



**Government
of South Australia**

Department of the Premier and Cabinet Circular

**PC021 – Guidelines for Evaluating Proposals for National or
Multi-jurisdictional Schemes for Uniform or Consistent
Legislation, National Standards and Cooperative Regulatory
Schemes**

**June 2003
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CONTENTS

	Page
Purpose	3
Introduction	3
Threshold Question	4
Constitutional Background	5
In Principle	7
Some Methods of Implementing Schemes	7
(a) Legislation according to an agreed model	8
(b) Reference of power	8
(c) Complementary arrangements	10
(d) Application of laws	11
(e) Mirror legislation	13
National or Multi-Jurisdictional Regulatory Authorities	13
National Standards	14
General Evaluation Criteria	15
Further Information	17
Appendix 1: Appendix to Cabinet Instructions	18
Appendix 2: Check List for Inter-Governmental Agreements	21
Appendix 3	23

Premier and Cabinet Circular

PC021 – Guidelines for Evaluating Proposals for National or Multi-jurisdictional Schemes for Uniform or Consistent Legislation, National Standards and Cooperative Regulatory Schemes

Purpose

The purpose of this Instruction and Guidelines is to:

- guide Ministers and officers who are negotiating inter-governmental schemes or arrangements that will be implemented by legislation or subordinate legislation;
- instruct them on the information that is to be provided to Cabinet.

Introduction

Proposals for national or multi-jurisdictional schemes for uniform or consistent legislation, for national standards or for co-operative regulatory schemes can take a variety of forms, each with different constitutional and practical consequences for South Australia. Therefore, they must have Cabinet approval.

Ministers should consider informing Cabinet when a decision is made to negotiate: see *appendix 3*.

One of the essential features of a federal system¹ is diversity. This has benefits, as well as inconveniences. Uniformity is not a goal in itself. Uniformity is warranted only when it will result in significant real and lasting commercial, social, practical or legal² advantages that cannot be achieved by other means.

¹ Other examples of federations are Canada and the United States of America, where there are separate Federal and State or Provincial legislatures, administrations and courts. Like Australia, they are large countries with diverse historical, cultural, geographic and economic conditions.

² An example of uniform legislation that had significant legal advantages was the *Statutes Amendment (Courts and Judicial Administration) Act 2001* enacted uniformly throughout Australia to validate decisions of the Federal Court that were invalid for constitutional reasons following *R v Wakim; ex parte McNally* (1999) 198 CLR 511.

The constitutional arrangements under which the separate colonies of Australia federated to form the Commonwealth of Australia and the role of each Australian government constitute a framework into which any scheme must be fitted.

Schemes for uniform legislation often involve some sacrifice of the State's executive and legislative independence, as they often result in limitations on the ability of the State to exercise policy, administrative and legislative discretions and powers. Cabinet will evaluate such proposals carefully, to satisfy itself in each case that the proposal will achieve the desired national or multi-jurisdictional objective, with the least possible detriment to this State's autonomy.

Proposals for multi-jurisdictional or national approaches can take a number of forms, for example:

- for the Commonwealth to take entire control over the activity; or
- for the Commonwealth and all States and Territories (or the Commonwealth and one or more States and Territories) to share control over the activity; or
- for each State and Territory to co-operate in controlling the activity individually, within their own jurisdictions, in ways that are uniform or consistent with an agreed model.

The methods for implementing them are various. They tend to be described by labels such as "model", "complementary", "template" and "mirror" legislation and "reference" or "referral of power". Because these labels are used by different people in different ways, and because some schemes have administrative and legislative aspects associated with more than one particular method, they can cause confusion. Simply describing the method of implementing a scheme by one of these labels is not sufficient for Cabinet. Cabinet expects that each proposal contain a precise explanation of how the scheme will work, constitutionally, legislatively and administratively.

Threshold Question

The single most important question for Cabinet to ask in evaluating proposals for uniform legislation or a national regulatory scheme is whether, on balance, it is in best interest of this State to participate in the scheme at all.

Departments should:

- identify the matter to be dealt with;
- then determine what outcomes are to be achieved; and
- then consider whether this would be achieved best by:

- uniform legislation with or without a national regulator; or
- harmonisation of laws and administrative systems; or
- this State dealing with the matter in its own way³.

Constitutional Background

The powers of the Commonwealth Parliament to legislate are extensive, but are limited by the Constitution of the Commonwealth of Australia. Most of its legislative powers are concurrent with State legislative powers. It has exclusive power to legislate with respect to a few matters⁴. There are certain restrictions imposed by the Constitution on the manner in which the Commonwealth may legislate within its area of authority⁵. Some of these restrictions apply to State legislation as well⁶.

State Parliaments have power to legislate on any subject matter, except those over which the Commonwealth has exclusive power. State laws may have extra-territorial application if there is a sufficient nexus with the peace, order and good government of the State⁷. If the Commonwealth and the States both have power to legislate with respect to a particular subject matter, then a State law will be invalid to the extent that it is inconsistent with a valid Commonwealth law⁸. The enactment of a new valid Commonwealth Act may render a previously enacted State Act invalid. In some co-operative national schemes, the Commonwealth Act contains provisions that make it clear that the Commonwealth Act is not intended to cover the whole

³ Centre for Comparative Constitutional Studies, University of Melbourne - *Implementation of Options for National Legislative Schemes in Public Health* September 1999.

⁴ For example, the imposition of customs and excise on the production or export of goods: s. 90 of the Constitution.

⁵ For example, the Commonwealth Parliament may not by any law or regulation of trade or commerce or revenue give preference to one State or any part thereof over another State or any part thereof: s. 99 of the Constitution.

⁶ For example, s. 92 concerning freedom of trade between States.

⁷ *Australia Acts (Request) Act 1985 (SA)* and *Australia Act 1986 (Cth)*.

⁸ The Court generally adopts the following approach:-

- (a) is the Commonwealth law a law with respect to a matter listed in section 51 or in respect of which the Commonwealth has some other power to legislate? If yes,
- (b) what is the meaning and scope of the Commonwealth Act or provision that has been challenged? and,
- (c) what is the meaning and scope of the State's statutory provision said to be inconsistent with the Commonwealth Act? and
- (d) is there an inconsistency? If yes,
- (e) then the State Act is invalid to the extent of the inconsistency.

If both Acts can stand together, then both are valid.

field, so that State laws remain valid, provided that they are not directly inconsistent with the Commonwealth law⁹.

Thus, the States have power to legislate:

- on most matters with respect to which the Commonwealth can legislate; and
- on some matters with respect to which the Commonwealth cannot legislate; and
- on some matters with respect to which the Commonwealth can achieve only partial (albeit often substantial) coverage¹⁰;

but do not have power to legislate:

- on any of the few matters that the Constitution reserves for the Commonwealth Parliament; or
- inconsistently with valid Commonwealth legislation.

When it is not possible for the Commonwealth to cover the entire field of conduct in respect of which it is thought that uniformity or centralised regulation is desirable, a decision must be made as to whether it is better to deal with the matter by:

- Commonwealth and State/Territory legislation; or
- by uniform or consistent State/Territory legislation (without Commonwealth legislation).

The courts have examined a number of co-operative regulatory schemes involving Commonwealth and State legislation and set some constitutional limits. On the current state of the law, legal problems are most likely to occur in schemes in which the Commonwealth does not have sufficient legislative power to cover the entire field of conduct, but there is one “national” Commonwealth regulator. Some matters to keep in mind when a national regulator is proposed are set out in *appendix 1*.

Constitutional law is continually evolving and legal advice should be sought on every proposed national regulatory scheme. It is not prudent for States to rely solely upon the advice obtained by the Commonwealth, even if it is from the Australian Government Solicitor. The Commonwealth usually wishes to maximise its own policy, legislative and administrative control and the advice it seeks and receives is usually directed towards that end. The brief for advice,

⁹ Thus, for example, Commonwealth legislation can provide that certain requirements must be complied with, and State legislation can impose additional requirements, providing that it is possible for a person to comply with both.

¹⁰ The extent of Commonwealth legislative power is increasing with the increasingly expansive judicial interpretation of section 51 of the Constitution, particularly of the corporations and external affairs powers, which sometimes can be used indirectly to legislate on matters not directly within its constitutional power.

which determines the extent and focus of the advice given, is rarely disclosed fully to States. An additional opinion from this States constitutional legal advisers can put a different perspective on some matters and raise other matters. Cabinet will not approve a proposal unless the advice on any constitutional implications has been obtained from the Crown Solicitor and a certificate obtained from the Attorney-General: see *appendix 3*.

In Principle

Cabinet takes the following in-principle positions:

- Cabinet will not approve a proposal for SA to refer power to legislate to the Commonwealth¹¹, or for SA to give control over the scheme to another jurisdiction, unless all other options have been ruled out, including not participating in the scheme;
- Subject to future decisions of the High Court, Cabinet generally prefers:
 - that SA enact its own substantive law in accordance with an agreed model; and
 - if a national regulator is needed, joint co-operative schemes over schemes where the Commonwealth has exclusive power or SA has less power than another jurisdiction. Although joint co-operative schemes may take longer to negotiate and put in place, the outcome may be preferable from the point of view of SA's influence, and certain constitutional difficulties¹² and risks are avoided.

Some Methods of Implementing Schemes

There are various ways of implementing national or multi-jurisdictional schemes. Some previously used methods are set out below, together with factors Cabinet will consider in determining whether to approve a proposal.

¹¹ under section 51(xxxvii) or (xxxviii) of the Constitution.

¹² Difficulties arising out of High Court decisions such as *Re Wakim: ex parte McNally* op.cit. and *R v Hughes* (2000) 2002 CLR 535; (2000) 74 ALJR 802.

(a) Uniformity or Consistency by enactment of legislation according to an agreed model.

This involves each State and Territory enacting legislation that is the same or substantially the same as an agreed model Bill¹³. A decision must be made as to the level of uniformity or consistency that is needed. It may be sufficient for certain core provisions of the Bill of each jurisdiction to be the same, while other provisions may vary to take into account particular State circumstances, or existing State systems (eg convenience and efficiency of using existing administrative or regulatory bodies or arrangements, jurisdiction of courts, sentencing laws and the like). Agreement for this approach may be reached by resolution of a Ministerial Council or informally by Ministers, but it may be underpinned by a formal inter-governmental agreement.

This method:

- is the best from the point of each State's autonomy;
- leaves the Act, amendments to it and subordinate legislation within the control of each State's Parliament;
- does not risk invalidity, unless it is inconsistent with valid Commonwealth legislation or trespasses on an area reserved exclusively to the Commonwealth; but:
- it can be difficult to maintain a desirable level of uniformity over a long term.

A formal inter-governmental agreement under which each jurisdiction agrees not to repeal or amend its law, except as and when agreed, can assist in maintaining uniformity, but usually is not legally enforceable. States may be more inclined to maintain uniformity or consistency if there are funding or other strong practical reasons for doing so.

(b) Reference of power

Section 51(xxxvii) of the Constitution empowers the Commonwealth Parliament to make laws with respect to

“matters 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 who afterwards adopt the law.”

In order to refer power to the Commonwealth, or to adopt a law of the Commonwealth enacted pursuant to a power referred by

¹³ This is different from a scheme in which one jurisdiction passes an Act and other jurisdictions adopt or apply it.

another State, SA must pass its own referring or adopting Act of Parliament. Some references of power only enable the Commonwealth Parliament to enact an Act in the same or substantially the same form as an Act appended to the referring SA Act.

This type of scheme:

- achieves the highest level of uniformity possible;
- relieves the State of some responsibility;
- avoids some constitutional difficulties associated with administration and enforcement of co-operative national regulatory schemes;
- may make the scheme easy to change and administer, although this depends on the scope of the reference of power;

but;

- it transfers South Australian law-making power to the Commonwealth Parliament, perhaps irrevocably, and thus alters the federal balance¹⁴;
- it may be difficult to define the reference so that unintended powers are not conferred on the Commonwealth Parliament (eg through enabling use of the incidental power¹⁵);
- the Commonwealth legislation can be amended only if the referred power is wide enough to support the amendment;
- SA is powerless to vary the Commonwealth law;
- the Commonwealth law enacted as a result of the reference overrides any existing or future inconsistent South Australian legislation and so nullifies or limits the State's ability to make and give effect to its own policies;
- it is probable that, for legal reasons, an unconditional reference cannot be revoked or varied by the State¹⁶.
- it is probable that, for legal reasons, a conditional reference for a specified time or until a specified event cannot be withdrawn or varied before that time or event;
- it may be practically or politically difficult or impossible not to continue or renew the reference or adoption;

¹⁴ Some argue that transfer of State legislative power to the Commonwealth is inappropriate unless authorised by referendum.

¹⁵ Section 51(xxxix) of the Constitution.

¹⁶ It is thought that a South Australian Act repealing or amending the Act by which the power was referred might have no effect on the law enacted by the Commonwealth Parliament as a result of the referral. Thus, it is thought that the referral could be revoked or changed only if the Commonwealth Parliament enacted legislation to permit the State Parliament to do so.

- it may leave South Australia in a position of having to administer a scheme that may not suit local conditions or without adequate funding;
- this State is unlikely to be able to hold the Commonwealth to any agreement underpinning the reference if the Commonwealth does not wish to honour the agreement, particularly if the Commonwealth holds all the constitutional and fiscal cards (See “Complementary arrangements” for more detail concerning inter-governmental agreements);
- despite a short term advantage for South Australia (for example relief from the expense of regulatory responsibility in a complicated area), referral of a power may not be in this State’s long term interest, because it may lose a strategic advantage in future negotiations with the Commonwealth in this and other areas.

As a general rule, the Government will not refer power to the Commonwealth, unless there is no other alternative.

(c) Complementary arrangements

These are becoming more common as the Commonwealth attempts to unify the law of Australia without having sufficient legislative capacity to do so. These involve the Commonwealth enacting an Act that applies either to the full extent of its legislative power, or to an agreed extent less than this¹⁷. The matters that are not within the reach of the Commonwealth Act (the gaps) are covered by enactment of a State Act that is substantially the same as the Commonwealth Act.

If a regulatory authority is needed and it is thought that there should be one authority for the whole of Australia, then the Commonwealth will need the co-operation of the States. See *appendix 1*

Factors to be taken into account will include:

- the extent to which the Commonwealth can cover constitutionally the whole of the subject matter (“the field”);
- the fact that if the Commonwealth law covers in practical effect a large part of the field, and the State legislates inconsistently with the Commonwealth Act in respect of the remainder of the field, there may be risks because of difficulty in ascertaining whether it is the Commonwealth or

¹⁷ For example, it might be agreed that a Commonwealth law that relies on the Commonwealth’s power to make laws with respect to inter-state and overseas trade and commerce and to trading and financial corporations will not apply to State Government owned companies or entities or higher education institutions in the State, or that the Commonwealth Act will not apply to State quarantine matters.

- the State law that applies in a particular factual situation or to a particular person or organisation;
- constitutional restrictions or risks to validity of State or Commonwealth provisions;
 - roll-back/wind-back provisions¹⁸;
 - the need for provisions to allow SA legislation to operate concurrently with the Commonwealth legislation;
 - whether there is need for a provision in the Commonwealth Act to allow a State to validly exclude or modify the application of the Commonwealth Act to some place, activity or persons (eg to deal with local conditions);
 - the extent to which important provisions of the Commonwealth Act can be changed by regulation (Henry VIII provisions);
 - the powers of the regulator (also see *appendix 1*);
 - the extent to which the law requires the Commonwealth to consult with SA, take into account State views or obtain State/Territory agreement to:
 - introduction of Bills to amend the Act or certain provisions of the Act;
 - the making of regulations or other delegated legislation or quasi-legislation;
 - appointments to and removal from the regulatory authority, advisory or other bodies;
 - whether there is a need for a Ministerial Council or other inter-jurisdictional body to exercise policy oversight, to approve quasi-legislation or to exercise other functions and what legal status the body should have;
 - funding of any regulatory or advisory bodies;
 - responsibility for and funding of monitoring and enforcement measures;
 - the status and terms of any inter-governmental agreement (see *appendix 2*).

(d) Application of laws

This method involves the enactment of the substantive provisions of the law by one jurisdiction (the host or lead jurisdiction) and an Act in each other jurisdiction applying or adopting the law of the host jurisdiction as a law of its own jurisdiction. The template Act may be a law enacted by a State or Territory or by the Commonwealth Parliament for a

¹⁸ These are provisions that provide that the Commonwealth law will apply (usually to the full extent of its constitutional reach) until corresponding State laws are enacted, after which the State law will apply.

Territory¹⁹. There may be a supplementary Commonwealth Act. Various terms have been used to describe these schemes, including template.

If a regulator is required, it may be either a regulator of the host jurisdiction, or a jointly established regulatory body. Alternatively, the template Act may cover only core aspects of the scheme, leaving administration and enforcement to each jurisdiction.

Usually these schemes are under-pinned by an inter-governmental agreement that may have a draft of the template Act scheduled to it. The Agreement should provide for matters such as future changes to the law (including mechanisms to ensure that each participating jurisdiction has a say in this), the funding of the scheme and withdrawal from the scheme. In some cases, it may be in SA's interests to have some of these matters included in the "template" Act. (See under "Complementary arrangements" and *appendix 2*.)

This type of scheme:

- can give a moderate to high level of uniformity, depending on the precise arrangements.

Assuming that the template Act is the law of another jurisdiction, this method:

- does not permit full Parliamentary process to operate on the legislation in that:
 - the South Australian Act does not contain the substantive provisions of the template and they are not subject to debate in this State's Parliament;
 - often amendments made by the host State to the original Act automatically change the law of SA without any further reference to the South Australian Parliament, (although sometimes the individual jurisdictions retain the right to enact amendments within agreed time frames);
 - often regulations made by the host State and variations of them and other delegated legislation or quasi-legislation never come before the South Australian Parliament and so are not subject to South Australian Parliamentary scrutiny;
- it may derogate from the autonomy of SA and its institutions by:

¹⁹ under section 122 of the Constitution.

- providing the administrative law regime, Acts interpretation legislation and such like of another jurisdiction apply in SA;
 - vesting jurisdiction over South Australian subjects and business in the courts and tribunals of another, perhaps less convenient, jurisdiction;
 - perhaps removing natural justice, review and appeal rights that are considered important in SA;
 - perhaps imposing criminal liability and sentencing law regimes that are inconsistent with general criminal law standards in SA;
- the law of the host State does not appear in the Statute books and Gazettes of S.A;
 - If the template Act is passed by SA, then the inter-governmental agreement may require the South Australian Government to introduce amending legislation or make regulations to which it is opposed.

Another method that has been tried, and found wanting, was to “*federalise*” the scheme by means of the State legislating to apply the Commonwealth law as a Commonwealth law in the State²⁰. It is not discussed in these guidelines.

(e) Mirror legislation

This is legislation enacted by all the States and the Commonwealth in identical terms. This has been used when there is uncertainty whether the law may be enacted by the States or the Commonwealth because of questions of legislative power. These are uncommon and are not discussed further here²¹.

National or Multi-Jurisdictional Regulatory Authorities

The administration and enforcement of uniform legislation may be the responsibility of each jurisdiction and this may have advantages for the State. In some cases, there are advantages in having one national regulatory authority.

A national or multi-jurisdictional regulatory authority may take one of several forms.

- It may be a separate body corporate, which may be:

²⁰ This was the method agreed in the Corporations Agreement in 1990 that resulted in legislation that posed enforcement difficulties. It has now been superseded.

²¹ An example, is the *Crimes at Sea Acts*.

- an instrumentality of one Government; or
 - a body established jointly by all or several jurisdictions.
- It may be an office holder or committee or group that is within a Department of one jurisdiction, usually the Commonwealth.

A number of matters to be taken into account when considering proposals for national or multi-jurisdictional regulatory bodies are set out above under the heading “*Complementary Arrangements*”. See also *appendix 1* for these guidelines. The matters set out in the appendix may need revision when the High Court has made further decisions on cases challenging application of laws and co-operative schemes.

National Standards

Sometimes it is proposed that there be national standards. National standards may be made by a body established by the Commonwealth, a particular State or Territory, by a multi-jurisdictional standard setting body or by a non-government body. The legal status of a multi-jurisdictional standard setting body may be a statutory body corporate that has its own separate legal existence, a statutory committee, a company limited by guarantee, an association, a ministerial council or a committee of experts.

Compulsory compliance with national standards can be implemented through any of the various forms of legislative scheme discussed above.

When considering this type of proposal, the Cabinet will need information on all matters set out in these Instructions and Guidelines that are relevant.

Cabinet will require information about how the standards will become part of the law of South Australia. The Information provided must include:

- the extent to which the standards and future changes to them will be subject to scrutiny by the South Australian Parliament; and
- the extent to which variations from the standards may be made to cater for particular South Australian conditions or policies.

General Evaluation Criteria

In evaluating proposals for nationally uniform legislation, or co-operative regulatory schemes, Cabinet will consider the effect on South Australia's constitutional and strategic position.

Cabinet will take into account these factors:

1. Whether the scheme is one under which South Australia will continue to control the activity under laws of its own making, and administer using its own institutions, subject to agreement with other jurisdictions about a consistent way to do this.
2. If the scheme involves South Australia making its own laws:
 - any limits on what laws South Australia can make; and
 - how those limits are set (constitutional limitations, limitations imposed by Commonwealth funding conditions, by agreement between Governments, or by other means).
3. If the Act is to be made by another Parliament:
 - how it would become part of the law of this State; and
 - how future amendments would become part of the law of the State;
 - whether State Parliament will have an opportunity to debate and vote on the initial legislation and amendments.
4. If regulations or other delegated/subordinate legislation or quasi-legislation (eg standards)²² are to be made by another Government:
 - how they and variations to them would become part of South Australian law; and
 - the extent to which SA would influence whether and when they are made and the content of them.
5. Whether the proposal would confer too much power on the Commonwealth or another jurisdiction or group of jurisdictions in relation to matters:
 - over which each participating Government should have an equal say; or

²² Standards or codes that are not part of the Act or Regulations, compliance with which is required by the Act, Regulations, or some other means such as proclamation or ministerial order. For example, Food Standards or National Environment Protection Policies.

- in respect of which SA might wish to have greater freedom of action.
6. Whether the proposal unduly diminishes the authority of the South Australian Parliament over laws that the South Australian government must enforce (for example by removing or placing unacceptable limits on SA's ability to withdraw from or change the terms of the scheme)²³.
 7. Whether the proposal would give excessive control to the executive arm of Commonwealth or State Government.
 8. The effect the proposal would have on the accountability of the executive arm of the South Australian Government to Parliament, including:
 - whether regulations and other subordinate legislation or quasi-legislation would be subject to scrutiny by South Australian Parliament;
 - whether any regulatory body would report to the South Australian Parliament or any other Parliament;
 - whether the relevant South Australian Minister is required to report to Parliament (eg on decisions of a Ministerial Council);
 - whether any inter-governmental agreement will be appended to the legislation or tabled before the South Australian Parliament.
 9. The impact of the scheme on SA's revenue collection (eg stamp duty), and whether it would be revenue-neutral for SA
 10. Whether there are perceived constitutional problems with the scheme. See the appendix for some examples. *All relevant legal advice must be made available to Cabinet.*
 11. Whether any inter-governmental agreement or resolution of a Ministerial Council which under-pins the scheme would sufficiently protect the interests of SA and facilitate the object of the scheme. Factors to be considered include:
 - whether the agreement is legally enforceable (usually it is not);
 - whether there is a need for a Ministerial Council to exercise policy oversight, to approve recommendations of a regulatory or advisory body, or to exercise other functions;

²³ This is often the criticism of schemes where the States refer all relevant constitutional power to the Commonwealth, or where the intergovernmental agreement allows the Commonwealth, or the Commonwealth in combination with the more powerful States, effectively to dictate the terms of future change to the legislation.

- representation on any Ministerial Council or other body that has general policy oversight of the scheme;
- voting rights, eg:
 - how many votes per jurisdiction
 - the majorities required for different types of decisions;
- the extent to which the agreement binds the South Australian and each other Government to introduce legislation in a particular form;
- procedures for variation of the agreement or withdrawal from it, and whether the scheme can continue if one or more jurisdictions withdraw;
- whether there would be any constitutional, or practical impediments to SA withdrawing from the scheme, once it was established;
- limitations on or obligations of each jurisdiction in relation to future amendment of the scheme legislation;
- SA's role in appointments to any administering authority or regulator;
- responsibility for funding.

A check list for inter-governmental agreements is contained in *appendix 2*.

NOTE: These are in addition to the Regulatory Impact Statement that may be prepared by South Australia, or in accordance with the *Principles and Guidelines for National Standard Setting and Regulatory Action by Ministerial Councils and Standard-Setting Bodies* (COAG 1997 as amended).

Approved by Cabinet on the 3rd day of March 2003

Further Information

For further information contact:
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Appendix to Cabinet Instructions

Proposals for establishment of a national regulator.

Decisions of the High Court indicate this about national regulatory authorities:

- State legislation cannot confer powers on a Commonwealth authority or officer unless there is a provision in the Commonwealth Act for accepting those powers and vice versa²⁴;
- a Commonwealth authority or officer cannot exercise powers conferred by State legislation unless some head of power (other than the executive power) can be identified in the Constitution if:
 - the power is coupled with a “duty” to exercise the power; and
 - the exercise of the power has the potential to adversely affect the rights of individuals²⁵;
- a body established jointly by the Commonwealth and one or more States can exercise administrative or regulatory functions under Commonwealth and State laws²⁶;
- a body established by a State may exercise administrative or regulatory functions on behalf of other States²⁷;
- two or more States can combine to establish a regulatory or marketing authority for those States²⁸;

²⁴ *R v Hughes (2000) (2000) 202 CLR 535.*

²⁵ A State authority or officer can exercise Commonwealth powers conferred by the Commonwealth with the consent of the State.

²⁶ *R v Duncan; ex parte Australian Iron & Steel Pty Ltd (1983) 158 CLR 535* approved in *R v Hughes*.

²⁷ For example Australian Financial Institutions Commission that was established by Queensland legislation and exercised powers for all States (now abolished).

²⁸ For example the Australian Wheat Board that was established by Victoria and South Australia.

- It is not possible for the States or the Commonwealth, alone or together, to confer jurisdiction on Federal Courts in relation to State matters²⁹;
- the Commonwealth can confer, with the consent of the State, jurisdiction on a State Court;
- one State can confer jurisdiction on the courts of another State, with that other State's consent;
- the Commonwealth Administrative Appeals Tribunal is not a court within the meaning of the Constitution and so the AAT can review decisions made by Commonwealth regulators under State laws (but see above);
- despite legislation that purports to confer on the Federal Court power to hear appeals from the AAT on reviews of decisions made by Commonwealth regulators under State laws, the validity of this has not been tested and there is some doubt about it.

Cabinet considers that proposals for the establishment of a national regulator will generally be acceptable if based on the following model.

- A joint regulatory body is established under :
 - an agreement between the Commonwealth and the States, and
 - complementary Commonwealth and State legislation under which the Commonwealth and the States each legislate to enable the body to perform functions and exercise powers created under their respective laws. (The joint regulatory body is therefore neither a Commonwealth body nor a State body, but a joint body in the true sense.)
- The Commonwealth legislation:
 - provides that when the body is performing functions or exercising powers under Commonwealth legislation, it is acting on behalf of the Commonwealth ;
 - acknowledges that when the body is acting under corresponding State legislation it is also exercising State functions and powers.

²⁹ *R v Wakim; ex parte McNally* (1999) 198 CLR 511 and Chapter III of the Constitution. Cross vesting arrangements in the former *Corporations Law* scheme were invalid in so far as they conferred State jurisdiction upon Federal Courts. This meant the Federal Court was unable to hear matters arising under the State *Corporations Laws*. The States then enacted remedial legislation to render past decisions valid and enforceable.

- The State legislation provides that when the body is performing functions or exercising powers under State legislation, it is acting on behalf of the respective State.
- The members of the body are to hold multiple appointments: an appointment under the Commonwealth legislation as officers of the Commonwealth and appointments as State officers under the respective State Acts.
 - The Commonwealth legislation permits its officers to hold the State appointments and exercise the powers and functions conferred on them by the State Acts.
 - The State legislation contains reciprocal provisions, (although this may not be strictly necessary).
 - (Optional) The Commonwealth is given effective control over the membership of the body by providing that no person may be appointed as a member of the body without its approval.
 - (Optional) Arrangements for the joint funding of the body (This could be through direct Commonwealth appropriation and a system of tied grants to the States.)

Check List for Inter-Governmental Agreements

The following check list incorporates and adds to a check list developed by the Centre for Comparative Constitutional Studies at the University of Melbourne³⁰.

- Who are the parties to the agreement?
- When does the agreement come into operation?
- What is the duration of the agreement?
- When and how is the agreement to be reviewed?
- Can a party withdraw from the agreement?
 - if yes, can the agreement continue with the rest of the parties?
 - What is its legal status? Does it bind the parties?
 - if yes, how?
- How are disputes under the agreement to be dealt with? Does it include dispute resolution mechanisms?
- How are breaches of the agreement to be dealt with?
- What are the rights of each party –
 - with regard to variation or termination of the agreement?
 - with regard to any resolutions to be made under the agreement? (it may be appropriate to require different majorities for different types of resolutions)
 - to veto?
 - to vote by proxy, post, fax etc?

³⁰ *Implementation Options for National Legislative Schemes in Public Health* 7 September 1999

www.dhs.vic.gov.au/nphp/legtools/options/index.htm

This paper was written before the High Court decision in *R v Hughes*.

- If meetings are to be held, what are the requirements for-
 - a quorum?
 - voting rights?
- With regard to (a) the need for and (b) the formulation of, any legislation to flow from the agreement-
 - what are the arrangements for consultation?
 - agreement?
- How are amendments to the legislation to be proposed? implemented?
- How is administrative responsibility divided between the parties?
- How is funding to be provided (if needed)?

Cabinet Notes

When a decision is made to enter into negotiations with another jurisdiction for an arrangement that is likely to require an Act or Regulations, or to result in national standards or a national code applying in South Australia, or a national regulator, the Minister should consider whether a Note should be given to Cabinet to inform it that the negotiations are commencing. Proposals that are likely to have cross-portfolio interest should be notified. It might be appropriate to notify proposals that will be publicly contentious. There may be other reasons to notify Cabinet. If there is doubt about whether a Note should be given, advice should be sought from the Cabinet Office.

Attorney-General's Certificate

The certificate of the Attorney-General will be to the effect either:-

- (a) that no constitutional implications for South Australia have been identified, or
- (b) that:-
 - (i) these constitutional implications have been identified [specifying them];
 - (ii) advice has been given about them;[and if appropriate]
 - (iii) they have been dealt with [specifying how] or
 - (iv) they have not been dealt with and the risks are [specifying them].

Obtaining advice from the Crown Solicitor

Early assistance from the Crown Solicitor's Office will assist in identifying constitutional and legal issues and in exploring ways in which those issues might be managed. Further or more detailed advice might be required when the proposal has been more fully developed. Advice should be sought if:-

- it has been decided that there should be a national regulatory scheme, or
- it is proposed to refer legislative power to the Commonwealth, or
- it is proposed to apply the law of another jurisdiction in South Australia, or

- it is proposed to confer on the Commonwealth or another State or Territory power to make decisions for South Australia, or
- it is proposed that the Commonwealth will legislate and there is existing South Australian legislation on the topic that the Government might want to preserve, or
- it is thought that there are any other constitutional or legal questions.

Notifying Parliamentary Counsel

Consideration should be given to consulting Parliamentary Counsel when the instructions to draft legislation are being developed. Also, Parliamentary Counsel should be informed about any proposal to commence drafting. In some cases the drafting of legislation is done through Parliamentary Counsels' Committee comprising the Parliamentary Counsel of each Australian jurisdiction. In that event, all Parliamentary Counsel have an opportunity to discuss drafts before they are finalised.