implementation poses particular problems for the values of open and accountable government. Two methods of harmonisation are particularly vulnerable to this criticism. Conditional federal grants are often made in circumstances that lack transparency and adequate accountability. Section 96 of the Constitution, authorising federal grants to the States, specifies that the terms and conditions of financial assistance must be prescribed or authorised by Parliament. The inclusion of the latter phrase, however, means that conditions are not necessarily embodied in the appropriation legislation itself. Increasingly, Parliament makes one-line appropriations, coupled with a power on the part of the relevant Minister to attach conditions.[129] The High Court, relying on the principles in *Victorian Stevedoring & General Contracting Co Pty Ltd v Dignan*,[130] has upheld the delegation to the executive of the power to set terms and conditions of financial assistance on the basis that the delegated power is still subject to the control of the Parliament. In practice, Parliament exercises no

125 Bidmeade and Reynolds, above n 1, 18.

126 Ibid 23.

127 Kirby, above n 102, 2.

128 See above Part III(E).

129 Cheryl Saunders, 'Accountability and Access in Intergovernmental Affairs: A Legal Perspective' (Papers on Federalism No 2, Centre for Comparative Constitutional Studies, The University of Melbourne Law School, 1984) 13–14; Saunders, 'Intergovernmental Arrangements: Legal and Constitutional Framework', above n 120, 13.

130 (1931) 46 CLR 73.

effective scrutiny over the manner in which the delegated powers are exercised, either through disallowance or by committee scrutiny.[131]

Even greater concern is raised by multilateral approaches to harmonisation that are filtered through Ministerial Councils and intergovernmental agreements. So pervasive are the activities of these Councils that one commentator has made this rather negative assessment of their impact:

> In virtually every week of every year, federal and State Ministers of the Crown can be found meeting in some capital city to hammer out yet another Ministerial Council agreement for uniformity or harmony.
> Indeed, so tentacle-like and cumbersome have these councils become that few people have an appreciation of their extent and nature. Seldom set up by statute and operating mostly behind closed doors, these councils operate informally, taking decisions which are not legally binding on member-Ministers, but which now reach out into almost every conceivable field of public administration — including the environment, education, health, trade[,] training, police, forestry, sport, tourism and gaming, to name but a few.[132]

Cooperative arrangements made through Ministerial Councils effect a significant shift in power away from Parliaments and toward executives. This is clearly apparent when uniform laws hammered out at Ministerial Council meetings are presented to each Parliament for adoption. The pressure to maintain uniformity of the agreed scheme undermines the possibility of effective independent scrutiny by Parliaments or their committees.[133] Moreover, intergovernmental relations are seldom open to other forms of scrutiny that make these institutions open and accountable. Freedom of information legislation, ombudsman legislation and judicial review are frequently inapplicable to intergovernmental relations. While some of these problems seem to be the unavoidable cost of intergovernmental relations in a federal system,[134] others can be addressed through better reporting requirements. There is room for reform of intergovernmental processes concerned with harmonisation to enhance the openness and accountability of government.

6 *Compatibility with Global Developments*

Globalisation is a phenomenon that is praised in some quarters and condemned in others for its likely effects on Australian law and culture. It is, however, a phenomenon of our time and since we cannot avoid its pressures, we must

[131] Cheryl Saunders, 'The Strange Case of Section 96' (Papers on Federalism No 11, Centre for Comparative Constitutional Studies, The University of Melbourne Law School, 1987) 17–18, 28–30; Saunders, 'Section 96 Grants', above n 119, 2–3.

[132] Pendal, above n 121, 20–1.

[133] Nigel Bankes, 'Co-operative Federalism: Third Parties and Intergovernmental Agreements and Arrangements in Canada and Australia' (Papers on Federalism No 19, Centre for Comparative Constitutional Studies, The University of Melbourne Law School, 1991).

[134] Murray Frazer, 'Accountability in Inter-government Affairs' in Michael Wood, Christopher Williams and Campbell Sharman (eds), *Governing Federations: Constitution, Politics, Resources* (1989) 107, 108, 120; Cheryl Saunders, 'Accountability and Access in Inter-government Affairs: A Legal Perspective' in Michael Wood, Christopher Williams and Campbell Sharman (eds), *Governing Federations: Constitution, Politics, Resources* (1989) 123.

develop creative ways of responding to it.[135] One of the potential benefits of the permeation of Australian domestic law by international laws and standards, is that it may help Australia keep in step with beneficial overseas developments in public health law and may bring to bear on domestic issues the experience and knowledge of other countries and international organisations.

The extent to which international laws are capable of harmonising public health laws within Australia depends, however, on the way in which they are implemented. In the vast majority of cases, treaty implementation is effected through federal legislation. This has an automatic harmonising effect on Australian law since federal law runs throughout the land[136] and any inconsistency with a law of a State is resolved by the supremacy of the federal law.[137] Occasionally, however, international obligations are implemented by State law alone, or by a combination of State and federal law. Both of these mechanisms may pose difficulties for the harmonisation of law.[138] There may be problems of timeliness because of the need to involve up to nine Parliaments in the process — those of the States, the Territories and the Commonwealth. There may be problems of diversity within Australian legal regimes if each jurisdiction fashions its own law to meet the treaty obligations.[139] There may also be problems of gaps or of incompatibility between the State legislative regime and the treaty, resulting in a breach of Australia's international obligations. This presents particular difficulties in a federal system because the Commonwealth is responsible under international law for the conduct of the constituent States of the federation, although it is powerless to amend or repeal the offending State law.[140]

From this brief discussion, it is clear that whether international laws are implemented through federal legislation, State legislation or a combination of the two is a matter requiring careful balance between the values of unity and diversity in a federal system. State implementation may allow for greater autonomy of local legislatures and permit variations in accordance with local conditions, but this may be at the expense of compliance with Australia's international obligations. This is especially so where State laws take some licence in modelling the international standard. On the other hand, unilateral federal action is well-suited to meeting the goals of both harmonisation of Australian law and compliance with international norms. Where federal legislation relies on the 'external affairs' power in s 51(xxix) as its constitutional foundation, compliance with interna-

135 Hilary Charlesworth, 'Dangerous Liaisons: Globalisation and Australian Public Law' (Paper presented at the Annual Public Law Weekend, Canberra, 7-8 November 1997) 1.

136 *Australian Constitution* covering cl 5.

137 *Australian Constitution* s 109.

138 Charlesworth, 'International Human Rights Law and Australian Federalism', above n 29, 292–7 (discussing these difficulties with respect to Australian human rights law).

139 This diversity of regimes need not necessarily threaten compliance with the treaty given the 'margin of appreciation' granted by the broad language in which most international obligations are couched.

140 The Commonwealth may, however, use federal law to override the State law. This situation arose in *Nicholas Toonen and Australia*, United Nations Human Rights Committee, Communication No 688/1992, Doc CCPR/C/50/D/488/1992 (4 April 1994), discussed in Brian Opeskin, 'International Law and Federal States' in Opeskin and Rothwell (eds), above n 29, 23–4.

tional norms is ensured by the judicial requirement that the legislation be capable of being seen as 'appropriate and adapted' to the terms of the treaty.[141]

VI CONCLUSION

The harmonisation of public health law raises complex issues from which it is difficult to draw conclusions of general application. These complexities stem from the number of actors involved, the range of values that harmonisation may advance or impede, the variety of mechanisms that may be invoked and the differing contexts of harmonisation. Something should be said about each of these issues by way of conclusion.

This article has focused on the role of the legislative and executive arms of Commonwealth, State and Territory governments in Australia in harmonising public health law through such means as they have at their disposal. Yet the diversity of agents involved in the many processes of harmonisation should be acknowledged and embraced. These include not only Parliaments, Ministerial Councils and inter-jurisdictional groups of government officials, but also independent statutory authorities, professional associations, courts, private lobbying groups, research institutes and individual citizens. Successful harmonisation depends to a large degree on the use made of the rich variety of existing actors.

A principal difficulty in drawing general conclusions about harmonisation is that, contrary to the views of some writers, harmonisation should not be regarded as an end in itself but as a means to some ends and a hindrance to others.[142] Whether or not available mechanisms should be invoked to harmonise public health law in Australia thus depends on what substantive values can be advanced by harmonising the law and at what cost. In every case, it is necessary to weigh these values to determine whether the subject area is suitable for harmonisation. This article has articulated a number of values that are inherent in a federal system, namely, those of State autonomy, respect for diversity and encouragement of regional experimentation. But these are not the only values by which harmonisation proposals ought to be judged — others include the maintenance of high standards of public health in Australia, the democratic value of open and accountable government, and compatibility with global developments. The inherent difficulty of evaluating any proposal for harmonisation is that it may simultaneously advance some values and retard others, though the particular values affected will depend on the mechanism chosen. This choice of mechanism, and the related question of whether harmonisation should be pursued at all, entail value judgments that ought to be made and contested in the political arena. It is a choice that may, in certain circumstances, require a selection between effective

[141] *Commonwealth v Tasmania* (1983) 158 CLR 1, 130 (Mason J), 259 (Deane J); *Richardson v Forestry Commission (Tasmania)* (1988) 164 CLR 261, 289 (Mason CJ and Brennan J), 303 (Wilson J). See also Donald Rothwell, 'International Law and Legislative Power' in Opeskin and Rothwell (eds), above n 29, 112–13.

[142] Cappelletti and Golay, above n 95, 266.

federal mechanisms that promote higher standards of public health, and State-based mechanisms that are less effective but more respectful of federal values.

The various mechanisms available for the harmonisation of law, like the values themselves, do not lend themselves to easy classification or analysis. This article has drawn a distinction between unilateral or noncooperative processes, on the one hand, and multilateral or cooperative processes, on the other. However, there are substantial variations in the attributes of the specific mechanisms falling within these broad groups. Unilateral federal action is speedy, relatively effective in achieving harmonisation and capable of fulfilling international obligations, but it is neither respectful of State autonomy nor encouraging of innovation. Unilateral State action (ie modelling) is speedy, respectful of State autonomy and open to the possibility of innovation, but it is also relatively ineffective in attaining harmonisation and questionable in the extent to which it can ensure compliance with international norms. Cooperative mechanisms are modest performers in respect of effectiveness and autonomy but poor in relation to accountability and speed. These examples could be multiplied, suffice to say that there is a complex matrix of relevant considerations.

It is unrealistic to expect the same methods of harmonisation to be suitable for all areas of public health law and allowance must be made for the different contexts and institutions in each area. Federal legislation may be the only viable means of regulating some areas of public health law while intergovernmental cooperation or voluntary modelling may be more suitable for others. A public health risk that is highly localised in its origins and likely solutions, such as the regulation of swimming pool fencing, may not warrant harmonisation at all; or if it does, the most suitable method of harmonisation may differ from that which is appropriate for a problem of national dimensions. These differences make it inevitable that harmonisation will exist at different levels of advancement in different areas of public health law at a given point in time. Moreover, the methods of harmonisation appropriate to each area of public health law may change over time. An example from a different field may illustrate the point. In corporate law, harmonisation has evolved over the course of this century from the modelling of State legislation on a United Kingdom progenitor, to cooperative schemes for uniform company law in the 1960s and 1970s, to a failed attempt to regulate the area through federal law, to a return to a cooperative scheme in the 1990s, albeit on a basis that differs from earlier schemes.[143] These temporal changes were not driven by a theoretical choice between competing models of harmonisation but by practical, legal, economic and political considerations relevant to that particular area of law. Any move towards harmonisation must be sensitive to these context-specific constraints.

In conclusion, it is little surprise that the Australian States and Territories have been drawn closer together as a legal community over a century of federation.

[143] Roman Tomasic and Stephen Bottomley, *Corporations Law in Australia* (1995) 17–32; Geoffrey Sawer, 'Federal–State Co-operation in Law Reform: Lessons of the Australian Uniform Companies Act' (1963) 4 *Melbourne University Law Review* 238; Harold Ford and Richard Austin, *Ford and Austin's Principles of Corporations Law* (7th ed, 1995) 44–53.

That possibility was foreseen and welcomed from the outset. In 1903, Alfred Deakin wrote that:

> Some day ... the real unity of the six little streams of public affairs will become obvious as they are more and more brought together. Reciprocal relations will be fostered under the growing pressure of [common] ideals, needs, activities, and the mutual understandings begotten of mutual interests.[144]

The increased permeability of State and national borders, nourished by globalisation of the world economy and culture, has hastened the processes of harmonisation in the Australian federation. It seems inevitable that these processes will continue in one form or another — it is a challenge to ensure that the processes are harnessed to achieve high standards of public health in Australia, while simultaneously accommodating other values at the core of Australia's federal system of government.

[144] Quoted in Leach, above n 50, 212.